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CERCLA CONTRIBUTION: AN INQUIRY INTO WHAT CONSTITUTES AN ADMINISTRATIVE SETTLEMENT

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The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) provides broad authority to the federal and state governments to address releases of hazardous substances.¹ One such authority is the ability of the United States or states to hold liable for the costs of cleanup any party that is responsible for the presence of hazardous substances at certain hazardous waste sites.² Because the cost of cleanup can often be astronomical, some parties responsible for the presence of hazardous substances may wish to settle their liability. If a settlement is deemed an “administrative settlement” or a “judicially approved settlement” under CERCLA, such a settlement provides a settling party with two tremendous benefits. First, it protects a settling party from claims of contribution regarding matters addressed in the settlement. Second, it allows a settling party to seek contribution from any person who is not a party to a settlement who is responsible for the presence of hazardous substances at the site at issue. Unfortunately, there is a lack of clarity as to what constitutes an administrative settlement. This article examines what constitutes an administrative settlement.

I. INTRODUCTION

In 1980, on the eve of President Reagan assuming office Congress enacted CERCLA to provide a mechanism for the identification and clean-up of the releases of hazardous substances into the environment.³ Specifically, CERCLA was enacted “in response to the serious environmental and health risks resulting from the existence of inactive hazardous waste sites.”⁴

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1. U.S. EPA, CERCLA Overview, <http://www.epa.gov/superfund/policy/cercla.htm> (last visited Feb. 19, 2008).

2. 42 U.S.C. § 9607(a)(4)(A) (2000).

3. William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193, 193 (1996).

4. *United States v. Union Corp.*, 277 F. Supp. 2d 478, 485 (E.D. Pa. 2003) (citing *United States v. Bestfoods*, 524 U.S. 51, 55 (1998)).

Congress had two goals in enacting CERCLA.⁵ The first goal was the cleanup of our nation's hazardous waste sites.⁶ The second goal, known as the "polluter pays" principle, was to place the cost of cleanup on those parties that Congress deemed responsible for the creation of such hazardous waste sites.⁷

One of the ways that CERCLA facilitates the achievement of Congress's dual goal is that it permits the United States⁸ or states to hold liable any party that is responsible, either in whole or in part, for the presence of hazardous substances at certain hazardous waste sites, often referred to as Superfund sites, for the costs of the sites' cleanup.⁹ These potentially liable parties are known as "Potentially Responsible Parties" (PRPs). Specifically, Section 107(a) of CERCLA defines a PRP as a person who falls within one or more of the following four categories:

- (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

5. *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 (8th Cir. 1995).

6. *Id.*

7. *See id.* ("CERCLA's dual goals are to encourage quick response and to place the cost of that response on those responsible for the hazardous condition.").

8. The EPA by delegation has the powers of the United States under Section 107(a) of CERCLA. *See* Exec. Order No. 12,580 § 2(g), 52 Fed. Reg. 2923 (Jan. 23, 1987).

9. 42 U.S.C. § 9607(a)(4)(A) (2000). CERCLA has several other mechanisms that also facilitate the achievement of Congress's two goals. For example, CERCLA authorizes the President, under certain circumstances:

[T]o remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

Id. § 9604(a)(1). In addition, the President may issue cleanup orders "as may be necessary to protect public health and welfare and the environment." *Id.* § 9606(a). The President may also "require the Attorney General of the United States to secure such relief as may be necessary to abate [an] imminent and substantial endangerment to the public health or welfare or the environment." *Id.*

(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.¹⁰

Hence, an entity even marginally responsible for the presence of minimal hazardous substances at a Superfund site may be held liable for the site's cleanup.¹¹

In order for the United States or states to hold a PRP *liable* for the costs of cleanup, it must first engage in a removal¹² or remedial action¹³ and then seek reimbursement pursuant to Section 107(a) of CERCLA,¹⁴ the cost recovery section,¹⁵ in an action referred to as a cost recovery action. In order to seek reimbursement in a cost recovery action, the United States or state must establish that the PRP is: (1) in fact a PRP as defined by CERCLA; (2) that hazardous substances¹⁶ were disposed of at the "facility";¹⁷ (3) that

10. *Id.* § 9607(a)(1)-(4).

11. *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2336 (2007).

12. The term "removal" is defined as:

[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23).

13. CERCLA defines "remedial action" as:

[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare of the environment.

Id. § 9601(24). *See also id.* § 9604. Section 104 of CERCLA states in relevant part:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present any imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

Id. § 9604(a)(1).

14. *Id.* § 9607(a). Section 107(a) provides in relevant part that any responsible party "shall be liable for (A) all costs of removal or remedial action incurred by the United States Government or a [s]tate or an Indian tribe not inconsistent with the national contingency plan." *Id.*

15. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004).

16. CERCLA defines a "hazardous substance" as a substance that is so designated by the EPA pursuant to Section 9602 of CERCLA or by one of four other environmental statutes. 42 U.S.C. § 9601(14). Specifically, the term "hazardous substance" means:

there has been a “release”¹⁸ or “threatened release” of hazardous substances from the facility into the environment; and (4) that the release caused the incurrence of “response costs.”¹⁹

Any PRP that can be held liable by the United States or state in a cost recovery action pursuant to Section 107(a) can be held liable for all cleanup costs, even if the PRP’s responsibility for contamination is minimal; CERCLA allows for joint and several liability.²⁰ Such joint and several liability can result in astronomical liability. In 1992, the average cost of a single Superfund site was \$24 million.²¹ Today, many cleanups are

(A) any substance designated pursuant to [S]ection 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to [S]ection 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to [S]ection 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under [S]ection 1317(a) of the title 33, (E) any hazardous air pollutant listed under [S]ection 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to [S]ection 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Id.

17. CERCLA defines a “facility” as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.

Id. § 9601(9).

18. CERCLA defines a “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.” *Id.* § 9601(22).

19. *Id.* § 9607(a). See also Araiza, *supra* note 3, at 203-04 (setting forth the necessary elements for a cost recovery action).

20. Araiza, *supra* note 3, at 194 n.5. See *United States v. Colo. & E.R.R.*, 50 F.3d 1530, 1535 (10th Cir. 1995) (“[I]t is . . . well settled that [Section] 107 imposes joint and several liability on [parties liable under Section 107] regardless of fault.”); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 811 (S.D. Ohio 1983) (holding that CERCLA liability is joint and several except when defendant can prove actual divisibility of harm). Section 107(a) of CERCLA also allows those who voluntarily clean up a site to recover costs from other responsible parties. *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2335 (2007).

21. William H. Rogers, Jr., *A Superfund Trivia Test: A Comment on the Complexity of the Environmental Laws*, 22 ENVTL. L. 417, 422 (1992). Average cleanup costs do not include transaction costs, which can amount to millions of additional dollars. See generally JANE PAUL ACTION & LLOYD S. DIXON, *SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS* 43-49 (1992).

estimated to cost far more. For example, the cleanup of the Hudson River is estimated at \$460 million.²²

In order to deflect the pain of joint and several liability, any PRP held liable to the United States or state pursuant to Section 107(a) may “seek contribution,” pursuant to Section 113(f)(1) of CERCLA, “from any other person who is liable or potentially liable under Section 9607(a) . . . during or following any civil action . . . under [S]ection 9607(a).”²³ Hence, a PRP held liable under Section 107(a) may seek contribution from other PRPs pursuant to Section 113(f)(1) of CERCLA.²⁴ However, pursuant to Section 113(f)(1), the maximum amount of contribution available from each PRP may not exceed that PRP’s share of responsibility.²⁵

Despite the availability of Section 113(f)(1) contribution, there are numerous reasons a PRP may still be inclined to try to avoid the possibility of government imposed Section 107(a) liability including, but not limited to: (1) the magnitude of liability with which a PRP may be saddled pursuant to a Section 107(a) cost recovery action brought by the United States or state; (2) the burden of having to bring suit in order to recover contribution pursuant to Section 113(f)(1); and (3) the great possibility of being unable to recover contribution from all responsible entities for a variety of reasons, including the failure to find all PRPs to the site.²⁶ Thus, the only way for a PRP to effectively avoid the problems of such joint and several liability is to settle.²⁷

In addition to avoiding joint and several liability, settlement provides a settling PRP with two additional tremendous benefits. First, pursuant to Section 113(f)(2), “[a] person who has resolved its liability to the United States or a [s]tate in an administrative or judicially approved settlement shall not be liable for claims for contribution [pursuant to Section 113(f)(1)]

22. Cindy Skrzycki, *GE Ads Zap the EPA Over PCB Cleanup*, WASH. POST, July 24, 2001, at E01.

23. 42 U.S.C. § 9613(f)(1).

24. *Id.*

25. See *United States v. Union Corp.*, 277 F. Supp. 2d 478, 485-86 (E.D. Pa. 2003) (“The contribution liability of a responsible party under [Section] 113 corresponds to that party’s equitable share of the total liability.”); *Saco Steel Co. v. Saco Def., Inc.*, 910 F. Supp. 803, 809 (D. Me. 1995) (“Liability for contribution under [Section] 113(f) is not joint, but several.”); *N.J. Dept. of Env’tl. Prot. & Energy v. Gloucester Env’tl. Mgmt. Servs.*, 821 F. Supp. 999, 1004 (D. N.J. 1993) (explaining that liability is several under Section 113); *United States v. Kramer*, 757 F. Supp. 397, 414 (D. N.J. 1991) (discussing the several nature of liability pursuant to Section 113); Araiza, *supra* note 3, at 206 (explaining that liability is several under Section 113).

26. See William W. Balcke, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 149 (1988) (“[I]n some cases, only a small percentage of the waste at a site may be traceable to identifiable potentially responsible parties; even a smaller percentage may be traceable to solvent parties.”).

27. 42 U.S.C. § 9622.

regarding matters addressed in the settlement.”²⁸ Second, pursuant to Section 113(f)(3)(B):

A person who has resolved its liability to the United States or a [s]tate 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 a party to a settlement referred to in paragraph [f](2).²⁹

Thus, settlement with the United States or state provides a PRP with protection from contribution actions brought by other PRPs pursuant to Section 113(f)(2).³⁰ And, pursuant to Section 113(f)(3)(B), PRPs may also seek contribution from other PRPs who have not settled their liability.³¹

However, in order for a PRP that has settled its liability to receive the protection of Section 113(f)(2) from contribution actions, a settlement must constitute either an “an administrative or judicially approved settlement.”³² And, in order to receive the benefit of Section 113(f)(3)(B) of being able to seek contribution from other PRPs who have not yet settled their liability, a settlement must constitute either “an administrative or judicially approved settlement.”³³ There is, however, great uncertainty as to what constitutes an administrative settlement.³⁴ Given the importance to settlers that their settlements protect them from contribution actions, as well as provide them with the ability to seek contribution, this article examines what constitutes an administrative settlement.

Part II of this article examines the limited guidance that the statutory language of CERCLA provides in regard to what constitutes an administrative settlement. Part III of this article explores what the courts have said

28. *Id.* § 9613(f)(2).

29. *Id.* § 9613(f)(3)(B).

30. It is important to note that the contribution protection provision of Section 113(f)(2) does not provide a complete exemption from further liability under CERCLA or state law, but rather provides immunity from claims for contribution relating to the “matters addressed in the settlement.” *Am. Special Risk Ins. Co. v. City of Centerline*, 180 F. Supp. 2d 903, 906 (E.D. Mich. 2001).

31. *See Fireman’s Fund Ins. Co. v. City of Lodi*, 296 F. Supp. 2d 1197, 1210 (E.D. Ca. 2003) (stating that settlement “further[s] the purpose of CERCLA by providing immediate funds ‘to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation.’” (quoting *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1029) (D. Mass. 1989))). Section 113 only furthers these goals as it is “designed to ‘maximize the participation of responsible parties’ in hazardous waste cleanup and expedite that cleanup by ‘encouraging early settlement, thus reducing the time and expense of enforcement litigation.’” *Id.*

32. 42 U.S.C. § 9613(f)(2)-(3)(B). *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) (holding that the only way a PRP that has settled its liability may assert a claim for contribution is if it satisfies the conditions of Section 113(f)(3)(B)).

33. 42 U.S.C. § 9613(f)(2)-(3)(B).

34. This article does not address what constitutes a judicially approved settlement.

constitutes an administrative settlement under Sections 113(f)(2) and 113(f)(3)(B).³⁵ Part III also highlights disagreements that exist amongst certain courts with regard to what constitutes an administrative settlement.³⁶

II. STATUTORY LANGUAGE

Although Section 113(f)(2) of CERCLA provides contribution protection to PRPs that have entered into administrative settlements³⁷ and Section 113(f)(3)(B) provides PRPs that have entered into administrative settlements with the ability to seek contribution,³⁸ neither Sections 113(f)(2) nor 113(f)(3)(B) provide any guidance as to what constitutes an administrative settlement. This is not surprising given that CERCLA is “notorious for its lack of clarity and poor draftsmanship.”³⁹ Some provisions of CERCLA do, however, provide minimal guidance as to what may or may not constitute an administrative settlement.

First, Section 122(d)(1)(A) of CERCLA makes clear that a settlement “with respect to remedial action under Section 9606 of [CERCLA]” may not be entered as an administrative settlement, except in the case of certain *de minimus* settlements.⁴⁰ Second, Section 122(g)(1) of CERCLA makes clear that under certain circumstances, “a final settlement with a potentially responsible party in an administrative or civil action under [S]ection 9606 or 9607 of [CERCLA] . . . if such settlement involves only a minor portion of the response costs at the facility concerned” (i.e., a *de minimus* settlement) may be entered as an administrative settlement.⁴¹ And third,

35. No cases decided after January 1, 2008, are included in this article.

36. The purpose of these examinations is to inform the reader of pertinent case law pertaining to the question of what constitutes an administrative settlement and to provide clarity to a murky area of law, not to pass judgment on the validity of judicial holdings. There may be cases on point that are not discussed in this article. However, extensive research has been conducted in the hope that all relevant cases are included in the article.

37. 42 U.S.C. § 9613(f)(2).

38. *Id.* § 9613(f)(3)(B).

39. *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993). *See* *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) (“CERCLA is hardly a model of legislative clarity.”); *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 246 (5th Cir. 1998) (“[I]t is widely recognized that many of CERCLA’s provisions lack clarity and conciseness.”); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989) (stating that CERCLA has “acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history”); *Artesian Water Co. v. Gov’t of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) (“CERCLA is not a paradigm of clarity or precision . . . [and] has been criticized frequently for inartful drafting.”).

40. 42 U.S.C. § 9622(d)(1)(A). *See* *Responsible Env’tl. Solutions Alliance v. Waste Mgmt., Inc.*, 293 F. Supp. 2d 1017, 1022 (S.D. Ohio 2007) (explaining that Section 112(d)(1)(A) of CERCLA requires an agreement concerning a remedial action, executed in accordance with Section 106 of CERCLA, to be entered as a consent decree by a district court).

41. 42 U.S.C. § 9622(g).

CERCLA is unambiguous that the following procedures must be followed for entry of *de minimus* settlements⁴² and cost recovery settlements with the United States:⁴³ (1) at least thirty days before the settlement may become final, the head of the department or agency which has jurisdiction over the proposed settlement must publish in the Federal Register notice of the proposed settlement; (2) for a thirty-day period beginning on the date of publication in the Federal Register, an opportunity must be provided to persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement; and (3) the head of the department or agency shall consider any comments.⁴⁴

Despite the above-discussed provisions of CERCLA pertaining to what may and may not constitute an administrative settlement, a universe of questions regarding what constitutes an administrative settlement for purposes of Sections 113(f)(3)(B) and 113(f)(2) remain unanswered. Thus, the courts have been left to discern what constitutes an administrative settlement for such purposes.

III. JUDICIAL INTERPRETATION

Below is a discussion of what the courts have said constitutes an administrative settlement pursuant to Sections 113(f)(3)(B) and 113(f)(2). Although both Sections 113(f)(3)(B) and 113(f)(2) utilize the term “administrative settlement,” and although the term administrative settlement as used in both sections may very well have the same meaning, this article examines the courts’ interpretations of the term as used in each provision separately.

A. SECTION 113(F)(3)(B)

Many courts have wrestled with questions regarding what constitutes an administrative settlement for purposes of Section 113(f)(3)(B). Three main categories of questions have arisen with regard to a Section 113(f)(3)(B) settlement. The first category of questions involves the resolution of CERCLA liability. The second category of questions examines the provisions of CERCLA, pursuant to which an administrative settlement may be entered for purposes of Section 113(f)(3)(B). The third category involves the seemingly random questions raised by the case of *ITT Industries v. Borgwarner, Inc.*⁴⁵

42. *Id.*

43. *Id.* § 9622(h).

44. *Id.* § 9622(i)(1)-(3).

45. No. 06-2393, 2007 WL 3023995 (6th Cir. Oct. 18, 2007).

1. *Category One: Resolution of CERCLA Liability*

One of the primary questions with which courts have grappled is whether a purported administrative settlement must resolve a settling PRP's CERCLA liability or merely its liability under some other law, such as a state environmental law, to constitute an administrative settlement for purposes of Section 113(f)(3)(B). All of the courts that have struggled with this question have held that for a settlement to provide the benefits of Section 113(f)(3)(B) to a settling PRP, the settlement must resolve that PRP's CERCLA liability.⁴⁶

Although the purpose of this article is not to pass judgment, it is noteworthy that such a holding seems obvious given that the resolution of liability for "response action[s]" is a prerequisite to Section 113(f)(3)(B) contribution.⁴⁷ The term "response action" is a CERCLA-specific term "describing an action to clean up a site or minimize the release of contaminants in the future."⁴⁸ Moreover, although the legislative history of CERCLA is not always informative when attempting to discern the meaning of CERCLA

46. *See* *Schaefer v. Town of Victor*, 457 F.3d 188, 202 n.19 (2d Cir. 2006) ("[W]hen an administrative or judicially approved settlement is with a state entity and concerns only non-CERCLA liability, a party may not bring a contribution action under [Section] 113(f)(3)(B)."); *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90, 95 (2d Cir. 2005) ("[W]e read Section 113(f)(3)(B) to create a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved."); *BASF Catalysts LLC v. United States*, 479 F. Supp. 2d 214, 225 (D. Mass. 2007) (holding that the consent order that did not resolve the party's CERCLA liability is not an administrative settlement within the meaning of CERCLA); *Differential Dev. 1994, Ltd. v. Harkrider Dist. Co.*, 470 F. Supp. 2d 727, 741 (S.D. Tx. 2007) ("[When] a [s]tate agency has entered into a settlement agreement that does not specifically resolve the participant's CERCLA liability to the [s]tate, that agreement is not a 'settlement' of CERCLA liability that can serve as the basis for a [S]ection 113(f)(3)(B) claim."); *Asarco, Inc. v. Union Pac. R.R. Co.*, No. CV 04-2144-PHX-SRB, 2006 U.S. Dist. LEXIS 2626, at *46-47 (D. Ariz. Jan. 24, 2006) (holding that a person must resolve its CERCLA liability, and not merely its liability under some other source of law, to be eligible for Section 113(f)(3)(B) contribution); *City of Waukesha v. Viacom Int'l, Inc.*, 404 F. Supp. 2d 1112, 1115 (E.D. Wis. 2005) ("[R]esolving liability with respect to non-CERCLA claims, such as [a] claim arising under state environmental statutes, does not create a CERCLA contribution right under [S]ection 113(f)(3)(B)."); *W.R. Grace & Co. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2005 U.S. Dist. LEXIS 8755, at *18-21 (W.D.N.Y. May 3, 2005) (holding that a party is not entitled to maintain a Section 113(f)(3)(B) contribution action when the party settles only its liability under state law).

47. 42 U.S.C. § 9613(f)(3)(B).

48. *Consol. Edison Co.*, 423 F.3d at 95-96. The Second Circuit further explained:

CERCLA defines the term "response" to mean "remove, removal, remedy, and remedial action" and all "enforcement activities related thereto." The terms "remove" or "removal" means [*inter alia*] the cleanup or removal of released hazardous substances from the environment. The terms "remedy" or "remedial action" mean *inter alia* "those actions consistent with permanent remedy taken instead of or in addition to removal actions . . . to prevent or minimize the release of hazardous substances."

Id. at 96 n.6 (internal citations omitted).

provisions,⁴⁹ the legislative history of the Superfund Amendments and Reauthorization Act of 1986 (SARA), which enacted Section 113 of CERCLA, provides further support for the conclusion that CERCLA liability is a prerequisite to Section 113(f)(3)(B) contribution.⁵⁰ The House Committee on Energy and Commerce report states that Section 113 “clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties.”⁵¹ Hence, amongst the courts there is unanimous—and seemingly correct—agreement that Section 113(f)(3)(B) does not permit contribution actions based on resolution of any liability other than CERCLA liability.⁵² Several questions have, however, arisen before the courts regarding when a settlement actually resolves a settling PRP’s CERCLA liability such that Section 113(f)(3)(B) contribution is available.

a. State Resolution of CERCLA Liability

Although the courts are in agreement that a settlement must resolve a PRP’s CERCLA liability in order for that settling PRP to be eligible for

49. *See* *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 246 (5th Cir. 1999) (“A multitude of courts have roundly criticized the statute as vague, contradictory, and lacking a useful legislative history.”); *HRW Sys., Inc. v. Wash. Gas Light Co.*, 823 F. Supp. 318, 327 (D. Md. 1993) (“[T]he legislative history of CERCLA gives more insight into the ‘Alice-in-Wonderland’-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature.”); *United States v. Mottolo*, 605 F. Supp. 898, 902 (D. N.H. 1985) (“CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.”); *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (explaining that the legislative history of CERCLA is “unusually riddled by self-serving and contradictory statements”).

50. *Consol. Edison Co.*, 423 F.3d at 96.

51. H.R. REP. NO. 99-252(I), at 79 (1985) (emphasis added). *See* THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE REPORT, S. REP. NO. 99-11, at 44 (1985) (containing similar language).

52. *See, e.g., Asarco, Inc.*, 2006 U.S. Dist. LEXIS 2626, at *47 (holding that a person is required to resolve its CERCLA liability, and not only its liability under some other source of law, to be eligible for Section 113(f)(3)(B) contribution); *Consol. Edison Co.*, 423 F.3d at 95 (“We read [S]ection 113(f)(3)(B) to create a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved.”); *Waukesha*, 404 F. Supp. 2d at 1115 (“[R]esolving liability with respect to non-CERCLA claims, such as [a] claim arising under state environmental statutes, does not create a CERCLA contribution right under [S]ection 113(f)(3)(B).”); *Zotos, Int’l, Inc.*, 2005 U.S. Dist. LEXIS 8755, at *18-21 (holding that a party is not entitled to maintain a Section 113(f)(3)(B) contribution action when the party settles only its liability under state law); *Schaefer*, 457 F.3d at 202 (“[W]hen an administrative or judicially approved settlement is with a state entity and concerns only non-CERCLA liability, a party may not bring a contribution action under [Section] 113(f)(3)(B).”); *BASF Catalysts LLC*, 479 F. Supp. 2d at 219-20 (holding that RCRA Consent Order that did not resolve the party’s CERCLA liability is not an administrative settlement within the meaning of CERCLA); *Differential Dev. 1994, Ltd.*, 470 F. Supp. 2d at 741 (“[W]hen a [s]tate agency has entered into a settlement agreement that does not specifically resolve the participant’s CERCLA liability to the [s]tate, that agreement is not a ‘settlement’ of CERCLA liability that can serve as the basis for a [S]ection 113(f)(3)(B) claim.”).

Section 113(f)(3)(B) contribution, and although expressly stated in Section 113(f)(3)(B) that a state may resolve a PRP's CERCLA liability in an administrative settlement, several courts have wrestled with the question: Under what circumstances may a settlement—that purports to resolve the PRP's CERCLA liability between a PRP and a state—constitute an administrative settlement for purposes of Section 113(f)(3)(B)? Specifically, the federal courts are split as to whether a settlement between a PRP and a state, that purports to resolve the PRP's CERCLA liability, may constitute an administrative settlement for purposes of Section 113(f)(3)(B) if the state did not receive authorization from the EPA to enter into the settlement prior to entering into the settlement.⁵³

Several federal courts have held that in order for a settlement that alleges to resolve a PRP's CERCLA liability with a state to actually resolve the PRP's CERCLA liability, such that the settlement may constitute an administrative settlement under Section 113(f)(3)(B), the state must have prior authorization from the EPA to enter into the agreement.⁵⁴ The first court to reach this conclusion was the Federal District Court for the Western District of New York in *W.R. Grace & Co. v. Zotos International, Inc.*⁵⁵ In *Zotos*, Grace, the current owner of a parcel of property where hazardous waste had been deposited approximately fifty years prior, and thus a PRP, commenced an action seeking contribution from Zotos, another PRP, pursuant to Section 113(f)(3)(B) for costs it incurred in investigating and

53. *Asarco, Inc.*, 2006 U.S. Dist. LEXIS 2626, at *19; *Waukesha*, 404 F. Supp. 2d at 1117; *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 436 F. Supp. 2d 398 (N.D.N.Y. 2006); *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, 427 F. Supp. 2d 279, 286-87 (W.D.N.Y. 2006); *Ferguson v. Arcata Redwood Co.*, No. C03-05632SI, 2005 U.S. Dist. LEXIS 18015, at *4 (N.D. Cal. Aug. 5, 2005); *Benderson Dev. Co., Inc. v. Neumade Prods. Corp.*, No. 98-CV-0241 SR, 2005 WL 1397013, at *12 (W.D.N.Y. June 13, 2005); *Zotos Int'l, Inc.*, 2005 U.S. Dist. LEXIS 8755, at *16; *Fireman's Fund Ins. Co. v. City of Lodi*, 296 F. Supp. 2d 1197, 1212 (E.D. Cal. 2003); *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134, 154-55 (W.D.N.Y. 2003).

54. See *Asarco, Inc.*, 2006 U.S. Dist. LEXIS 2626, at *19 (“[The] state is not required to seek authorization from the EPA before entering into settlements concerning environmental cleanups, but in that event, the settlement could not be deemed to resolve CERCLA liability.”); *Niagara Mohawk Power Corp.*, 436 F. Supp. 2d at 401-02 (“[T]o bring a [Section] 9613(f)(3)(B) claim, CERCLA liability must have been resolved. A state has no CERCLA authority absent specific agreement with the federal Environmental Protection Agency.”); *Waukesha*, 404 F. Supp. 2d at 1117-18 (holding that a settlement agreement entered into by the City of Waukesha and the Wisconsin Department of Natural Resources, that purportedly resolved the city's CERCLA liability, did not constitute an administrative settlement for purposes of Section 113(f)(3)(B) because the EPA had not delegated authority to the state to enter into a settlement agreement that would resolve the city's CERCLA liability); *Ferguson*, 2005 U.S. Dist. LEXIS 18015, at *14-15 (dismissing a Section 113(f)(3)(B) claim because the state agency did not seek permission from the EPA prior to entering into the settlement agreement at issue and the state agency did not assert that it was exercising authority under CERCLA).

55. No. 98-CV-838S(F), 2005 U.S. Dist. LEXIS 8755, at *16 (W.D.N.Y. May 3, 2005).

remediating contamination on its property.⁵⁶ In 1984, Grace had entered into a legal agreement known as an “Administrative Order on Consent” (AOC)⁵⁷ with the New York Department of Environmental Conservation (DEC) for a Phase II investigation of the site.⁵⁸ Four years later, on September 28, 1998, Grace entered into another AOC with the DEC requiring that Grace develop and implement a remedial investigation,⁵⁹ feasibility study,⁶⁰ and if necessary, a remedial program for the property.⁶¹ Subsequently, in 2000, Grace sought contribution pursuant to Section 113(f)(3)(B) from Zotos believing that the AOCs it entered with the DEC constituted administrative settlements for purposes of Section 113(f)(3)(B).⁶²

The issue before the *Zotos* court was whether the 1984 AOC or the 1998 AOC constituted administrative settlements for purposes of Section 113(f)(3)(B).⁶³ The *Zotos* court held that for an AOC between a PRP and a state to resolve the PRP’s CERCLA liability, and thus constitute an administrative settlement under Section 113(f)(3)(B), the state must have made an application to and entered into a contract or cooperative agreement with the EPA.⁶⁴ If a state acts only on its own authority, the resulting AOC does not resolve the PRP’s CERCLA liability, and thus may not constitute an

56. *Id.* at *1.

57. An AOC is a legal agreement under the authority of the Superfund law between the EPA or a state and a PRP.

58. *Id.* at *4.

59. A Remedial Investigation “serves as the mechanism for collecting data to: characterize site conditions; determine the nature of the waste; assess risk to human health and the environment; and conduct treatability testing.” U.S. EPA, <http://www.epa.gov/superfund/policy/remedy/sfremedy/rifs.htm> (last visited May 14, 2008).

60. A Feasibility Study “is the mechanism for the development, screening, and detailed evaluation of alternative remedial actions.” *Id.*

61. *Zotos Int’l, Inc.*, 2005 U.S. Dist. LEXIS 8755, at *4-5.

62. *Id.* at *5. Zotos allegedly arranged to have hazardous substances, which were owned or possessed by Zotos, disposed of on the Grace property. *Id.* at *6. Zotos was allegedly liable under CERCLA as an arranger. 42 U.S.C. § 9607(a)(3) (2000). As noted earlier, the categories of “covered persons” are: (1) owners, (2) operators, (3) arrangers, and (4) transporters. *Id.* § 9607(a)(1)-(4). CERCLA imposes “arranger” liability on “any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances.” *Id.* § 9607(a)(3). A person can be liable as an arranger with or without the knowledge that hazardous substances would be deposited at the particular site. *United States v. Hardabe*, 761 F. Supp. 1501, 1511 (W.D. Okla. 1990). Arranger liability may attach even if the arranger does not own or physically possess the hazardous substances, so long as the arranger constructively possesses the materials. Steven G. Davison, *Governmental Liability Under CERCLA*, 25 B.C. ENVTL. AFF. L. REV. 47, 78-79 (1997) (citing *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986)).

63. *Zotos Int’l, Inc.*, 2005 U.S. Dist. LEXIS 8755, at *10.

64. *Id.* at *14-15.

administrative settlement under Section 113(f)(3)(B).⁶⁵ The *Zotos* court reasoned: because (1) Section 104⁶⁶ of CERCLA provides that certain CERCLA authority may be delegated to a state if the state makes application to and enters into a contract or cooperative agreement with the EPA; and (2) one of the actions that may be delegated to a state under Section 104 is the ability to enter into a settlement agreement resolving a PRP's CERCLA liability, it flows logically that absent express delegation by the EPA to a state to enter into a settlement agreement that purportedly resolves a PRP's CERCLA liability, such a settlement agreement does not resolve the PRP's CERCLA liability, and thus may not constitute an administrative settlement under Section 113(f)(3)(B).⁶⁷

Subsequent to *Zotos*, several courts held that in order for a state to resolve a PRP's CERCLA liability pursuant to a settlement agreement, the state must have prior authorization from the EPA to enter into the agreement.⁶⁸ However, several courts have disagreed, holding that a state may resolve a PRP's CERCLA liability pursuant to a settlement absent prior authorization from the EPA, and that such a settlement may constitute an

65. *Id.* at *16-17.

66. 42 U.S.C. § 9604. The relevant provision of Section 104 states:

A [s]tate or political subdivision thereof or Indian tribe may apply to the President to carry out actions authorized in this section. If the President determines that the [s]tate or political subdivision or Indian tribe has the capability to carry out any or all of such actions in accordance with the criteria and priorities established pursuant to [S]ection 9605(a)(8) of this title and to carry out related enforcement actions, the President may enter into a contract or cooperative agreement with the [s]tate or political subdivision or Indian tribe to carry out such actions. The President shall make a determination regarding such an application within 90 days after the President receives the application.

Id. § 9604(d)(1)(A).

67. *Zotos Int'l, Inc.*, 2005 U.S. Dist. LEXIS 8755, at *14-15.

68. *See Asarco, Inc. v. Union Pac. R.R. Co.*, No. CV 04-2144-PHX-SRB, 2006 U.S. Dist. LEXIS 2626, at *19 (D. Ariz. Jan. 24, 2006) (“[The] state is not required to seek authorization from the EPA before entering into settlements concerning environmental cleanups, but in that event, the settlement could not be deemed to resolve CERCLA liability.”); *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 436 F. Supp. 2d 398, 402 (N.D.N.Y. 2006) (“[T]o bring a [Section] 9613(f)(3)(B) claim, CERCLA liability must have been resolved. A state has no CERCLA authority absent specific agreement with the federal Environmental Protection Agency.”); *Ferguson v. Arcata Redwood Co.*, No. C03-05632SI, 2005 U.S. Dist. LEXIS 18015, at *14-15 (N.D. Cal. Aug. 5, 2005) (dismissing a Section 113(f)(3)(B) claim because the state agency did not seek permission from the EPA before entering into the settlement agreement and the state agency did not aver that it was exercising authority under CERCLA); *City of Waukesha v. Viacom Int'l Inc.*, 404 F. Supp. 2d 1112, 1117 (E.D. Wis. 2005) (holding that a settlement agreement between the City of Waukesha and the Wisconsin Department of Natural Resources, which purportedly resolved the city's CERCLA liability, did not constitute an administrative settlement under Section 113(f)(3)(B) because the EPA had not delegated authority to the state to enter into a settlement agreement that would resolve the city's liability).

administrative settlement under Section 113(f)(3)(B).⁶⁹ One such court explicitly rejected the reasoning set forth by the *Zotos* court. In *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*,⁷⁰ the Federal District Court for the Western District of New York rejected the reasoning set forth by the *Zotos* court for requiring that in order for a state to resolve a PRP's CERCLA liability, and thus for a settlement agreement between a state and a PRP that purports to resolve some of the PRP's CERCLA liability to constitute an administrative settlement for purposes of Section 113(f)(3)(B), the state must have prior authorization from the EPA to enter into the agreement.⁷¹ The *Seneca Meadows* court held that “[a]lthough a [s]tate may not be able to act on behalf of the federal government absent delegation of authority from the EPA,” and although a state may not be able to resolve a PRP's CERCLA liability *completely* absent such an express delegation, CERCLA does not mandate that a state receive authorization from the EPA prior to entering into a settlement agreement with a PRP that purports to resolve some of the PRP's CERCLA liability for that settlement agreement to constitute an administrative settlement under Section 113(f)(3)(B).⁷² The *Seneca Meadows* court asserted that the language of Section 107(a)(4)(A) provides support for its conclusion, which provides that all PRPs “shall be liable for . . . all costs of removal or remedial action incurred by the United States Government or a state or an Indian tribe not inconsistent with the national contingency plan.”⁷³ Thus, because CERCLA does not mandate that a state obtain authorization from the EPA prior to cleaning up hazardous waste sites and recovering costs pursuant to CERCLA from PRPs,⁷⁴ it

69. See, e.g., *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, 427 F. Supp. 2d 279, 286-87 (W.D.N.Y. 2006) (holding that a party that has entered into a consent order with the DEC can seek Section 113(f)(3)(B) contribution where the consent order expressly states that the party resolved its liability to the state for purposes of CERCLA, even if the DEC was not operating pursuant to a cooperative agreement with the EPA); *Benderson Dev. Co., Inc. v. Neumade Prods. Corp.*, No. 98-CV-0241SR, 2005 WL 1397013, at *12 (W.D.N.Y. June 13, 2005) (holding that a party that entered into a consent order with the DEC, which provided that “the provisions of 42 U.S.C. Section 9613(f)(3) shall apply,” may seek contribution pursuant to Section 113(f)(3)(B) despite the appearance that the DEC did not have prior authorization from the EPA); *Fireman's Fund Ins. Co. v. City of Lodi*, 296 F. Supp. 2d 1197, 1212 (E.D. Cal. 2003) (holding that an agreement resolving a PRP's liability to an agency of the state for some of its response costs is a Section 113(f)(3)(B) administrative settlement despite lack of evidence that state received prior EPA authorization); *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134, 154-55 (W.D.N.Y. 2003) (stating that Orders on Consent entered into between PRPs and the DEC settling the PRPs' CERCLA liability to New York in connection with the cleanup and the remediation of a landfill constituted administrative settlements under Section 113(f)(3)(B), even where there was no indication that the DEC had prior authorization from the EPA).

70. 427 F. Supp. 2d 279 (W.D.N.Y. 2006).

71. *Seneca Meadows, Inc.*, 427 F. Supp. 2d at 286-87.

72. *Id.* at 287.

73. 42 U.S.C. § 9607(a)(4)(A) (2000).

74. *Seneca Meadows, Inc.*, 427 F. Supp. 2d at 287.

flows logically that a state does not need prior authorization to enter into a settlement agreement with a PRP in order for that settlement agreement to resolve some of the PRP's CERCLA liability such that the settlement may constitute an administrative settlement under Section 113(f)(3)(B).⁷⁵

Because there is a disagreement amongst the federal courts as to whether EPA authorization is necessary for a settlement between a state and PRP to constitute an administrative settlement for purposes of Section 113(f)(3)(B), PRPs should be mindful of this disagreement, prior to entering into a settlement with a state, if they believe they may subsequently wish to seek contribution pursuant to Section 113(f)(3)(B). It may be prudent for any PRP entering into a settlement with a state to first determine whether the state has received prior authorization from the EPA to enter into the agreement, and if not, whether it is willing to risk possible foreclosure of the ability to seek contribution pursuant to Section 113(f)(3)(B).

b. Settlement of Only Investigation Costs

There is also judicial disagreement amongst courts to address the issue of whether a settlement of only CERCLA investigation costs is sufficient to constitute a Section 113(f)(3)(B) administrative settlement. In *ITT Industries, Inc. v. Borgwarner, Inc.*,⁷⁶ the issue before the Federal District Court for the Western District of Michigan was whether an AOC entered into by ITT Industries, Inc. with the EPA, which required ITT Industries to investigate suspected contamination of a site, was an administrative settlement within the meaning of Section 113(f)(3)(B) such that ITT could seek contribution.⁷⁷ The district court held that “the administrative order by consent cannot be construed an administrative settlement within the meaning of CERCLA [Section] 113(f)(3)(B),” because “[t]he consent order does not purport to resolve any party's liability—not ITT's, not the United States' and not that of any [s]tate.”⁷⁸ Subsequently, in a memorandum

75. *Id.*

76. No. 1:05-CV-674, 2006 WL 2460793 (W.D. Mich. Aug. 23, 2006).

77. *ITT Indus.*, 2006 WL 2460793, at *1-2.

78. *Id.* at *6. In support of its conclusion, the district court did not cite to any language found in the AOC, but did note that ITT, in one of its briefs, stated:

There has been no final settlement of liability between ITT and the U.S. EPA or of any other environmental agency regarding the investigation and remediation of the contaminated sites. Indeed the U.S. EPA gives up nothing regarding potential claims against ITT or any other entity. The AOC requires ITT to conduct the SRI/FFS, but does not release ITT of further liability at the NBFF OU1 site.

Id. at *6.

opinion denying a motion for reconsideration,⁷⁹ the district court responded to ITT's assertion that the court misconstrued Section 113(f)(3)(B) as requiring ITT to show that it resolved *all* of its liability as opposed to just some of its liability:⁸⁰

To the contrary, the Court fully understood the language of [Section] 113(f)(3)(B), which expressly states that the section applies to “[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.” Here, however, by the terms of the agreement, Plaintiff did not resolve its liability in any fashion, except as to EPA's costs to oversee completion of the investigation as ordered.⁸¹

Such a statement indicates that the Federal District Court for the Western District of Michigan believes that Section 113(f)(3)(B) does not require the resolution of all CERCLA liability, but that resolution of investigation costs is not sufficient for Section 113(f)(3)(B) purposes.⁸²

The other courts to address the issue of whether an administrative settlement under Section 113(f)(3)(B) must settle more than a party's investigation costs, disagree. In *Responsible Environmental Solutions Alliance v. Waste Management, Inc.*,⁸³ the Federal District Court for the Southern District of Ohio held that an AOC that settled a party's investigation costs constituted an administrative settlement under Section 113(f)(3)(B).⁸⁴ And, the Federal District Court for the Eastern District of Wisconsin in *City of Waukesha v. Viacom International, Inc.*⁸⁵ stated in dictum that Section 113(f)(3)(B) “creates a CERCLA contribution right only where a party resolves some or all of its liability for a ‘response

79. ITT Indus., Inc., v. Borgwarner, Inc., No. 1:05-CV-674, 2006 WL 2811310, at *10 (W.D. Mich. Sept. 28, 2006) (mem.).

80. *Id.* at *2.

81. *Id.* (citations omitted).

82. On appeal to the Sixth Circuit, the appellate court, in affirming the district court's dismissal of ITT's contribution claim, did not base its decision on the notion that resolution of investigation costs is insufficient for Section 113(f)(3)(B) purposes, but rather noted four other bases for its decision. ITT Indus., Inc. v. Borgwarner, Inc., No. 06-2393, 2007 WL 3023995, at *6-7 (6th Cir. Oct. 18, 2007). The Sixth Circuit, however, did not disparage the Western District of Michigan's reasoning. *Id.* It is unclear whether the Western District of Michigan's conclusion that resolution of only investigation costs is insufficient for the purposes of Section 13(f)(3)(B) remains good law. *Id.*

83. 493 F. Supp. 2d 1017 (D. Ohio 2007).

84. *Responsible Env't'l Solutions*, 493 F. Supp. 2d at 1024.

85. 404 F. Supp. 2d 1112 (E.D. Wis. 2005).

action.”⁸⁶ CERCLA defines the term “response” to mean “remove, removal, remedy, and remedial action, all such terms (including the terms ‘removal’ and ‘remedial action’) include enforcement activities related thereto.”⁸⁷ The terms “remove” and “removal” are defined by CERCLA as “[t]he cleanup or removal of released hazardous substances from the environment, [including] . . . such actions as may be necessary to monitor, assess, and *evaluate* the release or threat of release of hazardous substances.”⁸⁸ Hence, given the definition of “response action,” the *Waukesha* court intimated that the plain language of CERCLA permits a settlement that settles only a party’s CERCLA investigation costs to constitute an administrative settlement under Section 113(f)(3)(B). Therefore, there is arguably disagreement amongst the courts as to whether resolution of a party’s CERCLA investigation costs can constitute a Section 113(f)(3)(B) administrative settlement.

c. Possibility of Future Liability

Although the courts are not in agreement with regard to some of the issues pertaining to the resolution of CERCLA liability as a prerequisite to obtaining Section 113(f)(3)(B) contribution, there is agreement amongst the two courts found to have addressed the issue of whether a settlement that contains language leaving open the possibility of future CERCLA liability may constitute a Section 113(f)(3)(B) administrative settlement. Language in such agreements appears to take one of two forms. In one form, a provision of the settlement leaves the possibility open to the state or EPA to hold the settling PRP liable under CERCLA if the settling PRP does not satisfactorily perform the work set forth in the purported administrative settlement. In the second form, a settlement enunciates that the EPA or state reserves the right to take action under CERCLA. The courts have held that both types of limiting language in settlements negates the possibility that such settlements may constitute Section 113(f)(3)(B) administrative settlements.⁸⁹

86. *Waukesha*, 404 F. Supp. at 1115.

87. 42 U.S.C. § 9601(25) (2000).

88. *Id.* § 9601(23) (emphasis added).

89. *See, e.g., Waukesha*, 404 F. Supp. 2d at 1117 (holding that a provision that “leaves open the possibility” that the state or the EPA may still seek to hold the settling PRP liable under CERCLA if the PRP does not satisfactorily perform the work set forth in the agreement, results in an agreement that does not constitute a Section 113(f)(3)(B) settlement); *Consol. Edison Co. v. UGI Utils., Inc.*, 423 F.3d 90, 97 (2d Cir. 2005) (holding that language in the agreement reserving the department’s right to take action under CERCLA “‘deemed necessary as a result of a significant threat resulting from the Existing Contamination or to exercise summary abatement powers’—leaves open the possibility that the department might still seek to hold [Consolidated

The Eastern District of Wisconsin addressed the question of whether a purported administrative settlement is in fact an administrative settlement for purposes of Section 113(f)(3)(B)—if a provision exists in the settlement that leaves open the possibility that the state or EPA may seek to hold the settling PRP liable under CERCLA if the PRP does not satisfactorily perform the work set forth in the purported administrative settlement—in *City of Waukesha v. Viacom International, Inc.*⁹⁰ The *Waukesha* court held that a provision in the agreement that “leaves open the possibility” that the state or the EPA may still seek to hold the PRP liable under CERCLA, if the PRP has not satisfactorily performed the work set forth in the agreement, does not resolve the PRP’s CERCLA liability, and thus is not an administrative settlement for purposes of obtaining Section 113(f)(3)(B) contribution.⁹¹

Similarly, in *Consolidated Edison Co. v. UGI Utilities, Inc.*,⁹² the Second Circuit Court of Appeals held that language enunciated in the agreement at issue, which reserved the New York State Department of Environmental Conservation’s right to take action under CERCLA “deemed necessary as a result of a significant threat resulting from the Existing Contamination or to exercise summary abatement powers” negated the possibility of the agreement constituting a Section 113(f)(3)(B) administrative settlement.⁹³ The court explained that this was so because the agreement left open the possibility that the Department might still seek to hold the settling PRP liable under CERCLA, and therefore the agreement did not allow the settling PRP to resolve its CERCLA liability.⁹⁴ Although only two courts were found to have addressed the issue of whether language in settlements that leaves open the possibility of future CERCLA liability negates the possibility that such agreements may constitute Section 113(f)(3)(B) administrative settlements, a PRP wishing to settle its CERCLA liability pursuant to an administrative settlement should try to

Edison] liable under CERCLA” negates the possibility that the agreement constitutes a Section 113(f)(3)(B) settlement).

90. *Waukesha*, 404 F. Supp. 2d at 1117.

91. *Id.* Although the purpose of this article is not to pass judgment on the holdings of the courts, it is noteworthy that Section 122(f)(5) states explicitly that “[a]ny covenant not to sue under this subsection shall be subject to satisfactory performance by such party of its obligations under the agreement concerned.” 42 U.S.C. § 9622(f)(5).

89. 423 F.3d 90 (2d Cir. 2005).

90. *Consol. Edison Co.*, 423 F.3d at 97.

94. *Id.* at 98. It is noteworthy that Section 122(f)(6) states that except under certain circumstances, “a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant . . . where such liability arises out of conditions which are unknown at the time the President certifies . . . that remedial action has been completed at the facility concerned.” 42 U.S.C. § 9622(f)(6)(A).

avoid agreements that contain language leaving open the possibility of future CERCLA liability.

d. Unilateral Administrative Orders

There is also judicial agreement that a PRP may not recover all or some portion of the costs that the PRP incurred in a Section 113(f)(3)(B) contribution action for work it performed pursuant to an EPA issued unilateral administrative order (UAO).⁹⁵ EPA issued UAOs are not agreements, but rather are EPA issued mandates requiring PRPs to undertake certain response actions.⁹⁶ The two courts found to have addressed the issue are in agreement that a UAO may not constitute an administrative settlement for purposes of Section 113(f)(3)(B), and thus a party may not recover all or some portion of the costs incurred for work it performed pursuant to an EPA issued UAO.⁹⁷ The Federal District Court for the District of Kansas in *Raytheon Aircraft Co. v. United States*⁹⁸ explained that because “[S]ection 113(f)(3)(B) is one that limits a plaintiff’s right to contribution to those response costs for which it has resolved its liability in settlements with the United States or a state,” and because a UAO does not resolve a party’s CERCLA liability, the UAO is not an administrative settlement for purposes of Section 113(f)(3)(B).⁹⁹ Hence, a PRP that is issued a UAO should not hope to recover some of the costs it incurred for work performed pursuant to the UAO.

2. Summary

The courts are in agreement that a settlement must resolve a PRP’s CERCLA liability for the settlement to constitute a Section 113(f)(3)(B)

95. See, e.g., *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 1144 (D. Kan. 2006) (holding that a party could not seek contribution under Section 113(f)(3)(B) for costs incurred responding to a UAO); *Blue Tee Corp. v. ASARCO, Inc.*, No. 03-5011-CV-SW-FJG, 2005 U.S. Dist. LEXIS 15360, at *20 (W.D. Mo. June 27, 2005) (“Compliance with a UAO is not the same as an ‘administrative settlement’ for purposes of the separate contribution promises of [Section] 113(f)(3)(B).”).

96. U.S. EPA Superfund Unilateral Orders, <http://www.epa.gov/compliance/cleanup/superfund/orders.html> (last visited June 2, 2008).

97. *Raytheon Aircraft Co.*, 435 F. Supp. 2d at 1144; *Blue Tee Corp.*, 2005 U.S. Dist. LEXIS 15360, at *19-20.

98. 435 F. Supp. 2d 1136 (D. Kan. 2006).

99. *Raytheon Aircraft Co.*, 435 F. Supp. 2d at 1144. In *Raytheon*, the EPA issued a UAO to Raytheon, which identified Raytheon as a PRP and required Raytheon “to excavate and properly dispose of TCE-contaminated soils from an insular location.” *Id.* at 1140. Raytheon performed the work required in the UAO. *Id.* Subsequently, Raytheon sought recovery of some or all of the costs it had incurred from the Army Corps of Engineers pursuant to Section 113(f)(3)(B). *Id.*

administrative settlement entitling the settling PRP to contribution.¹⁰⁰ However, there is some disagreement amongst the courts regarding when a settlement that purports to resolve a settling PRP's CERCLA liability does so in a manner sufficient for purposes of Section 113(f)(3)(B). A PRP must be aware of the holdings of the courts with regard to settlement of CERCLA liability when entering into a settlement that purports to resolve the PRP's CERCLA liability should the settling PRP wish to seek contribution in the future.

3. *Category Two: Provisions of CERCLA, Pursuant to Which a Party May Enter Into an Administrative Settlement*

There has been a great deal of confusion and uncertainty regarding the question of pursuant to which CERCLA provisions an administrative settlement may be entered so that the settlement will suffice for purposes of Section 113(f)(3)(B). The questions that have arisen thus far before the courts, and what the courts have held, are discussed below.

a. Section 106

At least one court has held that settlements made pursuant to Section 106 of CERCLA do not constitute Section 113(f)(3)(B) settlements. In *Pharmacia Corp. v. Clayton Chemical Acquisitions LLC*,¹⁰¹ the Southern District of Illinois addressed the question of whether an AOC may be entered pursuant to Section 106 for it to constitute an administrative settlement for purposes of Section 113(f)(3)(b).¹⁰² In *Pharmacia*, twenty PRPs identified by the EPA as potentially responsible for releases and threatened releases of hazardous substances at Sauget Area 2, an area located within Cahokia, East St. Louis and Sauget, Illinois, formed the Sauget Area 2 Sites Group (Sauget Group).¹⁰³ On November 24, 2000, the Sauget Group entered into an AOC with the EPA requiring the Sauget Group to conduct a

100. *Asarco, Inc. v. Union Pac. R.R. Co.*, No. CV04-2144-PHX-SRB, 2006 U.S. Dist. LEXIS 2626, at *19 (D. Ariz. Jan. 24, 2006); *Niagara Mohawk Power Corp.*, 436 F. Supp. 2d 398, 402 (N.D.N.Y. 2006); *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, 427 F. Supp. 2d 279, 286-87 (W.D.N.Y. 2006); *Ferguson v. Arcata Redwood Co.*, No. C03-05632SI, 2005 U.S. Dist. LEXIS 18015, at *14-15 (N.D. Cal. Aug. 4, 2005); *Benderson Dev. Co. v. Neumade Prods. Corp.*, No. 98-CV-0241SR, 2005 WL 1397013, at *12 (W.D.N.Y. June 13, 2005); *W.R. Grace & Co. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2005 U.S. Dist. LEXIS 8755, at *16 (W.D.N.Y. May 3, 2005); *City of Waukesha v. Viacom Int'l, Inc.*, 404 F. Supp. 2d 1112, 1117 (E.D. Wis. 2005); *Fireman's Fund Ins. Co. v. City of Lodi*, 296 F. Supp. 2d 1197, 1212 (E.D. Cal. 2003); *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134, 154-55 (W.D.N.Y. 2003).

101. 382 F. Supp. 2d 1079 (S.D. Ill. 2005).

102. *Pharmacia Corp.*, 382 F. Supp. 2d at 1080-81.

103. *Id.*

Remedial Investigation and Feasibility Study (RIFS)¹⁰⁴ for the Sauget Area 2 source sites.¹⁰⁵ The AOC stated in its caption that it was an “Administrative Order by Consent Pursuant to Section 106 of the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9606(a).”¹⁰⁶ On May 15, 2002, the Sauget Group sought contribution pursuant to Section 113(f)(3)(B) for work performed under the AOC.¹⁰⁷ The issue before the court was whether the AOC constituted an administrative settlement for purposes of contribution pursuant to Section 113(f)(3)(B).¹⁰⁸

The *Pharmacia* court held that the AOC did not constitute an administrative settlement under Section 113(f)(3)(B) because it was issued pursuant to Section 106 of CERCLA.¹⁰⁹ The *Pharmacia* court explained that an AOC issued pursuant to Section 106 may not be an administrative settlement for purposes of Section 113(f)(3)(B) because Section 106 makes no mention of settlements, but rather states “the President may also, after notice of the affected [s]tate, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.”¹¹⁰ Hence, the *Pharmacia* court held that an AOC may not be issued pursuant to Section 106 if it is to be considered an administrative settlement for purposes of Section 113(f)(3)(B).¹¹¹

104. U.S. EPA, <http://www.epa.gov/superfund/policy/remedy/sfremedy/rifs.htm> (last visited May 14, 2008).

The Remedial Investigation/Feasibility Study (RI/FS) represents the methodology that the Superfund program has established for characterizing the nature and extent of risks posed by uncontrolled hazardous waste sites and for evaluating potential remedial options. The RI serves as the mechanism for collecting data to: characterize site conditions; determine the nature of the waste; assess risk to human health and the environment; and conduct treatability testing. The FS is the mechanism for the development, screening, and detailed evaluation of alternative remedial actions.

Id.

105. *Pharmacia Corp.*, 382 F. Supp. 2d at 1081.

106. *Id.* at 1085.

107. *Id.* at 1081.

108. *Id.* at 1084.

109. *Id.* at 1085. The court decided that the AOC was issued pursuant to Section 106 because: (1) the caption stated that the AOC was issued pursuant to Section 106(a); (2) the AOC stated explicitly that Section 106 governs in the event that the AOC is violated; and (3) “nowhere in the twenty-five pages of the AOC is the word settlement or a derivation there from used.” *Id.* at 1085-86. Rather, the AOC refers to the AOC as an “Order.” *Id.* This is so despite the AOC statement that “[t]he Order is issued pursuant to the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of [CERCLA].” *Id.* at 1085.

110. *Id.* at 1085.

111. *Id.* It is also arguable that the following rules may be gleaned from *Pharmacia*: (1) an AOC should not state that it was issued pursuant to Section 106; (2) an AOC should refer to itself

Subsequent to *Pharmacia*, no court has addressed the question of whether an AOC issued pursuant to Section 106 may constitute an administrative settlement under Section 113(f)(3)(B). As noted earlier, Section 122(d)(1)(A) states explicitly that, except with regard to certain *de minimus* settlements, “[w]henever the President enters into an agreement . . . with any potentially responsible party with respect to a remedial action under [S]ection 9606 . . . the agreement shall be entered in the appropriate United States district court as a consent decree.”¹¹² Such language indicates that an AOC issued pursuant to Section 106 pertaining to a remedial action may not constitute a Section 113(f)(3)(B) administrative settlement. To constitute a settlement, it must be entered by a district court. A PRP considering entering into an AOC pursuant to Section 106 must understand that such an agreement may not constitute an administrative settlement for purposes of Section 113(f)(3)(B).¹¹³

b. Sections 122(g) and 122(h)

At least two courts, albeit for the same case, have held that an AOC must be executed pursuant to Section 122(g) or 122(h) for the AOC to constitute a Section 113(f)(3)(B) settlement. The Western District of Michigan explored the question of pursuant to what sections of CERCLA an AOC may be entered such that an AOC would constitute an administrative settlement for purposes of Section 113(f)(3)(B) in *ITT Industries, Inc. v. Borgwarner*.¹¹⁴ In *ITT Industries* the district court held that for an AOC to constitute an administrative settlement for purposes of obtaining Section 113(f)(3)(B) contribution, it must be a settlement made pursuant to Section 122(g) or 122(h) of CERCLA.¹¹⁵ Section 122(g) of CERCLA deals with *de minimus* settlements.¹¹⁶ Section 122(h) of CERCLA regards cost recovery settlements.¹¹⁷ The *ITT Industries* court reasoned that the Supreme Court “made clear” in the case of *Cooper Industries* that “courts must read the right to contribution under CERCLA [Section] 113(f) in conjunction with the statute of limitations for such contribution actions, as set forth in

as a “settlement,” not an “order”; and (3) an AOC should not cite to any part of Section 106 as a governing provision should it be violated.

112. 42 U.S.C. § 9622(d)(1)(A) (2000).

113. Accordingly, the Southern District of Ohio held that an AOC for a removal action can be a Section 113(f)(3)(B) administrative settlement. *Responsible Env'tl Solutions Alliance v. Waste Management, Inc.*, 493 F. Supp. 2d 1017, 1022 (D. Ohio 2007).

114. No. 06-2393, 2007 WL 3023995 (6th Cir. Oct. 18, 2007); No. 1:05-cv-674, 2006 WL 2460793 (W.D. Mich. Aug. 23, 2006).

115. *ITT Indus.*, 2006 WL 2460793, at *7-8.

116. 42 U.S.C. § 9622(g).

117. *Id.* § 9622(h).

[Section] 113(g)(3).”¹¹⁸ Section 113(g)(3) references only two types of contribution actions: those made pursuant to Section 122(g) and those made pursuant to Section 122(h).¹¹⁹ The *ITT Industries* court reasoned that the language of Section 113(g)(3)(B) results in only two provisions of CERCLA pursuant to which a settlement may be entered for such a settlement to constitute a Section 113(f)(3)(B) administrative settlement: Sections 122(g) and 122(h).¹²⁰

On appeal to the Sixth Circuit, the Court of Appeals also held, citing to the *Cooper* case, that a settlement is an administrative settlement only if entered pursuant to Section 122(g) or 122(h) of CERCLA.¹²¹ No other court has specifically addressed the question of whether a Section 113(f)(3)(B) administrative settlement must be executed pursuant to Section 122(g) or 122(h) of CERCLA.¹²² If the Federal District Court for the Western District of Michigan and the Sixth Circuit are correct in their assertion that a settlement constitutes an administrative settlement entitling the settling PRP to Section 113(f)(3)(B) contribution only if it is executed pursuant to Section 122(g) or 122(h), in most instances only settlements entered pursuant to Section 122(h) will allow a settling PRP to seek Section 113(f)(3)(B) contribution. This is because Section 122(g)(8) states explicitly “as a condition for settlement” under Section 122(g):

[T]he President shall require . . . that a potentially responsible party waive all of the claims (including a claim for contribution under this chapter) that the party may have against other

118. *ITT Indus.*, 2006 WL 2460793, at *7.

119. 42 U.S.C. § 9613(g)(3)(B).

120. *ITT Indus.*, 2006 WL 2460793, at *7.

121. *ITT Indus.*, 2007 WL 3023995, at *6. The Sixth Circuit stated that the Supreme Court, in *Cooper*, “directs courts to read the phrase ‘administrative or judicially approved settlement’ in concert with subsection (g), which establishes time limitations applicable to contribution.” *Id.* at *6 (citing *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004)).

122. It is noteworthy that the *Zotos* court indicated in dicta that it too believes that an administrative settlement is a settlement entered pursuant to Section 122(f) or 122(h). *W.R. Grace & Co. v. Zotos Int’l, Inc.*, No. 98-CV-838S(F), 2005 U.S. Dist. LEXIS 8755, at *18-19 (W.D.N.Y. May 3, 2005). The *Zotos* court stated, without any explanation, that “[a] state may settle a PRP’s CERCLA liability, assuming it has been delegated that authority to do so, by entering into an administrative settlement (monetary settlement pursuant to [S]ection 122(g) or (h)) or a judicially approved settlement (cleanup settlement pursuant to [S]ection 122(d)(1)(A)).” *Id.*

It is noteworthy that the legislative history of Section 113(f) is not clear as to whether Congress intended for administrative settlements, for purposes of Section 113(f)(3)(B) contribution, to be limited to settlements made pursuant to Section 122(g) or 122(h). The only legislative history found that speaks to the issue is the Conference Report for the Superfund Amendments, which states in relevant part: “The conference substitute adopts new [S]ection 113(f) as contained in the House amendments, and thus provides contribution protection for those who enter into administrative settlement agreements with the government, as well as those who enter into consent decrees for settlements.” 99 CONG. CONF. REP., H.R. REP. NO. 962 (OCT. 3, 1986).

potentially responsible parties for response costs incurred with respect to the facility, unless the President determines that requiring a waiver would be unjust.¹²³

c. Summary

A PRP wishing to enter into a settlement that will later provide it with the right to contribution pursuant to Section 113(f)(3)(B) must be mindful of the statutory provision pursuant to which its settlement is being entered given some courts' holdings regarding the same. In particular, if a PRP should hope for future contribution rights, it should be wary of any settlement that will be entered pursuant to any CERCLA provision other than Section 122(h).

4. *Category Three: Questions Addressed by the Courts in ITT Industries*

The Federal District Court for the Western District of Michigan and the Sixth Circuit Court of Appeals, in *ITT Industries* addressed several issues relevant to the question of what constitutes a Section 113(f)(3)(B) administrative settlement. However, it appears that no other courts have addressed these issues, and there is no unifying theme to these issues. These issues are discussed below.

a. Federal District Court for the Western District of Michigan

In *ITT Industries*, the Federal District Court for the Western District of Michigan addressed the question of the value that should be given to EPA guidance regarding what constitutes a Section 113(f)(3)(B) settlement.¹²⁴ The EPA has produced a document entitled "Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f)" (EPA document).¹²⁵ In the EPA document, the EPA asserts its belief that EPA AOCs, issued prior to the release of the EPA document, are administrative settlements for purposes of Section 113(f)(3)(B).¹²⁶ Furthermore, in the EPA document the EPA

123. 42 U.S.C. § 9622(g)(8)(A).

124. *ITT Indus.*, 2006 WL 2811310, at *3.

125. Memorandum from EPA Office of Site Remediation Enforcement and U.S. Dep't of Justice to Regions I-VIII, U.S. Dep't of Justice Envtl. Enforcement Section and Envtl. Def. Section (Aug. 3, 2005), available at www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf [hereinafter EPA Document].

126. *Id.* at 2.

asserts its belief that EPA AOCs, issued subsequent to the release of the EPA document that employ the language recommended, are administrative settlements for purposes of Section 113(f)(3)(B).¹²⁷

The Western District of Michigan disagreed with both of the EPA's assertions, stating that it found such assertions to be "unpersuasive."¹²⁸ Furthermore, the Western District of Michigan stated that the EPA's above-noted assertions are not entitled to *Chevron* deference.¹²⁹ The court stated: "*Chevron* deference does not apply to every memorandum issued by a regulatory agency. Instead, it specifically applies only to rules and decisions issued within the regulatory authority of the agency and reached within the context of an adjudication or notice-and-comment rulemaking."¹³⁰

Thus, the Western District of Michigan held that the statements made by the EPA in the EPA document are not persuasive and are not entitled to *Chevron* deference.¹³¹ Accordingly, PRPs should be aware that the EPA's interpretation of what constitutes a Section 113(f)(3)(B) administrative settlement may not survive judicial scrutiny.

b. Sixth Circuit

In *ITT Industries* the United States Court of Appeals for the Sixth Circuit addressed several issues, yet cited to no case law in support of its resolution of these issues. First, the Sixth Circuit held that when "the EPA expressly reserves its right to legal action to adjudicate Plaintiff's liability for failure to comply with [a settlement]," such a settlement may not constitute a Section 113(f)(3)(B) administrative settlement.¹³² Second, the Sixth Circuit held that if a PRP does not admit its CERCLA liability in the language of the settlement, such a settlement may not constitute a Section

127. *Id.*

128. *ITT Indus.*, 2006 WL 2811310, at *3.

129. *Id.* Under the *Chevron* doctrine, the Supreme Court held that courts must defer to an agency's reasonable interpretation of a statute that is ambiguous. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984). It is noteworthy that the EPA document states explicitly:

This model language and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person.

EPA Document, *supra* note 124.

130. *ITT Indus.*, 2006 WL 2811310, at *3.

131. *Id.*

132. *ITT Indus., Inc. v. Borgwarner*, No. 98-CV-838S(F), 2007 WL 3023995, at * 6 (6th Cir. Oct. 18, 2007).

113(f)(3)(B) administrative settlement.¹³³ Third, the Sixth Circuit held that a settlement whereby a PRP is not “simply reimbursing the United States for costs [the United States] ‘incurred’” may not constitute an administrative settlement for purposes of Section 113(f)(3)(B).¹³⁴ A PRP considering settlement must be aware of the Sixth Circuit’s holdings regarding these three issues.

c. Summary

A PRP seeking to settle its liability must be mindful of the holdings of the *ITT Industries* cases. Although it appears that no other courts have addressed the above-discussed issues, future courts may follow the holdings of *ITT Industries*. A PRP should be wary of entering a settlement that would not survive scrutiny by the Federal District Court for the Western District of Michigan or the Sixth Circuit Court of Appeals.

B. SECTION 113(F)(2)

The courts have addressed several questions with regard to what constitutes an administrative settlement for purposes of Section 113(f)(2). Four main categories of questions have arisen with regard to what constitutes a Section 113(f)(2) settlement. The first category of questions involves the resolution of CERCLA liability. The second category of questions analyzes the procedures that must be followed when entering a settlement. The third category of questions pertains to the parties to the settlement. Finally, the fourth category of questions involves the language of the settlement.

1. *Category One: Resolution of CERCLA Liability*

There is judicial agreement that a settlement must resolve a settling PRP’s CERCLA liability to constitute an administrative settlement for purposes of Section 113(f)(2).¹³⁵ No case has been found whereby a court

133. *Id.* Although the purpose of this article is merely to inform its readers of what the courts have held thus far, it is important to note that Section 122(d)(1)(B) states:

Except as otherwise provided in the Federal Rules of Evidence, the participation by any party in the process under this section shall not be considered an admission of liability for any purpose, and the fact of such participation, shall not be admissible in any judicial or administrative proceeding, including a subsequent proceeding under this section.

42 U.S.C. § 9622(d)(1)(B) (2000).

134. *ITT Indus.*, 2007 WL 3023995, at *7.

135. *See Gen. Time Corp. v. Bulk Materials, Inc.*, 826 F. Supp. 471, 476 (M.D. Ga. 1993) (“[T]he Court does not believe Congress intended for settlements effected under a state’s environmental statute to confer CERCLA contribution protection.”); *Akzo Coatings, Inc. v.*

has held that a purported administrative settlement that did not resolve a settling PRP's CERCLA liability constituted a Section 113(f)(2) administrative settlement. Hence, for purposes of both Sections 113(f)(3)(B) and 113(f)(2), a settlement must resolve a settling PRP's CERCLA liability.

2. *Category Two: Procedures*

a. Due Process

The courts have addressed due process issues with regard to the procedures that must be followed for purposes of establishing a Section 113(f)(2) administrative settlement. The primary due process issue has been with regard to notice and comment requirements. As noted earlier, Section 122(i) of CERCLA mandates that: (1) at least thirty days before a settlement may become final, the head of the department or agency which has jurisdiction over the proposed settlement must publish in the Federal Register notice of the proposed settlement; and (2) for a thirty-day period beginning on the date of publication in the Federal Register, an opportunity shall be provided to persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement.¹³⁶ The courts to address the matter have intimated that for an administrative settlement to provide a settling PRP with contribution protection pursuant to Section 113(f)(2), non-settling PRPs must have been provided the due process protections of notice and an opportunity to be heard.¹³⁷

CERCLA's specific notice and comment procedures are arguably required only of the federal government. However, several courts have recognized that because due process concerns are also present when an administrative settlement is entered into with a state, a non-settling party should still be provided with notice and an opportunity to be heard.¹³⁸ Thus

Aigner Corp., 803 F. Supp. 1380, 1383 (N.D. Ind. 1992) (“[Section 113(f)(2)]” insulates a potentially liable party who has settled a CERCLA action.”).

136. 42 U.S.C. § 9622(i); 28 C.F.R. § 50.7 (2007).

137. See *Am. Special Risk Ins. Co. v. City of Centerline*, 180 F. Supp. 2d 903, 909-10 (E.D. Mich. 2001) (intimating that for an administrative settlement to provide a settling PRP with contribution protection pursuant to Section 113(f)(2), non-settling PRPs must have been provided the due process protections of notice and opportunity to be heard); *Gen. Time Corp.*, 826 F. Supp. at 476-77 (explaining that CERCLA explicitly mandates that a barred party be provided notice and an opportunity to be heard); *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 759 F. Supp. 1269, 1283 (W.D. Mich. 1991) (stating in dicta that a consent order failed to qualify as an administrative settlement because “the negotiation process was devoid of any public hearings or public comment that might give rise to an argument that contribution claims should be barred”).

138. *Am. Special Risk Ins. Co.*, 180 F. Supp. 2d at 909-10; *Gen. Time Corp.*, 826 F. Supp. at 477; *CPC Int'l, Inc.*, 759 F. Supp. at 1283.

far, no court has specifically set forth the exact due process requirements in such circumstances.¹³⁹

Thus, a PRP wishing to settle its CERCLA liability with the federal government must ensure that the agency with which it is settling adheres to the notice and comment requirements of Section 122 of CERCLA.¹⁴⁰ Furthermore, a PRP seeking to settle its CERCLA liability with a state must be aware that although the exact contours of the due process requirements have not yet been delineated, several courts have intimated that broad contribution protection should not be upheld when a settlement is entered into under a process devoid of notice or public comment.¹⁴¹ At the very least, it will likely be in the best interest of a settling PRP to ensure that the state entity with which it is settling provides non-settling PRPs with notice and an opportunity to comment.

However, courts have held that procedures beyond those noted in Section 122(i) are not necessary to satisfy the requirements of due process.¹⁴² In *United States v. Cannons Engineering Corp.*,¹⁴³ the First Circuit held that a non-settling PRP does not have a due process right to be included in or kept aware of the settlement process.¹⁴⁴ No court has held to the contrary. And, in *United States v. Serafina*,¹⁴⁵ the Federal District Court for the Middle District of Pennsylvania held that PRPs do not have a due process right to participate in a settlement giving rise to contribution protection pursuant to Section 113(f)(2).¹⁴⁶ Thus, a settling PRP should concern itself only with whether the procedural requirements set forth by CERCLA are adhered to for the purpose of due process.

139. *Am. Special Risk Ins. Co.*, 180 F. Supp. 2d at 909-10; *Gen. Time Corp.*, 826 F. Supp. at 477; *CPC Int'l, Inc.*, 759 F. Supp. at 1283.

140. *See, e.g., Am. Special Risk Ins. Co.*, 180 F. Supp. 2d at 909-10 (showing that Section 122 sets forth detailed mandatory notice and comment procedures for administrative settlements entered into by the EPA); *Gen. Time Corp.*, 826 F. Supp. at 476-77 (explaining that CERCLA requires that a barred party be provided notice and an opportunity to be heard); *CPC Int'l, Inc.*, 759 F. Supp. at 1283 (stating that a consent order failed to qualify as an administrative settlement).

141. *See, e.g., Am. Special Risk Ins. Co.*, 180 F. Supp. 2d at 909-10 (intimating that contribution should not be upheld when a settlement with a state is entered into under a process devoid of notice or public comment); *Gen. Time Corp.*, 826 F. Supp. at 477 (explaining that a settlement with a state must not be devoid of due process aspects); *CPC Int'l, Inc.*, 759 F. Supp. at 1283 (noting that a consent order signed by the Michigan Department of Resources and the Attorney General's office could not constitute an administrative settlement because "the negotiation process was devoid of any public hearings or public comment that might give rise to an argument that the contribution claims should be barred").

142. *See, e.g., United States v. Cannons Eng'r Corp.*, 899 F.2d 79, 93 (1st Cir. 1990); *United States v. Serafina*, 781 F. Supp. 336, 339 (M.D. Pa. 1992).

143. 899 F.2d 79 (1st Cir. 1990).

144. *Cannons Eng'r Corp.*, 899 F.2d at 93.

145. 781 F. Supp. 336 (M.D. Pa. 1992).

146. *Serafina*, 781 F. Supp. at 339.

b. Required Procedures

Beyond merely satisfying the contours of due process, the courts have held that all of the procedures set forth in Section 122(i) of CERCLA must be followed for a settlement to protect a settling PRP from a contribution action initiated by a non-settling PRP.¹⁴⁷ In 1993, the United States Court of Appeals for the Second Circuit in *United States v. Cornell University*¹⁴⁸ addressed the question of whether EPA advisement to a party that it was removing that party from the list of PRPs for a particular Superfund site constitutes a Section 113(f)(2) administrative settlement, such that the party should be insulated from any future contribution action.¹⁴⁹ The Second Circuit held that such EPA advisement of removal from a PRP list does not constitute a Section 113(f)(2) administrative settlement because the “procedural steps necessary to effectuate a settlement under CERCLA [Section] 9622 were not followed.”¹⁵⁰ The Second Circuit explained that a party is shielded from a contribution claim only when, as required by Section 9622 of CERCLA, the settlement is entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement, and when notice of such is published in the Federal Register.¹⁵¹ If such procedural steps are not followed, then no administrative settlement for purposes of Section 113(f)(2) exists.¹⁵² A mere decision by the EPA not to hold a party liable under CERCLA does not constitute a Section 113(f)(2) settlement.¹⁵³

Similarly, in *United States v. Moore*,¹⁵⁴ the Federal District Court for the Eastern District of Virginia held that if the administrative procedures set forth by CERCLA for entering into an administrative settlement (such as the public comment period mandated by Section 122(i))¹⁵⁵ are not followed, then a settlement cannot constitute a Section 113(f)(2) administrative settlement.¹⁵⁶ The *Moore* court explained that “[t]he legislative history [of CERCLA] reveals that Congress was concerned about ‘sweetheart deals,’ and thus mandated that certain procedures be followed.”¹⁵⁷ There is

147. See, e.g., *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 725 (2d Cir. 1993) (holding that procedures set forth in Section 122 must be followed); *United States v. Moore*, 703 F. Supp. 455, 459 (E.D. Va. 1988) (opining that Section 122 procedures must be followed).

148. 990 F.2d 711 (2d Cir. 1993).

149. *Alcan Aluminum Corp.*, 990 F.2d at 724-25.

150. *Id.* at 725.

151. *Id.*

152. *Id.*

153. *Id.*

154. 703 F. Supp. 455 (E.D. Va. 1988)

155. 42 U.S.C. § 9622(i) (2000).

156. *Moore*, 703 F. Supp. at 459.

157. *Id.*

agreement amongst the courts that the administrative procedures set forth in CERCLA for entering into an administrative settlement must be adhered to for such a settlement to constitute an administrative settlement for purposes of Section 113(f)(2).¹⁵⁸

3. *Category Three: Parties to the Settlement*

a. Agreements Between Two United States Agencies

Thus far, one court has confronted the question of whether a settlement between two United States agencies may constitute a Section 113(f)(2) settlement. The Eastern District for Virginia encountered a settlement entered into by the DOD and the EPA that the DOD later asserted shielded it from CERCLA contribution actions in *United States v. Moore*.¹⁵⁹ The *Moore* court concluded that “a settlement between two agencies of the United States is not the sort of settlement envisioned by [Sections] 9613(f)(2) and 9622(h).”¹⁶⁰

b. Settlements With Cities

Two courts were found to have grappled with the question of whether a settlement resolving a settling PRP’s liability to a city or municipality may constitute a settlement for purposes of providing the settling PRP with Section 113(f)(2) contribution protection. In *City of New York v. Exxon Corp.*,¹⁶¹ the Southern District of New York addressed the question of whether a settlement between the City of New York and several PRPs could constitute a settlement for purposes of Section 113(f)(2).¹⁶² Specifically, the court addressed the question of whether Section 113(f)(2)’s language, providing contribution protection to “a person who has resolved his liability to the United States or a [s]tate,” allowed contribution protection to a person who has resolved his or her liability to a city.¹⁶³ The Southern District of New York concluded that a settlement that operates to release a city’s claim against the settling PRPs provides the settling PRPs with the contribution protection of Section 113(f)(2).¹⁶⁴

158. *See supra* text accompanying notes 134-57.

159. *Moore*, 703 F. Supp. at 459.

160. *Id.*

161. 697 F. Supp. 677 (S.D.N.Y. 1988).

162. *Exxon Corp.*, 697 F. Supp. at 686.

163. *See generally id.* at 682-87.

164. *Id.* at 686. It is important to note that the question of whether a settlement with a city or municipality may constitute a settlement for purposes of providing the settling PRP with Section 113(f)(2) contribution protection was addressed by the Southern District of New York in the

However, in 2001 in the case of *City of Detroit v. Simon*,¹⁶⁵ the United States Court of Appeals for the Sixth Circuit held that “‘statutory contribution protection’ can exist only when the settlement is with the federal government or a state government,” not a city.¹⁶⁶ The court explained that a city “is certainly not ‘the United States’” and there is “no reason to suppose that [a] city could be equated ‘a [s]tate.’”¹⁶⁷ Thus, the Sixth Circuit concluded that a city’s settlement of its environmental claims against a PRP could not entitle the PRP to the statutory contribution protection prescribed by CERCLA when a state settles its CERCLA claims.¹⁶⁸

There exists a disagreement between the only two courts to address the question of whether a settlement with a city or municipality may constitute a settlement for purposes of providing the settling PRP with Section 113(f)(2) contribution protection. Thus, it would be prudent for a PRP entering into a settlement with a city to be mindful of the fact that at least one court has held that such a settlement will not provide the settling PRP with contribution protection pursuant to Section 113(f)(2).

4. *The Language in the Settlement Agreement*

At least two courts have also addressed the issue of whether a settlement agreement must explicitly note the contribution protection of Section 113(f)(2) to provide a settling PRP with such contribution protection. In *General Time Corp. v. Bulk Materials, Inc.*,¹⁶⁹ the Federal District Court for the Southern District of Georgia addressed the question of whether a settlement agreement must specifically refer to Section 113(f)(2),

context of a judicially approved settlement. *Id.* However, the court’s conclusion that a settlement with a city may constitute a settlement for purposes of Section 113(f)(2) was not restricted to instances of judicially approved settlements. *Id.*

165. 247 F.3d 619 (6th Cir. 2001).

166. *Simon*, 247 F.3d at 627-28.

167. *Id.* at 628.

168. *Id.* at 628. It is noteworthy that in this case the court was dealing with a peculiar situation, whereby during a trial the court was advised by the parties to the case that they had resolved their differences. *Id.* As a result, the terms of the settlement were placed on the record in open court. *Id.* Some weeks later, the PRP denied that there had been a meeting of the minds with regard to the scope of the contribution protection that the PRP was to receive from the city. *Id.* The trial court determined that it was unable to determine precisely what the parties had agreed to, and denied a motion by the city for entry of a settlement judgment. *Id.* The case was tried to completion and a final judgment was entered on all claims. *Id.* The Sixth Circuit concluded that the trial court erred as the record showed that the city’s lawyer adequately stated the scope of the contribution protection, and that the PRP’s lawyer acknowledged the scope of the protection set forth by the city’s lawyer. *Id.* It is in this context that the Sixth Circuit addressed the issue of whether a settlement with a city or municipality may constitute a settlement for purposes of providing the settling PRP with Section 113(f)(2) contribution protection. *Id.* at 627-28.

169. 826 F. Supp. 471 (M.D. Ga. 1993).

or explicitly confer contribution protection, for such a settlement agreement to constitute an administrative settlement for purposes of Section 113(f)(2).¹⁷⁰ The *General Time Corp.* court held that “[t]he statutory language does not require the settlement to specifically refer to [S]ection 113(f)(2) or to explicitly confer contribution protection.”¹⁷¹ Thus, the court held that “the absence of any contractual language providing contribution protection does not preclude the operation of [Section] 113(f)(2).”¹⁷²

Similarly, in *Commercial Bank-Detroit v. Allen Industries, Inc.*,¹⁷³ the Eastern District of Michigan approved a settlement that did not mention contribution protection.¹⁷⁴ Thus, there is agreement of at least two courts that a settlement agreement need not contain language providing for contribution protection for the agreement to suffice for purposes of Section 113(f)(2). However, it may be wise for a settling PRP to request that a settlement agreement contain language providing for contribution protection to ensure such protection.

IV. CONCLUSION

There is a great deal of ambiguity as to what constitutes an administrative settlement for purposes of Section 113(f)(2) and Section 113(f)(3)(B) given the lack of statutory guidance regarding the matter. Compounding the ambiguity are the courts’ differing opinions pertaining to many pertinent issues. This article seeks to clarify what the courts have held constitutes an administrative settlement, especially for PRPs that contemplate entering into a settlement that will provide them with the benefits of Sections 113(f)(3)(B) and 113(f)(2). However, all should be mindful that it is likely that courts will continue to tackle issues pertaining to what constitutes an administrative settlement. Thus, the courts will further clarify, and likely will further confuse, the question of what constitutes an administrative settlement.

170. *Gen. Time Corp.*, 826 F. Supp. at 475.

171. *Id.*

172. *Id.*

173. 769 F. Supp. 1408 (E.D. Mich. 1991)

174. *See Comerica Bank-Detroit*, 769 F. Supp. at 1410 (“[T]he [s]tate/GM agreement is silent as to contribution protection.”).