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RECOVERY OF CLEANUP COSTS

In the wake of the U.S. Supreme Court decision in Cooper Industries Inc. v. Aviall Services Inc., confusion abounds regarding the viability of cost recovery actions by responsible parties who voluntarily clean up contaminated sites. The authors of this article argue that a potentially responsible party who voluntarily undertakes site remediation should be able to maintain an action against other PRPs under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, but without the benefit of ''full'' joint and several liability.

A CERCLA Cause of Action for Voluntary PRPs After Cooper v. Aviall

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In *Cooper Industries, Inc. v. Aviall Services, Inc.*,[1] (*Cooper Industries*), the United States Supreme Court ruled that a person who is liable or potentially liable under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[2] (a potentially responsible party or PRP) may not sue other PRPs for contribution pursuant to

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The opinions expressed here do not represent those of BNA, which welcomes other points of view.

[1] 543 U.S. 157, 125 S.Ct. 577, 59 ERC 1545 (2004).

[2] 42 U.S.C. § 9607(a).

 ISSN 0013-9211

CERCLA Section 113(f)[3] in the absence of a pending or completed civil action against the plaintiff PRP under CERCLA Sections 106 or 107(a).[4] The *Cooper Industries* decision raises, although declines to address, the question as to whether a PRP that has incurred response costs voluntarily, i.e., not under compulsion of a civil action under CERCLA Sections 106 or 107 (a volunteer PRP), may file suit under Section 107, even though *Cooper Industries* deprives it of a cause of action under Section 113.

As discussed in more detail below, a volunteer PRP should be able to maintain an action against other PRPs under CERCLA Section 107(a)(4)(B). The maintenance of such a suit would comport with *Cooper Industries* and lower court decisions applying *Cooper Industries*. Significantly, the U.S. Court of Appeals for the Second Circuit in a recent decision, *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc. (Consolidated Edison)*,[5] *sua sponte* allowed a voluntary PRP to sue other responsible parties under CERCLA Section 107.

Given CERCLA's remedial purposes and lower courts' interpretations of CERCLA both before and after *Cooper Industries*, the following list represents the most reasonable compilation of causes of action available under CERCLA for parties that have incurred costs in response to hazardous substance releases:

- Cost recovery actions under Section 107(a)(4)(B) filed by the government or other innocent parties for joint and several liability against PRPs;
- Actions under Section 107(a)(4)(B) filed by volunteer PRPs against other PRPs for amounts exceeding the volunteer PRPs' pro rata share of cleanup costs; and
- Contribution actions under Section 113(f) where PRPs whom the government or other parties have sued in turn sue other PRPs (including volunteer PRPs) for the defendants' pro rata shares of cleanup costs.

The table below further illustrates the available claims for relief.

Under this scheme, both governmental and private sector innocent parties (i.e., those not liable for clean up costs) and volunteer PRPs have causes of action under CERCLA Section 107. Defendant PRPs in suits filed by the government or innocent parties face joint and several liability, whereas the liability of defendant PRPs in suits filed by volunteer PRPs extends only to the amounts that exceed the volunteer PRPs' pro rata share of liability. This distinction follows from the principle that PRPs (whether volunteer or not) must incur at least the costs corresponding to their respective shares of responsibility for the contamination, whereas innocent parties should not shoulder any of this burden. A PRP defendant in a Section 107 action may also have to take up the ''orphan'' shares of other PRPs either not named or otherwise unable to pay.

Further, under this scheme, a PRP subject to suit under Section 106 or Section 107 may sue under Section 113 to recoup costs from other PRPs (including volunteer PRPs). Thus, this scheme both provides a volunteer PRP with a means for recovering costs exceeding its pro rata share under Section 107 and adheres to *Cooper Industries'* requirement for a concurrent or antecedent Section 113 action for other PRPs.

Prior to *Cooper Industries*, when volunteer PRPs had the option of filing Section 113 suits to recoup costs, courts tended to reject volunteer PRPs' Section 107 claims due to the joint and several liability generally available to Section 107 plaintiffs.[6] These courts reasoned that the imposition of heightened liability against defendants effectively would extinguish the volunteer PRP's liability for its own pro rata share of the costs.[7] Inasmuch as *Cooper Industries* has stripped them of a Section 113 cause of action, volunteer PRPs have only Section 107 actions available to them. To prevent volunteer PRPs from escaping from liability for their own pro rata shares the courts may restrict the application of ''full'' joint and several liability in Section 107 suits to innocent party plaintiffs (i.e., where innocent parties are indemnified in full), while allowing volunteer PRPs to recover on a ''limited'' joint and several basis (i.e.,

[3] *Id.* § 9613(f).

[4] *Id.* §§ 9606, 9607(a). Section 107(a) defines a PRP as a person or entity who has caused or contributed to the environmental contamination at the target site, whether by ownership or operation of the site, generation of the hazardous substances at the site, or arrangement for transportation or accepting the hazardous substances for transport to the site.

[5] 423 F.3d 90, 61 ERC 1321 (2d Cir. 2005).

[6] *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-424; 47 ERC 1449 (2d Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton Railroad Co.*, 142 F.3d 769, 776; 46 ERC 1481 (4th Cir. 1998); *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1240; 44 ERC 1065 (7th Cir. 1997); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301; 45 ERC 1588 (9th Cir. 1997).

[7] *See e.g., Bedford Affiliates*, 156 F.3d at 424; *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121; 44 ERC 1513 (3d Cir. 1997); *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 100; 39 ERC 1097 (1st Cir. 1994).

Plaintiff	***Defendants***	***CERCLA Basis***	***Joint & Several Liability?***	***Remedy Sought***
Government or another innocent party	PRPs (including volunteer PRPs)	Section 107(a)(4)(B)	Yes	Recoupment of all costs that plaintiff expended for clean up
Volunteer PRP	Other PRPs	Section 107(a)(4)(B)	No	Recoupment of amounts exceeding the plaintiff volunteer PRP's pro rata share of clean up costs
PRPs sued by the government or other parties under CERCLA Sections 106 or 107	Other PRPs	Section 113(f)	No	Recoupment of the pro rata shares of clean up costs of other PRPs

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only for amounts exceeding their own pro rata shares, thus amounting to a ''limited'' indemnity).

This interpretation of the interplay between Sections 107 and 113 conforms with both a textual analysis of Section 107 and with CERCLA's remedial policy.[8] As for text, CERCLA Section 107(a)(4)(B), in relevant part, provides that parties responsible for cost expenditures in response to a release or threatened release of a hazardous substance at or from a covered facility ''shall be liable for . . . *any other necessary cost* of response incurred *by any other person* consistent with the national contingency plan.''[9] As the U.S. Court of Appeals for the Second Circuit held in *Consolidated Edison*, this statutory requirement is satisfied only if volunteer PRPs, along with every other party incurring remediation costs, have a cause of action to recoup these costs.[10] Accordingly, volunteer PRPs must have a cause of action under Section 107, given that *Cooper* bars them from maintaining Section 113 suits.

As a matter of CERCLA policy, the statute favors voluntary remediation.[11] To deprive volunteer PRPs from recouping expenditures that exceed their shares of responsibility would provide a strong disincentive for voluntary remediation.[12] Compelling volunteer PRPs to absorb the costs reasonably attributable to other PRPs because volunteers would not qualify under either Section 107 or Section 113 would also undermine CERCLA's underlying ''polluter pays'' policy. That policy consists of the equitable principle that the party whom CERCLA identifies as responsible for the contamination should pay to clean it up. Accordingly, volunteer PRPs should be able to recover from other PRPs the cleanup expenditures for which these other PRPs share responsibility.

Joint and Several Liability

The principle of joint and several liability arises from the notion that an innocent party that incurs costs resulting from the action, inaction, or status of a legally responsible party merits indemnification for all its expenses, despite the potential absence or inability to pay of one or more of those responsible parties.[13] The responsible parties, rather than the innocent parties, should absorb the share of the absent or insolvent parties. Although CERCLA ''was—and still is—silent as to the extent of a particular PRP's liability . . . ,''[14] courts have read Section 107(a) to impose joint and several liability on responsible parties.[15] It runs contrary to CERCLA's ''polluter pays'' principle that any party that shares liability for the incurrence of cleanup costs, even its own, may seek indemnity from any other party for its own share of costs. Providing indemnity to a PRP is simply inconsistent with Section 107(a). Inasmuch as CERCLA does not explicitly require the imposition of joint and several liability the judicial overlay of that principle should not result in limiting the class of plaintiffs entitled to relief under Section 107 only to those entitled to recover on the basis of ''full'' joint and several liability.[16]

The *Cooper Industries* opinion arguably suggests that the distinction between the eligibility of a PRP to recover against another PRP should not rest on the difference in the standards of liability applied to volunteer PRPs and other PRPs. Although it explicitly declines to address the question of whether a volunteer PRP may recover costs under Section 107(a)(4)(B), the Court sprinkles the *Cooper Industries* decision with references to the possibility of a future court's holding that a volunteer PRP may recover under Section 107(a)(4)(B) without the benefit of joint and several liability.

First, the *Cooper Industries* Court sets forth the two questions that courts addressed after CERCLA's enactment in 1980 and before the enactment in 1986 of the Superfund Amendment Reauthorization Act (SARA), with regard to a PRP's ability to recover its response costs from other PRPs.

The first question is ''whether a private party that had incurred response costs, *but had done so voluntarily*

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[8] *But see, Brief of the United States as Amicus Curiae, Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing and Coatings, Inc.*, No. 05-3299 (7th Cir. May 2, 2006); *Petition for a Writ of Certiorari, Consolidated Edison Co. of New York v. UGI Utilities, Inc.*, No. 05-1323 (2006 WL 1022026) (U.S. April 14, 2006), on appeal from the decision handed down by the U.S. Court of Appeals for the Second Circuit in *UGI Utilities, Inc. v. Consolidated Edison Co. of New York, Inc.*, 423 F.3d 90, 61 ERC 1321 (2d Cir. 2005)

[9] 42 U.S.C. § 9607(a)(4)(B) (emphasis added). ''[O]ther person'' in this context means an entity other than ''the United States Government or a State or Indian Tribe[.]'' *See id.* § 9607(a)(4)(A).

[10] *Consolidated Edison*, 423 F.3d at 100.

[11] *See, e.g., Mobay Corp. v. Allied Signal, Inc.*, 761 F. Supp. 345, 349; 32 ERC 1837 (D. N.J. 1991) (citing H.R. Rep. No. 1016, 96th Cong., 2d Sess. 1 at 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136) (''A fundamental policy underlying CERCLA is to accomplish this objective at the primary expense of private responsible parties rather than taxpayers. The House Report explained that the purpose of Section 107 of CERCLA is 'to provide a mechanism for prompt recovery of monies expended for the costs of [remedial actions] . . . from persons responsible therefore and to induce such potentially liable persons to pursue appropriate environmental response actions voluntarily.' '').

[12] In its recent amicus brief, the government exalts the CERCLA policy of promoting settlement with the government, arguing that the unavailability of a Section 107 action for voluntary PRPs will encourage them to pursue settlement since it is the only litigation-free avenue to bringing a Section 113 suit. *Amicus Brief of the United States at 18-20, Metropolitan Water* No. 05-3299. The government, however, fails to recognize that this means of encouraging settlement obliterates CERCLA's *raison d'etre* of encouraging voluntary remediation: the absence of a Section 107 cause of action for cost recoupment will dissuade parties that might otherwise have voluntarily remediated a site from doing so.

[13] *See, e.g., Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1125 (5th Cir. 1995) (joint and several liability is ''historically one of two counterbalancing principles [along with contributory negligence] arising out of the legal theory of the 19th Century that all parties are responsible for all of the consequences of their negligence'').

[14] *United Technologies Corp. v. Browning Ferris Indus., Inc.*, 33 F.3d 96, 100; 39 ERC 1097 (1st Cir. 1994).

[15] *Id.*

[16] Parties may overlook the point that the courts, rather than Congress, imposed the joint and several liability standard on Section 107 claims and therefore that the courts may apply a different standard under appropriate circumstances. *See, e.g., Petition for Certiorari* at *8, *Consolidated Edison* No. 05-1323 (Section ''107(a) . . . authorizes full recovery from private parties, jointly and severally''); *see also Amicus Brief of the United States* at 6, *Metropolitan Water* No. 05-3299 (the Section 107 claim that plaintiff, a voluntary PRP, filed ''would potentially allow [plaintiff] to impose joint and several liability on the defendant''). Due to this oversight, parties fail to consider the prospect of Section 107 claims that lack the benefit of joint and several liability.

and was not itself subject to suit, had a cause of action for cost recovery against other PRPs.''[17] The Court noted, ''Various courts held that § 107(a)(4)(B) and its predecessors authorized such a cause of action.''[18]

The second ''separate'' question was''whether a private entity *that had been sued* in a cost recovery action (by the government or another PRP) could obtain contribution from other PRPs.''[19] The opinion notes that several courts had concluded that such a right exists in the form of an ''implied'' contribution action under Section 107, but it also admonished, ''That conclusion was debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other statutes.''[20]

Thus, the court's raising doubts about holdings authorizing contribution actions for PRPs who were sued (i.e., its second question) arguably attaches significance to the Court's silence regarding the validity of the decisions that found a right to cost recovery for volunteer PRPs (i.e., its first question).

Second, in shifting its discussion to the legal landscape after the enactment of SARA and its express right to contribution for PRPs (codified in Section 113(f)), the Court explicitly declines to broach the question of whether SARA allows for a cause of action for volunteer PRPs, i.e., whether the appellate court's ''holding that a private party that is itself a PRP may not pursue a Section 107(a) action against other PRPs for joint and several liability . . . [is] correct.''[21] To rule on that issue, the Court ''might have to consider other issues . . . such as whether [plaintiff volunteer PRP], which seeks to recover the share of its cleanup costs attributable to [defendant PRP], may pursue a Section 107 cost recovery action for *some form of liability other than joint and several*.''[22] The Court thus leaves open and even suggests the possibility of cost recovery for volunteer PRPs with a different form of liability.

Finally, the Court reinforces this possibility in a footnote: ''As noted above, we do not address whether a Section 107 cost recovery action by Aviall may seek some form of liability other than joint and several.''[23]

Taken together, these three references suggest a foundation on which courts in future cases might directly address the availability of a Section 107 remedy for volunteer PRPs absent joint and several liability.[24]

Distinction Between Cost Recovery, Contribution

The majority of federal circuit courts of appeal held, before *Cooper Industries*, that the explicit creation in SARA of a contribution action under Section 113 consigned all intra-PRP actions to Section 113.[25] Most of these courts, however, did not require PRPs to file their Section 113(f)(1) contribution suits during or following a civil action under Section 106 or 107(a).[26] The majority of circuit courts also recognized a distinction between Section 107(a) ''cost recovery'' actions, which impose joint and several liability on all defendants, and ''contribution'' actions under Section 113(f)(1) where liability is ''several'' only, i.e., limited to the extent of each PRP's equitable share of responsibility. In almost every circuit only a non-PRP (and PRPs who can establish a defense under Section 107(b))[27] may bring a joint and several cost recovery claim under Section 107(a).[28]

Cooper Industries arguably has changed the legal landscape such that lower courts must reconsider prior rulings that limited rights under Section 107.[29] Although *Cooper Industries* recognizes that Section 113(f) imposes a procedural limitation on the right of a PRP to seek contribution from another PRP (i.e. that the plaintiff must file suit during or following a civil action under Section 106 or 107), courts should not read that limitation to swallow the right to a cost recovery action under Section 107(a)(4)(B) for ''any other necessary costs of response incurred by any other person''[30] regardless of standard of liability.[31] Simply put, volunteer PRPs will have a right to sue for cost recovery only if courts (1) recognize a Section 107 cause of action for volunteer PRPs and (2) restrict PRPs who have been sued to file contribution actions only under Section 113(f).[32]

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[17] *Cooper Industries*, 125 S. Ct. at 581 (emphasis added).

[18] *Id.*

[19] *Id.* (emphasis added).

[20] *Id.* (citing *Texas Industries, Inc., v. Radcliff Materials, Inc*. 451 U.S. 630, 638-647 (1981) (addressing the Sherman Act or Clayton Act); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 90-99 (1981) (addressing the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1984)).

[21] *Id.* at 585.

[22] *Id.* (emphasis added).

[23] *Id.* at 586 n.6.

[24] *But see Consolidated Edison*, 423 F.3d at 100 n.9 (suggesting, without deciding, that a PRP whom a volunteer PRP has sued under CERCLA Section 107 may sue for contribution under Section 113, thereby assuming that joint and several liability attaches to a Section 107 action brought by a volunteer PRP); see infra ''Second Circuit'' heading for further discussion.

[25] *Cooper Industries*, 125 S. Ct. at 585 (citing cases).

[26] *See e.g., Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 54 ERC 1833 (10th Cir. 2002); *Crofton Ventures Ltd. Partnership v. G&H Partnership*, 258 F.3d 292, 52 ERC 2005 (4th Cir. 2001); *Bedford Affiliates*, 156 F.3d 416, 47 ERC 1449 (2d Cir. 1998); *Pinal Creek*, 118 F.3d 1298, 45 ERC 1588 (9th Cir. 1997).

[27] 42 U.S.C. § 9607(b).

[28] *See, e.g., In re Reading Co.*, 115 F.3d 1111, 1120; 44 ERC 1865 (3d Cir. 1997); *Rumpke*, 107 F.3d 1235, 1240; 44 ERC 1065 (7th Cir. 1997); *United Technologies*, 33 F.3d 96, 100; 39 ERC 1097 (1st Cir. 1994).

[29] Therefore, the argument that nine courts of appeals prior to *Cooper Industries* permitted Section 107 claims only to innocent parties is unpersuasive. *See, e.g., Petition for Certiorari* at *4, *8, *10-*11, *Consolidated Edison* No. 05-1323; *Amicus Brief of the United States* at 7-8, *Metropolitan Water* No. 05-3299.

[30] 42 U.S.C. § 9607(a)(4)(B).

[31] *Cooper Industries*, 125 S. Ct. at 587 n.1 (Ginsburg, J. dissenting). Although the *Cooper Industries* dissent strongly endorses a broad interpretation of Section 107(a)(4)(B), it regrettably does not provide any analysis of how that interpretation is compelled by the language of the statute.

[32] Even absent these prerequisites, any PRP nonetheless can work with EPA or a state government to create a settlement agreement that would permit a suit for contribution under Section 113(f)(3). 42 U.S.C. § 9613(f)(3). Thus, absent Section 107 cost recovery actions and Section 113 contribution actions, a volunteer PRP can sue other PRPs after entering into a settlement agreement with the government. Several courts have taken up the issue of what constitutes such a settlement. *See, e.g., Asarco, Inc. v. Union Pacific Railroad Co.*, 2006 WL 173662, *6-15; 62 ERC 1092 (D. Ariz. Jan. 24, 2006); *Pharmacia Corp. v. Clayton Chemical Acquisition, LLC.*, 382 F. Supp. 2d 1079, 1084-1086; 60 ERC 2141 (S.D. Ill. 2005); *City of Waukesha v. Viacom International, Inc.*, 362 F. Supp. 2d 1025, 1027; 60 ERC 2021 (E.D. Wis. 2005); *W.R. Grace & Co. v. Zo-*

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Cooper Industries apparently attaches significance to a dichotomy between Section 107 ''cost recovery'' actions and Section 113 ''contribution'' actions, stating that ''after SARA, CERCLA provided for a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances, §§ 113(f)(1), 113(f)(3)(B).''[33] In addition, although the *Cooper Industries* Court does not reject the observation made in the Court's earlier decision, *Key Tronic Corp. v. United States*,[34] that Sections 107 and 113 provide ''similar and somewhat overlapping remed[ies,]''[35] the Court qualifies this language with the explanation that the ''cost recovery remedy of Section 107(a)(4)(B) and the contribution remedy of Section 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties. But the two remedies are clearly distinct.''[36] The court does not make clear whether the distinction it draws is substantive (i.e., who can sue) or procedural (i.e., with the prerequisite of a suit against the plaintiff for a Section 113 action to proceed). Arguably, and consistent with the suggestions in the text of *Cooper Industries*, the distinction resides in the availability of a Section 107 cost recovery remedy for volunteer PRPs and the restriction of PRPs who have been compelled to act to Section 113 contribution actions.

This distinction between Section 107 ''cost recovery'' actions and Section 113 ''contribution'' actions has more than semantic significance, particularly if a volunteer PRP may recover on the basis of the ''limited'' joint and several liability principle articulated above,[37] i.e., one that permits recovery only of amounts that exceed the volunteer PRP's own pro rata share. Under this scheme, a plaintiff volunteer PRP can shift to the defendant PRPs the burden of ''orphan'' shares—i.e., the shares of responsibility of unnamed parties or those unable to pay. Conversely, traditional common law contribution actions allow a plaintiff to recover only the pro rata shares of the defendants. Thus, in a Section 113 contribution action, which follows this common law principle, a plaintiff PRP may not shift the burden of ''orphan'' shares to defendant PRPs.

Supreme Court: Key Tronic Corp.

The argument that Section 107(a)(4)(B) provides a cause of action to every PRP finds support in *Key Tronic Corp. v. United States*[38] where the Supreme Court discusses the contours of Section 107 in the course of holding that CERCLA does not authorize the recovery of litigation expenses. In addition to its recognition, noted above, that Sections 107 and 113 provide ''similar and somewhat overlapping remed[ies,]''[39] the *Key Tronic* court concludes that, ''Section 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs[.]''[40] The court grounds the availability of this cause of action in the Section 107 language imposing liability for costs incurred ''by any other person[,]''[41] despite the statute's failure to identify to whom this person may be liable.[42] In fact, Justice Ruth Bader Ginsburg's dissent in *Cooper Industries* emphasizes that every justice in *Key Tronic* understood Section 107 to create a right to cost recovery for any private party that incurred such costs.[43]

The court stresses that CERCLA implies, and does not ''expressly command,'' the availability of this cause of action.[44] Indeed, that this cause of action is implied forms a basis for the Court's holding.[45] Nonetheless, *Key Tronic* arguably supports a Section 107 cause of action for volunteer PRPs due to its significant, unwavering approval of a Section 107 action for ''any other person'' to recoup costs.[46]

Second Circuit: Consolidated Edison, Syms

Recently, in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*,[47] (*Consolidated Edison*) the U.S. Court of Appeals for the Second Circuit became the first federal appellate court to hold that a voluntary PRP may sue for recoupment of costs under Section 107.[48] In so doing, the court relied solely on language in Section 107 which attaches liability for the government's remedial and removal costs and for ''any other necessary costs of response incurred by any other person consistent with the national contingency plan.''[49]

The *Consolidated Edison* court concludes that the only prerequisites for an action under Section 107 are that (1) the plaintiff is a ''person'' (2) that has incurred ''costs of response.''[50] The court determines that the plaintiff satisfies both of these requirements as a corporation (which falls under the definition of ''person'') that has incurred ''removal'' and ''remedial action'' costs not imposed by agency or court action (which sat-

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tos International, Inc., 2005 WL 1076117, *2-7; 61 ERC 1474 (W.D.N.Y. May 3, 2005).

[33] *Cooper Industries*, 125 S. Ct. at 582.

[34] 511 U.S. 809, 38 ERC 1633 (1994)

[35] *Id.* at 582 n.3 (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994)).

[36] *Id.*

[37] *See supra* Introduction and Summary.

[38] 511 U.S. 809, 38 ERC 1633 (1994).

[39] *Id.* at 816. *Cooper Industries* qualifies this point. *See supra* ''The Distinction Between Cost Recovery and Contribution.''

[40] 511 U.S. at 818.

[41] *Id.* at 818 n.11.

[42] *Id.*

[43] *Cooper Industries*, 125 S. Ct. at 587 (Ginsburg, J. dissenting).

[44] *Key Tronic*, 511 U.S. at 818 n.11.

[45] *Id.*

[46] CERCLA Section 107(a)(1)-(4) designates PRPs and imposes liability on them. Subsection 107(a)(4)(A) provides for recovery of costs by three classes of plaintiff parties, the United States Government, a State, or an Indian Tribe, while Subsection 107(a)(4)(B) provides for cost recovery by ''any other person[s].'' In its amicus brief, the government argues that ''other person[s]'' excludes PRPs from pursuing cost recovery because they cannot be at the same time ''other person[s]'' and the parties from whom a plaintiff may seek recovery. *See Amicus Brief of the United States* at 9-10. *Metropolitan Water* No. 05-3299. The government's argument ignores the statute's plain meaning since the simplest interpretation of ''any other person'' is the entire universe of parties with a cost recoupment claim except for the three plaintiff classes that already have a cause of action in the preceding subsection. If Congress meant to exclude PRPs from the class of subsection 107(a)(4)(B) plaintiffs, it easily could have said so explicitly.

[47] 423 F.3d 90, 61 ERC 1321 (2d Cir. 2005).

[48] *Id.* at 100.

[49] *Id.* at 99-100 (citing CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B)).

[50] *Id.* at 100.

isfies the definition of ''costs of response'').[51] The *Consolidated Edison* court rejects the notion that a Section 107 remedy is available only to ''innocent parties.''[52]

The court also explains that, absent a Section 107 remedy, responsible parties would wait to be sued before remediating contamination because they would be unable to recoup their costs from other responsible parties. This result would undermine CERCLA's goal of encouraging voluntary clean up by allowing for cost reimbursement.[53]

The *Consolidated Edison* Court assumes that all Section 107 plaintiffs, including volunteer PRPs, have the benefit of joint and several liability. That is, the court assumes that a volunteer PRP could recoup all of its remediation costs in a Section 107 action, but that defendant PRPs that pay more than their fair share, in turn, would counterclaim against the volunteer PRP for contribution under Section 113.[54] Thus, the *Consolidated Edison* court does not take up either the policy or law with regard to joint and several liability discussed above,[55] and avoids the need to craft an exception to this judicially-imposed liability standard for Section 107 actions.

Although the *Consolidated Edison* approach to joint and several liability may be practical, it avoids confronting the principle that a PRP should not, *ab initio*, be entitled to recover the share for which it is responsible. Allowing a volunteer PRP to join with innocent parties in benefiting from a liability scheme that allows full recovery of all incurred costs amounts to indemnification that runs contrary to the ''polluter pays'' principle. Putting volunteer PRPs on the same footing as innocent parties (and the government) with regard to imposition of liability also ignores the Supreme Court's suggestion in *Cooper Industries* that some form of liability other than joint and several would likely attach to a volunteer PRP suit under Section 107.[56] Apportioning liability such that a volunteer PRP does not escape its own pro rata share *from the outset* would resonate more tunefully with the ''polluter pays'' principle and result in less complicated proceedings (i.e., there are no counterclaims to assure the proper allocation of liability).[57]

Consolidated Edison follows on the heels of a prior Second Circuit case, *Syms v. Olin Corp.*,[58] which, in dicta, broached the disturbing policy ramifications of barring voluntary PRPs from ''contribution'' suits. In a footnote, *Syms* expressed concern that the Second Circuit's decision in *Bedford Affiliates v. Sills*,[59] if ''unaltered, would create a perverse incentive for PRPs to wait until they are sued before incurring response costs.''[60]

The *Syms* Court continued: ''Together, *Cooper Industries* and *Bedford Affiliates* leave a PRP with no mechanism for recovering response costs until proceedings are brought against the PRP. This might discourage PRPs from voluntarily initiating cleanup, contrary to CERCLA's stated purpose of 'inducing such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.' ''[61]

First Circuit: United Technologies, In re Hemingway

Although the U.S. Court of Appeals for the First Circuit has not yet addressed the volunteer PRP issue in light of *Cooper Industries* (as the Second Circuit has), existing First Circuit precedent leaves open the possibility that volunteer PRPs may sue other responsible parties under Section 107.

The leading case, *United Technologies Corp. v. Browning-Ferris Industries, Inc.*,[62] involves a plaintiff PRP that the federal government sued (to enter into a consent decree) and that, in turn, sued other PRPs for contribution.[63] The defendant PRPs moved for summary judgment, arguing that the statute of limitations had run on the plaintiff's claim.[64] At issue is whether the contribution claim falls under CERCLA Section 113,

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[51] *Id.* at 99.

[52] *Id.* at 99-100.

[53] *Id.* at 100 (citing *Syms v. Olin Corp.*, 408 F.3d 95, 106 n.8.; 60 ERC 1449 (2d Cir. 2005)).

[54] *Id.* at 100 n.9 (''Some might argue that a person who, if sued, would be partly liable for necessary costs of response may be unjustly enriched if allowed under section 107(a) to recover 100 percent of its costs from other persons. This fear seems misplaced. While we express no opinion as to the efficacy of such a procedure, there appears to be no bar precluding a person sued under section 107(a) from bringing a counterclaim under section 113(f)(1) for offsetting contribution against [the volunteer PRP].'').

[55] *See supra* ''Joint and Several Liability.''

[56] *Cooper Industries*, 125 S. Ct. at 585.

[57] By contrast, the undesirable consequence of the government's argument to bar Section 107 actions for voluntary PRPs, *see Amicus Brief of the United States* at 6-7, *Metropolitan Water* No. 05-3299, is that responsible parties could escape liability. At sites where the only identified PRPs are voluntary and where the government either lacks the resources to sue (e.g., for sites not on the National Priorities List which make up most so-called ''brownfield'' sites) or the inclination to do so (e.g., where the Department of Defense or Department of Energy are PRPs), these voluntary PRPs would have no statutory cost recoupment mechanism other than to enter a burdensome ''settlement'' process with EPA which itself may have no interest in the particular site.

[58] 408 F.3d 95, 60 ERC 1449 (2d Cir. 2005).

[59] 156 F.3d 416, 47 ERC 1449 (2d Cir. 1998)

[60] *Id.* at 106 n.8.

[61] *Id.* (citing H.R. Rep. No. 96-1016(I) at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 6119, 6120). Like the Second Circuit in *Syms*, the district court in *Mercury Mall Associates, Inc. v. Nick's Market, Inc.*, 368 F. Supp. 2d 513, 60 ERC 1338(E.D. Va. 2005), looked to the policy implications of *Cooper Industries* while holding that binding precedent barred a Section 107 cause of action for a volunteer PRP. The *Mercury Mall* court noted that denying volunteer PRPs a right of contribution runs counter to CERCLA's remedial purposes: ''The combined result of the Supreme Court's opinion in [*Cooper Industries, Inc. v.] Aviall [Services, Inc.*] and the Fourth Circuit's holding in *Pneumo Abex* is quixotic. Leaving a PRP that has not been subject to a cost recovery action devoid of any remedy . . . seems to undermine the twin purposes of [CERCLA].'' *Id.* at 519 (citing *Pneumo Abex Corp. v. High Point, Thomasville & Denton Railroad Co.*, 142 F.3d 769, 776; 46 ERC 1481 (4th Cir. 1998)). The plaintiff in *Mercury Mall* argued that, given that *Cooper Industries* disallows volunteer PRPs from suing for contribution under Section 113, the rationale for limiting PRP contribution claims to Section 113(f) no longer exists, and authorizing causes of action for some PRPs under Section 107 will promote CERCLA's purpose of encouraging timely and cost-effective cleanups. *Id.* The district court agreed with these arguments, but held that it lacked the power to infer a right of action absent supporting Fourth Circuit or Supreme Court precedent or a pertinent CERCLA amendment. *Id.* at 519-20.

[62] 33 F.3d 96, 39 ERC 1097 (1st Cir. 1994).

[63] *Id.* at 97-98.

[64] *Id.* at 98.

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with a three-year statute of limitations,[65] or under Section 107, with a six-year statute of limitations.[66] United Technologies argued that, on the one hand, it sought to recoup its repayment of governmental response costs under Section 113 and, on the other hand, sought to recoup its direct response costs for landfill cleanup under Section 107.[67] The court rejects this proposed dichotomy between Sections 107 and 113 based on the kinds of injuries suffered,[68] holding that ''innocent parties'' have a cause of action under Section 107, while PRPs have a cause of action under Section 113.[69] The distinction concerns who can sue, not the type of available claims and damages of the plaintiff.

Although courts commonly cite *United Technologies* for the principle that PRPs may bring claims only under Section 113,[70] the court leaves open the possibility that ''a PRP who spontaneously initiates a cleanup without governmental prodding [i.e., a volunteer PRP] might be able to pursue an implied right of action for contribution under [CERCLA § 107(c),] 42 U.S.C. § 9607(c).''[71] As *United Technologies* does not involve a volunteer PRP, the court takes no position on this issue. It notes, however, the difficulty in characterizing such a right of action either as a cost recovery action under Section 107 subject to a six-year statute of limitations or as a contribution action under Section 113 subject to a three-year statute of limitations.[72]

Nonetheless, *United Technologies*, relying on dicta from *In re Hemingway Transport, Inc.*,[73] recognizes the notion that some PRPs may have a right to recoup costs under Section 107.[74] In *Hemingway*, the court had to determine the extent of the debtor's CERCLA liability in order to resolve a bankruptcy dispute. The *Hemingway* court concluded that Section 107(a)(4)(B) authorized ''any person'' to bring a claim for response costs, including a ''private action plaintiff . . . potentially 'liable' to EPA for response costs [i.e., a PRP].''[75] The court characterized a PRP's acting before EPA enforcement as ''akin to a joint 'tortfeasor' '' and, as such, entitled to use Section 107(a)(4)(B) as the ''pre-enforcement analog to the 'impleader' contribution action permitted under Section 9613(f).''[76] For this conclusion that Section 113 preserves for PRPs a right to contribution under Section 107 prior to an EPA enforcement proceeding, the court cites the savings clause of Section 113(f)(1) and some Ninth Circuit precedent.[77] Thus, the court reaches its conclusion without any lengthy analysis of the distinctions between cost recovery and contribution which occupy both the *Cooper Industries* and *United Technologies* courts.

Although the *United Technologies* court does not fully explore *Hemingway*, it cites the case approvingly. In the absence of any other Supreme Court or First Circuit case law on point, *Hemingway* and *United Technologies* form a basis for the argument that the First Circuit should hold that volunteer PRPs have a right under Section 107(a)(4)(B) to recover costs exceeding their shares of responsibility.

Vine Street LLC v. Keeling,[78] a case in which a federal district court in Texas applied *Hemingway* and *United Technologies*, provides additional support for this argument. *Vine Street* holds that volunteer PRPs may sue to recover their costs under Section 107.[79] Vine Street LLC (Vine), the owner of a contaminated laundromat site, sued prior laundromat owners and Dow Chemical, the manufacturer of dry-cleaning fluid, under CERCLA Sections 107(a) and 113(f). Pursuant to *Cooper Industries*, the district court dismissed Vine's claim for contribution under Section 113(f) because Vine had not been sued under Section 106 or 107(a) or legally compelled to incur cleanup costs.[80] However, the court held that Vine, an owner and therefore a liable party, had a cause of action under CERCLA Section 107 because Vine acted voluntarily, thereby rendering this case ''unique.''[81] The court concluded that a liable party that voluntarily works to remedy environmental contamination need not wait to be sued in order to recover cleanup costs.[82]

The *Vine Street* court reviewed federal court of appeals opinions holding that a PRP may seek contribution only under Section 113(f)(1) and determined that each involved a PRP acting under government compulsion whereas Vine acted voluntarily.[83] The court found the distinction to be significant—a PRP acting voluntarily is ''innocent'' and entitled to seek contribution under Section 107(a)(4)(B) as if it were a PRP with an ''innocent owner'' defense under Section 107(b).[84] The *Vine Street* court defined ''innocent'' as not compelled to incur costs; this definition includes volunteer PRPs and parties with an ''innocent owner'' defense under CERCLA Section 107(b).[85]

The court found that decisions limiting recovery under Section 107(a) to only those parties with a valid defense under Section 107(b) (so-called ''innocent parties'') misapply CERCLA. The distinction between innocent parties and PRPs ''is a way of distinguishing between parties seeking to join other parties in liability and parties seeking to divide liability amongst other parties.''[86]

District Court Case Law

Prior to the groundbreaking *Consolidated Edison* case, district courts often did not consider *Cooper In-*

[65] CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3).
[66] *Id.* § 113(g)(2), 42 U.S.C. § 9613(g)(2).
[67] *United Technologies*, 33 F.3d at 101.
[68] *Id.* at 102.
[69] *Id.* at 99.
[70] *See, e.g.*, *Cooper Industries*, 125 S. Ct. at 585; *Pneumo Abex Corp. v. Portsmouth Development & Housing Authority*, 142 F.3d 769; 46 ERC 1481 (4th Cir. 1998); *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 47 ERC 1285 (6th Cir. 1998).
[71] *United Technologies*, 33 F.3d at 99 n.8.
[72] *Id.*
[73] 993 F.2d 915, 931; 36 ERC 1665 (1st Cir. 1993).
[74] *United Technologies*, 33 F.3d at 99 n.8.
[75] *Hemingway*, 993 F.2d at 931.
[76] *Id.*
[77] *Id.* Note that the *Hemingway* court concluded that the debtor, operating under an EPA order, could not sue under Section 113 which requires ''pending or completed EPA enforcement actions under [Section 106 or Section 107.]'' *Id.* at 922. Also, the Hemingway court's reliance on Section 113's savings clause, *id.* at 931, runs contrary to the Supreme Court's reading of the clause in *Cooper Industries*.
[78] 362 F. Supp. 2d 754, 60 ERC 1850 (E.D. Tex. 2005).
[79] *Id.* at 761.
[80] *Id.* at 760-61.
[81] *Id.* at 763.
[82] *Id.*
[83] *Id.* at 762.
[84] *Id.* at 762-64.
[85] *Id.* at 762 n.4.
[86] *Id.*

dustries a sufficient basis for disregarding existing precedent that barred PRP claims under Section 107. For example, *Elementis Chemicals, Inc. v. T H Agriculture and Nutrition, L.L.C.*,[87] a district court case in the Second Circuit predating *Syms v. Olin Corp.*,[88] rejected a claim that *Cooper Industries* undermined *Bedford Affiliates*.[89] The court explained that volunteer PRPs post-*Cooper Industries* must enter into a settlement with the government in order to support a suit: ''There is nothing necessarily irrational about requiring a PRP that voluntarily goes to court to obtain cost reimbursement, as opposed to being dragged into court by another party, to either prove its 'innocence' (via the assertion of a Section 107(b) affirmative defense) or officially admit its 'guilt' (via a settlement).''[90]

The *Elementis* court's reasoning, however, fails to address why volunteer PRPs lack eligibility for a cause of action for which they qualify by virtue of the liability that attaches for ''any other necessary costs of response incurred by any other person'' under Section 107.[91]

Moreover, the *Elementis* Court does not address why an unresponsive PRP (*i.e.*, one that neither volunteers to remediate, nor whom the government has sued) should escape liability, while a volunteer PRP should assume the share of the unresponsive PRP. The *Elementis* court's interpretation of the *Cooper Industries* decision, in tandem with the existing limits on PRP recovery under Section 107, would create not only a class of PRPs that cannot recover their costs, but also a related class of PRPs that are shielded from liability. This result would create a disincentive for voluntary clean up, thereby eviscerating CERCLA's dual purposes of cleaning up sites and having those responsible for contamination pay for its remediation.

In *Benderson Development Co. v. Neumade Products Corp.*,[92] a federal district court case in New Jersey decided between the *Syms* and *Consolidated Edison* cases,[93] the district court interpreted *Syms* as declining to ''determine whether the rule announced in *Bedford Affiliates* remains viable after *Cooper Industries*.''[94] The *Benderson* court cites *Elementis* for the proposition that *Bedford Affiliates* remains controlling after *Cooper Industries*.[95]

Also prior to *Consolidated Edison*, district courts in Wisconsin,[96] Missouri,[97] Virginia,[98] South Carolina,[99] New Jersey,[100] Connecticut[101] and New York[102] dismissed claims, or refused to allow amended complaints, that attempted to state claims for a right to contribution under Section 107(a)(4)(B) based on governing courts of appeal precedent disallowing PRP suits under CERCLA Section 107.

In *General Motors Corp. v. United States*,[103] a district court in the U.S. Court of Appeals for the Third Circuit permitted a plaintiff to amend its pleading to state a Section 107(a)(4)(B) claim, but only because the pending appeal of *E.I. DuPont DeNemours & Co. v. United States*[104] raises the possibility that the U.S. Court of Appeals for the Third Circuit will address the right to contribution question in the near future.

Conclusion

Since the Supreme Court in *Cooper Industries* eliminated the cause of action that volunteer PRPs would have had under Section 113, an action for volunteer PRPs under Section 107 provides the only available mechanism that permits ''good-citizen'' PRPs to recover costs they have incurred that exceed their own pro rata shares. The availability of this cost recovery mechanism encourages voluntary and prompt remediation and minimizes necessary governmental intervention and expenditures, thus promoting CERCLA's remedial purposes. Absent a Section 107 cause of action, responsible parties will have little incentive to clean up sites voluntarily; rather they will have the incentive to wait for a government suit to trigger the Section 113 cost contribution scheme.

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[87] 373 F. Supp. 2d 257, 272; 59 ERC 2071 (S.D.N.Y. 2005).

[88] 408 F.3d 95, 60 ERC 1449(2d Cir. 2005); *see supra*, ''Second Circuit'' discussion.

[89] *Elementis*, 373 F. Supp. 2d at 272 (referencing *Bedford Affiliates*, 156 F.3d 416, 47 ERC 1449 (2d Cir. 1998)).

[90] *Id.* at 272; *see also supra* n.29.

[91] *See* CERCLA § 107(a)(4)(B), 42 U.S.C. § 107(a)(4)(B).

[92] 2005 WL 1397013 at *11 (W.D.N.Y. June 13, 2005); *cf. Cadlerock Properties Joint Venture, L.P. v. Schilberg*, 2005 WL 1683494 (D. Conn. July 19, 2005).

[93] *See supra*, ''Second Circuit'' discussion.

[94] 2005 WL 1397013 at *11 (W.D.N.Y. June 13, 2005).

[95] *Id.. See also Kaladish v. Uniroyal Holding, Inc.*, 2005 WL 2001174, *3 n8; 61 ERC 1347 (D. Conn. Aug. 9, 2005).

[96] *City of Waukesha v. Viacom International Inc.*, 362 F. Supp. 2d 1025, 60 ERC 2021 (E.D. Wis. 2005).

[97] *Blue Tee Corp. v. Asarco, Inc.*, 2005 WL 1532955 (W.D. Mo. June 27, 2005).

[98] *Mercury Mall Associates, Inc. v. Nick's Market, Inc.*, 368 F. Supp. 2d 513, 60 ERC 1338 (E.D. Va. 2005); *but see supra* n.54.

[99] *R.E. Goodson Construction Co., Inc. v. International Paper Co.*, 2005 WL 2614927 (D.S.C. Oct. 13, 2005).

[100] *Montville Township v. Woodmont Builders, LLC*, 2005 WL 2000204 (D. N.J. Aug. 17, 2005).

[101] *Kaladish v. Uniroyal Holding, Inc.*, 2005 WL 2001174, 61 ERC 1347 (D. Conn. Aug. 9, 2005).

[102] *AMW Materials Testing, Inc. v. Town of Babylon*, 348 F. Supp. 2d 4, 59 ERC 1677 (E.D.N.Y 2004).

[103] 2005 WL 548266, at *3-*5 (D. N.J. March 2, 2005).

[104] 297 F. Supp. 2d 740, 746-747; 58 ERC (BNA) 1532(D. N.J. 2003).

  ER ISSN 0013-9211