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## Reimbursement for Voluntarily Cleaning up Your Mess? The Seventh Circuit Says Yes under CERCLA. Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.

Nikki Mullins

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# REIMBURSEMENT FOR VOLUNTARILY CLEANING UP YOUR MESS? THE SEVENTH CIRCUIT SAYS YES UNDER CERCLA \*

*Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*<sup>1</sup>

## I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) in order to address rising public concerns about the inadequacy of response measures to environmental risks and health hazards of improper waste disposal.<sup>2</sup> CERCLA was enacted to provide a way to decrease and control problems related to abandoned and inactive hazardous waste disposal sites,<sup>3</sup> and to shift cleanup costs of the contamination to responsible parties.<sup>4</sup> Under CERCLA, Congress gave the federal government broad authority to regulate hazardous substances, to respond to hazardous substance emergencies, and to develop long-term solutions for the Nation's most serious hazardous waste problems.<sup>5</sup> While CERCLA provides two causes of action in which a potentially responsible party (“PRP”) may recover cleanup costs, either through a joint and several cost recovery action<sup>6</sup> or a

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\* Subsequent to the completion of this article, the United States Supreme Court abrogated *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515 (3d Cir. 2006), holding that CERCLA provides a potentially responsible party with a cause of action to recover, from other potentially responsible parties, costs incurred in voluntarily cleaning up a contaminated site. *United States v. Atlantic Research Corp.*, 127 S.Ct. 2331, 2338-39 (2007). However, the Court reserved judgment on whether clean-up costs incurred by a potentially responsible party pursuant to a consent decree following an EPA administrative enforcement action are recoverable under Section 107(a), Section 113(f), or both. *Id.* at 2338. See *infra*, section V. Comment and accompanying text.

<sup>1</sup> 437 F.3d 824 (7th Cir. (Ill.)).

<sup>2</sup> See 42 U.S.C. §§ 9601-9675. CERCLA is codified at 42 U.S.C. §§ 9601-9675 (hereafter “CERCLA” §§ 101-175).

<sup>3</sup> H. R. Rep. No. 96-1016, at 1.

<sup>4</sup> See *Megrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996).

<sup>5</sup> See CERCLA §§ 101-175.

<sup>6</sup> *Id.* at § 107(a) (codified at 42 U.S.C. § 9607(a)).

contribution action,<sup>7</sup> the shifting of cleanup costs to responsible parties has been the result of much litigation for a number of federal courts.<sup>8</sup> It is the issue of cleanup cost recovery by a voluntary PRP that the Seventh Circuit Court of Appeals addressed in *Metropolitan Water v. North American Galvanizing & Coatings, Inc.*<sup>9</sup>

The *Metropolitan Water* case turns on the interpretation of the Supreme Court's holding of an implied cause of action under section 107(a) in *Cooper Industries, Inc. v. Aviall Services, Inc.*,<sup>10</sup> an analysis of three federal courts of appeals' opinions regarding the right of a PRP to bring suit under section 107(a) and a breakdown of the statutory language of section 107(a).<sup>11</sup> This case note will explore the legislative and case history leading up to the *Metropolitan Water* decision and attempt to point out that, although the Seventh Circuit comes to the correct legal result, its lack of analysis pertaining to the policy of CERCLA and its environmental goals leave open the possibility that a PRP who voluntarily performs cleanup will still be unable to bring a cost recovery action under section 107(a).

## II. FACTS & HOLDING

Over the course of approximately fifty years industrial chemicals spilled into the soil and groundwater on South Harlem Avenue, about one quarter mile north of Stevenson Expressway in Forest View, Illinois.<sup>12</sup> In 2003, the Metropolitan Water Reclamation District of Chicago ("Metropolitan Water") filed suit against Lake River Corporation ("Lake River") under CERCLA and the Superfund Amendments and

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<sup>7</sup> *Id.* § 113(f).

<sup>8</sup> See generally *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004); *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994); *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994); *Consol. Edison Co. of New York, Inc. v. UGI Utils., Inc.*, 423 F.3d 90 (2d Cir. 2005); *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006); *E.I. Dupont De Nemours & Co. v. United States*, 460 F.3d 515 (3d Cir. 2006).

<sup>9</sup> *Metro. Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 437 F.3d 824 (7th Cir. 2007) (hereafter "Metro. Water").

<sup>10</sup> 543 U.S. 157 (2004).

<sup>11</sup> *Metro. Water*, 437 F.3d 824, 832-36.

<sup>12</sup> *Id.* at 825.

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Reauthorization Act of 1986 (“SARA”) to recover cleanup costs arising from the contamination.<sup>13</sup>

The contaminated property, approximately fifty acres, is owned by Metropolitan Water.<sup>14</sup> Metropolitan Water entered into a long-term lease with Lake River in the late 1940s.<sup>15</sup> Lake River is a wholly owned subsidiary of North American Galvanizing & Coatings, Inc. (“North American”).<sup>16</sup> Lake River constructed a facility “to store, mix and package industrial chemicals for its own use and for the use of its customers.”<sup>17</sup> The fifty acres contained above-ground storage tanks that retained large quantities of chemicals.<sup>18</sup> This was a part of Lake River’s operations.<sup>19</sup> These chemicals arrived at the property through truck, barge, and rail.<sup>20</sup>

Lake River’s storage tanks were prone to leaks.<sup>21</sup> Over the fifty-plus years Lake River leased Metropolitan Water’s property, it was alleged that the tanks spilled close to 12,000 gallons of industrial chemicals into the soil and groundwater.<sup>22</sup> These toxins were “hazardous substances”<sup>23</sup> and “posed an imminent danger to the environment.”<sup>24</sup> Metropolitan Water incurred “substantial expenses” investigating, monitoring, and remediating the contaminated portions of its property.<sup>25</sup>

Metropolitan Water filed its complaint with the United States District Court for the Northern District of Illinois in February 2003 to recoup its costs in remediating the contamination.<sup>26</sup> Metropolitan Water

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> The toxins were “hazardous substances” as defined under CERCLA. *See* CERCLA § 101(11).

<sup>24</sup> *Metro. Water*, 473 F.3d at 825.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

asserted a claim for recovery costs under CERCLA section 107(a)<sup>27</sup> or an alternative claim for contribution under CERCLA section 113(f).<sup>28</sup> When Lake River failed to answer the complaint, a default judgment was entered for Lake River to pay approximately \$1.8 million in damages to Metropolitan Water.<sup>29</sup> This was in addition to future response costs.<sup>30</sup>

Later, Metropolitan Water amended the complaint to include North American as a defendant, realleging the CERCLA counts.<sup>31</sup> North American moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).<sup>32</sup> The district court, in ruling on the motion, distinguished between the two asserted CERCLA claims.<sup>33</sup> Under section 107(a)'s liability provisions, the district court found an implied right of action for cost recovery in cases "where a party is seeking direct recovery of costs incurred in cleaning up a hazardous waste site."<sup>34</sup> The court described section 113(f)'s claims for contribution as brought by "potentially responsible parties," or "PRPs," that want to divide damages among themselves.<sup>35</sup> The district court found that Metropolitan Water was a PRP under CERCLA's strict liability framework because it owned the property during the period of contamination.<sup>36</sup> While PRPs are normally limited to contribution claims under section 113(f), rather than the full cost of remediation under the joint and several recovery of section 107(a), since Metropolitan Water had commenced cleanup voluntarily and not

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<sup>27</sup> *Id.* See CERCLA § 107(a).

<sup>28</sup> *Metro. Water*, 473 F.3d at 825-26. See CERCLA § 113(f). Metropolitan Water also asserted state law claims for nuisance and breach of contract. *Metro. Water*, 473 F.3d at 826.

<sup>29</sup> *Metro. Water*, 473 F.3d at 826.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* Metropolitan Water also realleged the state law claims. *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* The district court said that a contrary outcome "would seem to lie contrary to the general purposes of CERCLA to promote prompt and proper cleanup of contaminated properties." *Id.*

<sup>36</sup> *Id.*

under compliance with a civil action, Metropolitan Water did not have a contribution right under section 113(f).<sup>37</sup>

The district court then held that, “for [those] PRPs that voluntarily undertake cleanup, an implied right to contribution under section 107(a) [is] available [despite] their status as strictly liable parties under the statute.”<sup>38</sup> North American’s motion was granted in part and denied in part.<sup>39</sup>

The United States Court of Appeals, Seventh Circuit, affirmed the judgment of the district court on January 17, 2007, holding that Metropolitan Water had an implied right to contribution under the cost recovery of CERCLA section 107(a).<sup>40</sup> The Seventh Circuit found when a PRP has voluntarily provided cleanup to a hazardous site and has neither settled liability with a government entity nor been the subject of a CERCLA suit for damages, the Supreme Court’s recognition of an implied cause of action in section 107(a)<sup>41</sup> along with that subsection’s plain language in which a “responsible party . . . shall be liable for . . . any other necessary costs of response incurred by any other person . . .” allow for an action to be brought under section 107(a) to recover necessary response costs.<sup>42</sup>

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<sup>37</sup> *Id.* CERCLA § 113(f)(1) (allowing contribution only “during or following any civil action”).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* North American’s motion to dismiss was granted as to the claims for common law nuisance and contribution under CERCLA § 113(f)(1). *Id.* Metropolitan Water was found to have an implied right to contribution under cost recovery provision of CERCLA, therefore, North American’s motion to dismiss was denied under § 107(a). *Id.*

<sup>40</sup> *Id.* The Environmental Protection Agency (“EPA”) submitted its views as *amicus curiae* and Metropolitan Water and North American filed supplemental briefs in response.

<sup>41</sup> See *Key Tropic Corp. v. United States*, 511 U.S. 809, 818 (1994); *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 163 (2004) (hereafter “Cooper Indus.”).

<sup>42</sup> *Metro. Water*, 473 F.3d at 834-35. The Seventh Circuit reviewed decisions from the Second, Third, and Eighth Circuit Courts of Appeals. *Id.* The Seventh Circuit agreed with the conclusions found by the Second and Eighth Circuit decisions and a dissent opinion in the Third Circuit. See *Consol. Edison Co. of New York, Inc. v. UGI Util., Inc.*, 423 F.3d 90 (2d Cir. 2005) (hereafter *Consol. Edison*); *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 528 (3d Cir. 2006) (hereafter “DuPont”); *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), respectively.

### III. LEGAL BACKGROUND

The reasoning in *Metropolitan Water* is a recent application of the limited holding of *Cooper Industries*, along with an analysis of the rationales of other federal circuit courts' decisions about the authorization of a cause of action under section 107(a) by potentially liable parties that commence cleanup voluntarily.<sup>43</sup> An examination of the legislative history and case law surrounding CERCLA will set the grounds for insight into the *Metropolitan Water* decision.

#### A. Legislative History

In 1980, Congress enacted CERCLA in order to address rising public concerns about the inadequacy of response measures to environmental risks and health hazards of improper waste disposal.<sup>44</sup> CERCLA was enacted to decrease and control problems related to abandoned and inactive hazardous waste disposal sites<sup>45</sup> and to shift cleanup costs of the contamination to responsible parties.<sup>46</sup> Under CERCLA, Congress gave the federal government broad authority to regulate hazardous substances, to respond to hazardous substance emergencies, and to develop long-term solutions for the Nation's most serious hazardous waste problems.<sup>47</sup>

The Environmental Protection Agency ("EPA") is in charge of the enforcement of CERCLA.<sup>48</sup> The EPA publicized regulations under the National Contingency Plan ("NCP") that specify how response actions to releases and threatened releases of hazardous substances, pollutants, or contaminants are to be completed and what standard the actions will be measured against for consistency.<sup>49</sup> If the EPA deems a specific site an imminent threat, the EPA can issue a compliance order or obtain a court

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<sup>43</sup> *Metro. Water*, 473 F.3d at 829, 832-37.

<sup>44</sup> *Id.* at 826. See CERCLA §§ 101-175.

<sup>45</sup> H. R. Rep. No. 96-1016, at 1.

<sup>46</sup> See *Megrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996).

<sup>47</sup> See CERCLA §§ 101-175.

<sup>48</sup> See CERCLA §§ 104, 106.

<sup>49</sup> See CERCLA § 105; The National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. pt. 300.

injunction that directs any responsible party to cleanup the contamination.<sup>50</sup> The EPA may also cleanup the contamination using its own money out of the Hazardous Substances Superfund.<sup>51</sup> If the EPA provides the cleanup efforts, the agency may recover its costs from any responsible party.<sup>52</sup>

The EPA normally uses five major efforts to compel PRPs to perform the cleanup.<sup>53</sup> Initially the EPA identifies the PRPs and sends notice to each PRP informing them of their potential liability under CERCLA.<sup>54</sup> The EPA will then request voluntary participation of the PRP in the cleanup.<sup>55</sup> Next, if the EPA believes the PRP can provide the cleanup, the EPA will attempt to facilitate negotiation of a settlement agreement, which involves a proposal for cleaning up the pollution under the assumption of PRP liability.<sup>56</sup> The enforcement agreement may be either judicial or administrative, but under both agreements the EPA oversees the PRP.<sup>57</sup> If a settlement is not reached, the EPA can seek an injunction in federal district court forcing the PRP to act or issue an administrative order pursuant to CERCLA section 104(e) or 106(a)

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<sup>50</sup> See CERCLA § 106(a).

<sup>51</sup> See *Id.* § 104. This fund was created by CERCLA and is financed through appropriations, EPA fees and industry taxes. *Id.* § 105.

<sup>52</sup> See *Id.* § 107.

<sup>53</sup> Environmental Fact Sheet The Superfund Enforcement Process: How It Works, Office of Solid Waste and Emergency Response, Office of Waste Programs Enforcement, Summer 1988, United States Environmental Protection Agency, *available at* [www.smallbiz-enviroweb.org/pub\\_video/epadocs/ddocs/d15.pdf](http://www.smallbiz-enviroweb.org/pub_video/epadocs/ddocs/d15.pdf).

<sup>54</sup> *Id.*

<sup>55</sup> See CERCLA § 122 (explained at Environmental Fact Sheet The Superfund Enforcement Process: How It Works, Office of Solid Waste and Emergency Response, Office of Waste Programs Enforcement, Summer 1988, United States Environmental Protection Agency, *available at* [www.smallbiz-enviroweb.org/pub\\_video/epadocs/ddocs/d15.pdf](http://www.smallbiz-enviroweb.org/pub_video/epadocs/ddocs/d15.pdf)).

<sup>56</sup> *Id.* (explained at Environmental Fact Sheet The Superfund Enforcement Process: How It Works, Office of Solid Waste and Emergency Response, Office of Waste Programs Enforcement, Summer 1988, United States Environmental Protection Agency, *available at* [www.smallbiz-enviroweb.org/pub\\_video/epadocs/ddocs/d15.pdf](http://www.smallbiz-enviroweb.org/pub_video/epadocs/ddocs/d15.pdf)).

<sup>57</sup> Environmental Fact Sheet The Superfund Enforcement Process: How It Works, Office of Solid Waste and Emergency Response, Office of Waste Programs Enforcement, Summer 1988, United States Environmental Protection Agency, *available at* [www.smallbiz-enviroweb.org/pub\\_video/epadocs/ddocs/d15.pdf](http://www.smallbiz-enviroweb.org/pub_video/epadocs/ddocs/d15.pdf).



demanding the PRP to perform the cleanup.<sup>58</sup> Finally, if the PRPs do not perform the response action and the EPA removes the contamination itself, it will file suit against the PRP(s) for reimbursement.<sup>59</sup>

Under CERCLA, a party may recover cleanup costs from other PRPs in one of two causes of action: a joint and several cost recovery action<sup>60</sup> or a contribution action.<sup>61</sup> Liability for the cleanup of sites contaminated by hazardous substances is established under section 107(a) of CERCLA.<sup>62</sup> Parties are liable under CERCLA for "all costs of removal or remedial action incurred by the government or a private party and any other necessary costs of response incurred by any other person consistent with the national contingency plan."<sup>63</sup> In order to establish liability, the government or a private party must establish the contaminated site is a facility,<sup>64</sup> the defendant is a potentially responsible party,<sup>65</sup> a release or

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<sup>58</sup> See CERCLA §§ 104(e), 106(a).

<sup>59</sup> *Id.* § 107(a).

<sup>60</sup> *Id.* § 107(a). Under joint and several liability any party can be held responsible for the entire cost of cleanup or other response costs. *Id.* A private party can also recoup all recoverable costs from any responsible party. The statute of limitations for most cost recovery claims is six years. *Id.* § 113(g)(2).

<sup>61</sup> *Id.* § 113(f). Under contribution, a responsible party may only recover an equitable share of cleanup and response costs from other PRPs. The statute of limitations for a contribution action is three years. *Id.* § 113(g)(3).

<sup>62</sup> *Id.* § 107(a). Although § 107(a) establishes liability for a cost recovery action, the same elements must also be established when seeking contribution under § 113(f) because this section allows a party to seek contribution only from a person who is liable or potentially liable under § 107. See *United States v. Chrysler Corp.*, 157 F. Supp. 2d 849, 855 n.11 (N.D. Ohio 2001). Sections 107(a) and 113(f) were codified at 42 U.S.C. §§ 9607(a) and 9613(f). See 42 U.S.C. §§ 9607(a) and 9613(f).

<sup>63</sup> *Id.* § 107(a)(4)(B). In order for private parties to recover corresponding cleanup costs, the actions must be necessary and "incurred consistent with the NCP." See CERCLA § 101(23) (definition of "removal"), § 101(24) (definition of "remedial action").

<sup>64</sup> *Id.* § 107. A facility is defined as:

[a]ny 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 any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

*Id.* § 101(9).

<sup>65</sup> *Id.* § 107(a). The four classes of PRPs are:

threat of release of a hazardous substance<sup>66</sup> has occurred at the facility,<sup>67</sup> and the release or threatened release has caused the government or a private party to incur "necessary" response costs consistent with the NCP.<sup>68</sup>

The original enactment of CERCLA did not expressly provide for a right of contribution.<sup>69</sup> In 1986, Congress amended CERCLA through the use of Superfund Amendments and Reauthorization Act ("SARA") to authorize an express action for contribution.<sup>70</sup> Under CERCLA section 113(f)(1), "Any person may seek contribution from any other person who is liable or potentially liable" for response costs under section 107(a) "during or following any civil action" under CERCLA section 106 or section 107(a).<sup>71</sup> Also, encouragement to settle was provided such that any party that settled with the government was insulated from being sued in a contribution action.<sup>72</sup> When a contribution claim was asserted by a private party, the claim was subjected to the court's discretion to allocate costs among liable parties.<sup>73</sup> Section 113(f)(1) also contained a savings clause

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[c]urrent owners or operators of a site; past owners or operators of a site at the time hazardous substances were disposed of at the site; anyone who arranged for the disposal, transport or treatment of hazardous substances found at the site; and anyone who accepted hazardous substances for disposal and selected the site now slated for cleanup.

*Id.* § 107(a)(1)-(4).

<sup>66</sup> A hazardous substance is defined by reference to substances defined as hazardous in other environmental statutes. *See* the Resource Conservation and Recovery Act, 42 U.S.C. § 6921; the Clean Water Act, 33 U.S.C. § 1317(a); and the Clean Air Act, 42 U.S.C. § 7412. Petroleum is specifically exempted from CERCLA's definition of hazardous substances. *See* 42 U.S.C. § 9601(14).

<sup>67</sup> CERCLA § 107(a).

<sup>68</sup> *Id.*

<sup>69</sup> *See* CERCLA §§ 101-175.

<sup>70</sup> *See* Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (hereafter "SARA"). SARA amended CERCLA to add CERCLA § 113, 42 U.S.C. § 9613. *Id.*

<sup>71</sup> CERCLA § 113(f)(1). Section 106 authorized the Federal Government to compel responsible parties to clean up contaminated areas. *See* *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994).

<sup>72</sup> *Id.* § 113(f)(2).

<sup>73</sup> *Id.* § 113(f)(1). "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.*

that provided: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under" section 106 or 107.<sup>74</sup> From the resulting legislation, courts have produced a variety of interpretations of when cost recovery actions are appropriate under section 107(a) and when contribution is necessary under section 113(f).<sup>75</sup>

### B. Judicial Interpretation

When the contribution claim joined cost recovery as a cause of action to recover cleanup costs from a hazardous waste site under CERCLA, the contested question of whether the right of contribution was now the only cause of action available to a PRP seeking to recover its cleanup costs arose, given that PRPs who had spent money in remedying a site or settling liability wished to seek joint and several cost recovery under section 107(a).<sup>76</sup> Each circuit to decide this question held that, generally, PRPs could not seek cost recovery under section 107(a), and that "any claim seeking to shift costs from one responsible party to another must be brought as a section 113(f) claim for contribution."<sup>77</sup>

In *Bedford Affiliates v. Sills*,<sup>78</sup> the Second Circuit stated that any action by one PRP against another to equitably apportion liability was a "quintessential claim for contribution" and it would be unfair to allow a PRP to recover "100 percent of the response costs from others similarly situated."<sup>79</sup> The court referenced a group of circuit court opinions which reasoned that if a PRP were allowed to recover under section 107(a) it

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<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004); *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994); *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994); *Consol. Edison Co. of New York, Inc. v. UGI Utils., Inc.*, 423 F.3d 90 (2d Cir. 2005); *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006); *E.I. Dupont De Nemours & Co. v. United States*, 460 F.3d 515 (3d Cir. 2006).

<sup>76</sup> See *id.*

<sup>77</sup> *Metro. Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d at 828 (citing seven cases from the 1st, 2d, 3rd, 4th, 6th, 9th, and 10th circuits).

<sup>78</sup> 156 F.3d 416 (2d Cir. 1998).

<sup>79</sup> *Id.* at 424.

would leave section 113(f) meaningless, since a PRP “would readily abandon a section 113(f)(1) suit in favor of the substantially more generous provisions of section 107(a).”<sup>80</sup> The Seventh Circuit adopted this reasoning in *Akzo Coatings, Inc. v. Aigner Corp.*<sup>81</sup> when it held that a claim “by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make” appears in contribution, and therefore, must be brought under section 113(f).<sup>82</sup>

Because CERCLA’s strict liability can provide for a large number of potentially liable parties,<sup>83</sup> the “innocent landowner” exception developed in case law. This exception provides that cost recovery under section 107(a) remains available to landowners who allege they did not pollute the site in any way.<sup>84</sup> The “innocent landowner” defense excludes from liability those “innocent” landowners who did not know and had no reason to know that the property was contaminated at the time of purchase; reacted responsibly when they found the contamination; and made reasonable inquiries into the past uses of the property before the purchase to determine whether the property was contaminated.<sup>85</sup> In *Rumpke*, the Seventh Circuit decided that a dump owner, who was strictly liable for, but had not actually contributed to the “cocktail of hazardous wastes” that had been deposited at the dump by a nearby recycling company, could maintain a direct cost recovery claim under section 107(a).<sup>86</sup> The court emphasized the fact that the dump owner had not been subject to either government or private obligation to initiate cleanup, the

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<sup>80</sup> *Id.* See *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States v. Colo. & Eastern R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994); *Akzo Coatings*, 30 F.3d at 764.

<sup>81</sup> 30 F.3d 761 (7th Cir. 1994).

<sup>82</sup> *Id.* at 764.

<sup>83</sup> CERCLA § 107(a).

<sup>84</sup> *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1241 (7th Cir. 1997). The “innocent landowner” exception originated in *Akzo Coating, Inc. v. Aigner Corp.* See *Akzo Coating, Inc. v. Aigner Corp.* 30 F.3d 761 (7th Cir. 1994).

<sup>85</sup> See *Cross, Establishing Environmental Innocence*, 23 Real Est. L.J. 332 (Spring 1995).

<sup>86</sup> *Rumpke*, 107 F.3d at 1240.

dump undertook cleanup on its own, and the dump maintained that it shared no actual responsibility for the site and was not trying to divide up its own liability or apportion costs.<sup>87</sup>

The right of private parties to seek recovery of cleanup costs was addressed in *Key Tronic Corp. v. United States*.<sup>88</sup> Although the issue before the court was attorney's fees, not the availability of a right of action under section 107(a), the Supreme Court stated that "section 107(a) unquestionably provides a cause of action for [PRPs] to seek recovery of cleanup costs."<sup>89</sup> Key Tronic, a PRP, asserted a \$1.2 million cost recovery claim under section 107(a) to recoup costs it [allegedly] incurred in cleaning up its site "at its own initiative."<sup>90</sup> Key Tronic settled with the EPA on a portion of its claim, but it brought an action for costs incurred before the EPA's involvement.<sup>91</sup> The Court explained that under CERCLA section 107(a)(4)(B), which allows any person who has incurred costs for cleaning up a hazardous waste site to recover all or a portion of those costs from any other person liable under CERCLA, an implied cause of action exists that PRPs "may have a claim for contribution against those treated as joint tortfeasors."<sup>92</sup>

Perhaps most significantly, the Supreme Court recently discussed the relationship between sections 107(a) and 113(f) of CERCLA.<sup>93</sup> In *Cooper Industries, Inc. v. Aviall Services, Inc.*,<sup>94</sup> the key matter decided concerned the timing of a contribution claim under section 113(f).<sup>95</sup> In *Cooper Industries*, Aviall Services, after having bought four Texas properties from Cooper Industries, Inc., discovered that both companies had contaminated the properties when hazardous substances leaked into the ground and ground water.<sup>96</sup> Aviall provided the funds for the properties' cleanup under Texas' supervision, without being compelled by

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<sup>87</sup> *Id.* at 1241-42.

<sup>88</sup> 511 U.S. 809 (1994).

<sup>89</sup> *Id.* at 818.

<sup>90</sup> *Key Tronic Corp. v. United States*, 984 F.2d 1025, 1026 (9th Cir. 1993).

<sup>91</sup> *Id.* at 1026-27.

<sup>92</sup> *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 & n.11 (1994).

<sup>93</sup> *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004).

<sup>94</sup> 543 U.S. 157 (2004).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 157-58.

the State or Federal Government to provide the cleanup, and then Aviall brought action against Cooper to recover the costs.<sup>97</sup> Aviall's complaint was amended to combine a cost recovery claim under section 107(a) and a separate claim for contribution under section 113(f)(1) into a single, joint claim that, pursuant to section 113(f)(1), sought contribution from Cooper as a PRP under section 107(a).<sup>98</sup> The Supreme Court ultimately held that a "private party who has not been sued under CERCLA section 106 or section 107(a) may not obtain contribution under section 113(f)(1) from other liable parties."<sup>99</sup> Since Aviall had not been the subject of any enforcement action, and its claim based on section 113(f) was not "during or following any civil action,"<sup>100</sup> section 113(f) did not authorize Aviall's suit for contribution.<sup>101</sup> The *Cooper Industries* court noted in dictum that section 113(f)(1) was not the "exclusive cause of action for contribution available to a PRP," and an action under section 107(a) was available.<sup>102</sup>

Although an implied cause of action was found under section 107(a), the question of if section 107(a) authorized a cause of action by PRPs that seek recovery costs after voluntary cleanup was not explicitly addressed until three federal courts were faced with the issue in the aftermath of *Cooper Industries*.<sup>103</sup> In *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, the Second Circuit held that section 107(a) authorized a suit to recover voluntary response costs "for parties that have not been sued or made to participate in an administrative proceeding, but that if sued, would be held liable under section 107(a)."<sup>104</sup> Consolidated Edison incurred cleanup costs in remedying hazardous waste contamination from one of its power plants.<sup>105</sup> It sought reimbursement

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 165-69.

<sup>100</sup> *Id.* at 165-66.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 167.

<sup>103</sup> See *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005); *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006); *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515 (3rd Cir. 2006).

<sup>104</sup> *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 100 (2d Cir. 2005).

<sup>105</sup> *Id.* at 95.

from the operator of one of the plants.<sup>106</sup> In the complaint, Consolidated Edison made claims under both sections 107(a) and 113(f).<sup>107</sup> The Second Circuit held that contribution was not available since Consolidated Edison had not been sued under CERCLA section 107 or resolved CERCLA liability through settlement.<sup>108</sup> Although the court denied contribution under section 113(f), the court reasoned that denying recovery costs under section 107(a) would discourage voluntary cleanup and thereby undermine CERCLA.<sup>109</sup>

The Eighth Circuit also took up the issue in *Atlantic Research Corp. v. United States*.<sup>110</sup> In *Atlantic*, a corporation that retrofitted rocket motors used high-pressure water spray to remove rocket propellant.<sup>111</sup> This propellant was then burned and the soil and groundwater at the service facility was contaminated from the residue of the burnt rocket fuel.<sup>112</sup> Atlantic Research Corporation investigated and cleaned up the contamination voluntarily.<sup>113</sup> It then sued to recover part of its costs under CERCLA section 107(a) and 113(f).<sup>114</sup> After the decision in *Cooper Industries* held that a party could only attempt to obtain section 113(f) contribution "during or following" a section 106 or 107(a) CERCLA civil action,<sup>115</sup> Atlantic Research Corporation amended its complaint to rely exclusively on section 107(a) since no action had been brought against it.<sup>116</sup> The Eighth Circuit addressed whether or not "one liable party could recover costs advanced, beyond its equitable share, from another liable party in direct recovery, or by section 107 contribution, or as a matter of federal common law."<sup>117</sup> The court followed the Second Circuit and held

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 160.

<sup>109</sup> *Id.*

<sup>110</sup> 459 F.3d 827 (8th Cir. 2006).

<sup>111</sup> *Id.* at 829.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 57, 161 (2004).

<sup>116</sup> *Atlantic*, 459 F.3d at 829.

<sup>117</sup> *Id.* at 834.

“that it no longer makes sense to view section 113 as a liable party’s exclusive remedy.”<sup>118</sup>

However, when the Third Circuit addressed the same issue as the Second and Eighth Circuits, it reached a different conclusion. In *E.I. DuPont De Nemours & Co. v. United States*,<sup>119</sup> E.I. DuPont owned 15 industrial facilities throughout the United States.<sup>120</sup> These sites were contaminated with hazardous waste.<sup>121</sup> E.I. cleaned up the sites voluntarily<sup>122</sup> but alleged that, although they were partly responsible for the contamination, the United States Government was also partly responsible due to their operation of the sites at various times during World War I, World War II, and/or the Korean War.<sup>123</sup> E.I. brought a contribution action against the Government.<sup>124</sup> The district court rejected E.I. DuPont’s claim<sup>125</sup> and DuPont appealed.<sup>126</sup> The Third Circuit affirmed the district court’s judgment.<sup>127</sup> In doing so, the Third Circuit followed its precedent in holding that “a PRP seeking to offset its cleanup costs must invoke contribution under section 113.”<sup>128</sup> The E.I. DuPont court stated that nothing in *Cooper Industries* required it to reevaluate its precedent.<sup>129</sup> The Third Circuit held that “a thorough review of CERCLA, as amended by SARA, does not support the conclusion [that] because CERCLA’s general goal was to assure prompt and effective cleanups, and *sua sponte* cleanups by PRPs may be prompt and effective, those PRPs must be able to seek contribution.”<sup>130</sup> However, the dissenting opinion stated that after *Cooper Industries*, the Third Circuit’s precedent could no longer “be reconciled with the policies Congress sought to encourage

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<sup>118</sup> *Id.*

<sup>119</sup> 460 F.3d 515 (2006).

<sup>120</sup> *Id.* at 525.

<sup>121</sup> *Id.* at 515.

<sup>122</sup> *Id.* E.I. DuPont was not under a § 106 or § 107 action or a § 113(f)(3) settlement. *Id.* at 526.

<sup>123</sup> *Id.* at 515, 525.

<sup>124</sup> *Id.* at 526-27.

<sup>125</sup> *Id.* There were two district court opinions. *Id.*

<sup>126</sup> *Id.* at 527.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 528.

<sup>129</sup> *Id.* at 532.

<sup>130</sup> *Id.* at 541.



when it enacted CERCLA.”<sup>131</sup> It is with a view toward the *Consolidated Edison*, *Atlantic Research*, and *E.I. DuPont* Courts along with the language of section 107(a) that the *Metropolitan Water* case was decided.

#### IV. INSTANT DECISION

In *Metropolitan Water*, the Seventh Circuit of the United States Court of Appeals held that the Metropolitan Water Reclamation District of Greater Chicago had an implied right to contribution under the cost recovery provision of CERCLA.<sup>132</sup> After an examination of CERCLA and a discussion of relevant case law by the Supreme Court,<sup>133</sup> the Seventh Circuit focused on what rights of action, if any, were available to Metropolitan Water under CERCLA.<sup>134</sup> The Seventh Circuit reviewed the rationales of various circuit courts<sup>135</sup> and scrutinized the language of section 107(a).<sup>136</sup>

The court began with a view toward the limited holding in *Cooper Industries v. Aviall Services*, in which a responsible party must have either settled its liability with the government or been sued for compliance under section 106 or costs under section 107(a), before contribution under section 113(f)(1) would be allowed from other responsible parties.<sup>137</sup> The *Metropolitan Water* court also noted dicta from the *Cooper Industries* court that section 113(f)(1) was not the “exclusive cause of action for contribution available to a PRP,” and an implied cause of action existed under section 107(a).<sup>138</sup> The court immediately determined that a contribution action was unavailable to Metropolitan Water since it had not been subject to an action for damages or compliance under CERCLA.<sup>139</sup>

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<sup>131</sup> *Id.* at 545.

<sup>132</sup> *Metro. Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824, 834-35 (7th Cir. 2007).

<sup>133</sup> *See supra*, notes and accompanying text.

<sup>134</sup> *Metro. Water*, 473 F.3d at 830.

<sup>135</sup> *See supra* notes 44-132 and accompanying text.

<sup>136</sup> *Metro. Water*, 473 F.3d at 834-36.

<sup>137</sup> *Cooper Industries v. Aviall Services, Inc.*, 543 U.S. 157, 167 (2004).

<sup>138</sup> *Id.* at 167-71.

<sup>139</sup> *Metro. Water*, 473 F.3d at 830.

## REIMBURSEMENTS FOR VOLUNTARY CLEAN UPS

Following this, the Seventh Circuit reiterated that section 107(a) provided a cause of action for at least some parties to sue.<sup>140</sup>

After the court recognized case law concerning an implied cause of action under section 107(a), it next turned to the question of whether section 107(a) authorized a cause of action by potentially liable parties that had voluntarily cleaned up the hazardous site without outside compulsion.<sup>141</sup> The court recognized that although Metropolitan Water was similar to the plaintiff in *Key Tronic*, as both were PRPs that brought action under section 107(a), the issues before the respective courts were different and the opinion in *Key Tronic* could be used for nothing more than “approval of a PRP’s right to action in these circumstances.”<sup>142</sup> Therefore, the court examined three federal courts of appeal opinions that had addressed that precise question.<sup>143</sup>

The *Metropolitan Water* court first considered the Second Circuit’s opinion in *Consolidated Edison*, which authorized a suit under section 107(a) to recover voluntary response costs “for parties that have not been sued or made to participate in an administrative proceeding, but that if sued, would be held liable under section 107(a).”<sup>144</sup> The Seventh Circuit then reflected on the Eighth Circuit’s ruling in *Atlantic Research* “that it no longer makes sense to view section 113 as a liable party’s exclusive remedy.”<sup>145</sup> The Eighth Circuit rejected an approach which categorically deprived a liable party of a section 107 remedy.<sup>146</sup> Next, the Seventh Circuit reviewed the Third Circuit’s opinion in *E.I. DuPont De*

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<sup>140</sup> *Id.* at 831-832 (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 818; *Cooper Industries*, 543 U.S. at 163 n. 3 (“The cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 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.”)).

<sup>141</sup> *Id.* at 832.

<sup>142</sup> *Id.* at 833 n. 11.

<sup>143</sup> *Id.* at 832-34 (examining *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005); *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006); *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515 (3rd Cir. 2006)).

<sup>144</sup> *Id.* at 833 (citing *Consolidated Edison*, 423 F.3d at 100).

<sup>145</sup> *Id.* at 833-34 (quoting *Atlantic Research*, 459 F.3d at 834-35).

<sup>146</sup> *Id.*

*Nemours*.<sup>147</sup> The Third Circuit followed its own precedent in which "a PRP seeking to offset its cleanup costs must invoke contribution under section 113" and determined that *Cooper Industries* did not require it to reevaluate that precedent.<sup>148</sup> The *E.I. DuPont* court stated that "Congress intended to allow contribution for settling or sued PRPs as a way to encourage them to admit their liability, settle with the Government, and begin expeditious cleanup operations pursuant to a consent decree or other agreement."<sup>149</sup> In reviewing the *E.I. DuPont* decision, the Seventh Circuit made note of Judge Sloviter's dissenting opinion.<sup>150</sup> After review of the various appeals courts' decisions, the *Metropolitan Water* court turned to the language of section 107(a).<sup>151</sup>

The Seventh Circuit began by restating certain parts of section 107(a) relevant to liability.<sup>152</sup> In particular the court reproduced the portions that "a responsible party . . . shall be liable for . . . all costs of removal or remedial action . . . and . . . any other necessary costs or response incurred by any other person."<sup>153</sup> The court noted that "[n]othing in subsection (B) indicates that a potentially liable party, such as Metropolitan Water, should not be considered 'any other person' for purposes of a right of action."<sup>154</sup> "Other" as used in the Code was interpreted to mean another person besides the United States Government, a State, or an Indian tribe.<sup>155</sup> The court disagreed with North American's argument that the term "other" in "any other person" differentiated from

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<sup>147</sup> *Id.* at 834.

<sup>148</sup> *Id.* (quoting *E.I. DuPont*, 460 F.3d at 528, 530).

<sup>149</sup> *Id.* (quoting *E.I. DuPont*, 460 F.3d at 541).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 835-36.

<sup>152</sup> *Id.* at 835.

<sup>153</sup> *Id.* (quoting CERCLA § 107(a)(4)). The complete portion of the statute the Seventh Circuit reproduced is:

[A] responsible party " (4) . . . shall be liable for (A) all costs or removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs or response incurred by any other person consistent with the national contingency plan; . . . "

*Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

the four categories of potentially responsible parties.<sup>156</sup> The United States Government, a State, or an Indian tribe "may recover costs '*not inconsistent* with the national contingency plan,' while 'any other person' is limited to recovery of those costs '*consistent* with the national contingency plan.'"<sup>157</sup> Therefore, the burden of proof for governmental entities, as opposed to private parties, is relaxed.<sup>158</sup>

The *Metropolitan Water* court next scrutinized whether Metropolitan Water was a "person" and if it had incurred "necessary costs of response."<sup>159</sup> The court affirmed that Metropolitan Water was a "person" under CERCLA's definition.<sup>160</sup> Since Metropolitan Water's response costs included investigation, monitoring and clean-up, this also fell under CERCLA.<sup>161</sup> The Seventh Circuit held since Metropolitan Water had neither settled liability with the Government nor been subject to a CERCLA suit for damages, and Metropolitan Water fell under section 107(a)(4)(B)'s liability provision, Metropolitan Water had adequately pleaded a cause of action under section 107(a).<sup>162</sup>

The Seventh Circuit also discussed the policy implications of prohibiting a suit by a voluntary plaintiff like Metropolitan Water.<sup>163</sup> It noted that disallowing the suit "would undermine CERCLA's twin aims of encouraging expeditious, voluntary environmental cleanup while holding responsible parties accountable for the response costs that their past activities induced."<sup>164</sup> The court recognized that "in order to further CERCLA's policies, potentially responsible parties must be allowed to recover response costs even before they have been sued themselves under CERCLA or have settled their CERCLA liability with a governmental entity."<sup>165</sup> The Seventh Circuit agreed with the Second Circuit in that if

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (quoting CERCLA § 107(a)(4)(A), (B)) (emphasis in original opinion).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* A "person" can be a "firm" or a "corporation" under the meaning of CERCLA. CERCLA § 101(21).

<sup>161</sup> *Id.* See CERCLA § 101(25).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 386.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

cost recovery actions were not available to parties that commenced voluntary cleanup, responsible parties would wait to begin cleanup until after being sued, due to an inability to be reimburse for those cleanup costs.<sup>166</sup>

As such, when a PRP has voluntarily provided cleanup to a hazardous site and has neither settled liability with a government entity nor been the subject of a CERCLA suit for damages, the Supreme Court's continued recognition of an implied cause of action in section 107(a)<sup>167</sup> along with that subsection's plain language in which a "responsible party . . . shall be liable for . . . any other necessary costs of response incurred by any other person . . ." allow for an action to be brought under section 107(a) to recover necessary response costs.<sup>168</sup>

## V. COMMENT

The Seventh Circuit, in analyzing the facts of *Metropolitan Water*, tried to take the multitude of scattered background cases and weave a tightly reasoned decision that would determinatively state how to read Congress' limits on the reach of CERCLA's liability scheme. They succeeded. The court became the fourth federal court of appeals to address the issue of possible cost recovery for a PRP that has voluntarily provided cleanup but has yet to be sued for liability.<sup>169</sup> Holding that *Metropolitan Water* had an implied right to contribution under the cost recovery provision of CERCLA, the Seventh Circuit became the third circuit to sustain that right.<sup>170</sup>

<sup>166</sup> *Id.* See Consolidated Edison, 423 F.3d at 100.

<sup>167</sup> See *Key Tropic Corp. v. United States*, 511 U.S. 809, 818 (1994); *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 163 (2004) (hereafter "Cooper Indus.").

<sup>168</sup> *Metro. Water*, 473 F.3d at 834-35. The Seventh Circuit reviewed decisions from the Second, Third, and Eighth Circuit Courts of Appeals. *Id.* The Seventh Circuit agreed with the conclusions found by the Second and Eighth Circuit decisions and a dissent opinion in the Third Circuit. See *Consol. Edison Co. of New York, Inc. v. UGI Util., Inc.*, 423 F.3d 90 (2d Cir. 2005) (hereafter *Consol. Edison*"); *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 528 (3d Cir. 2006) (hereafter "DuPont"); *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), respectively.

<sup>169</sup> *Metro. Water*, 473 F.3d 824, 832-35 (7th Cir. 2007).

<sup>170</sup> *Id.* at 834-35.

While the court's reasoning regarding prior circuits' decisions and the language of CERCLA's section 107(a) is logical and sound, the environmental policy considerations of CERCLA need to remain at the forefront of each judgment. The *Metropolitan Water* court addressed their concern "that prohibiting [a] suit by a voluntary plaintiff . . . may undermine CERCLA's twin aims of encouraging expeditious, voluntary environmental cleanups while holding responsible parties accountable for the response costs that their past activities included."<sup>171</sup> However, this concern seemed almost an afterthought to the court. The Second Circuit, in *Consolidated Edison*, reasoned that having parties wait to begin cleanup until they were sued would undercut CERCLA's goal of "encourage[ing] private parties to assume the financial responsibility of cleanup costs by allowing them to seek recovery from others."<sup>172</sup> *Metropolitan Water* mentioned this reason but provided no elaboration or development. The court seemed happy to follow in the footsteps of the prior judgments from the Second and Eighth Circuits.

In fact, when North American and the EPA responded to this policy argument, indicating that the United States would lose valuable settlement leverage if PRPs that performed voluntarily cleanup prior to being sued were allowed to bring a cost recovery action under section 107(a),<sup>173</sup> the Seventh Circuit seemed very sympathetic to their plight.<sup>174</sup> The EPA reasoned that PRPs who settle with the government are allowed protection from contribution suits by other parties, yet they retain the ability to seek contribution themselves, while PRPs that do not settle cannot receive contribution under section 113(f) from settling parties, and therefore, may have disproportionate liability.<sup>175</sup> The EPA argued if non-settling parties were allowed to sue under section 107(a) although they could not under section 113(f), PRPs would be discouraged from settling with the United States.<sup>176</sup> The *Metropolitan Water* court agreed with the EPA as to the congressional desire that PRPs settle their liability with the

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<sup>171</sup> *Id.* at 836.

<sup>172</sup> *Consolidated Edison*, 423 F.3d at 100 (quoting *Key Tronic v. United States*, 511 U.S. 809, 819 n. 13).

<sup>173</sup> *Metro. Water*, 473 F.3d at 836.

<sup>174</sup> *Id.* at 836-37.

<sup>175</sup> *Id.* See CERCLA § 113(f)(2).

<sup>176</sup> *Id.* at 837.

government.<sup>177</sup> However, since those circumstances did not exist in the present case and no government entity had involved itself in the cleanup, the EPA had no basis for representation in the case.<sup>178</sup>

While it is a correct decision that PRPs who voluntarily cleanup without any threat of suit should be allowed cost recovery from other PRPs under section 107(a), this court has left open the question of whether or not a PRP will be allowed cost recovery if the EPA is involved at all, no matter how minute its involvement. Since the court is very concerned and sensitive to the EPA's position involving settlement with the government, the Seventh Circuit seems to be on the edge of disallowing a cost recovery action if any government entity is involved with a voluntary cleanup action. This would be unfair and illogical in those situations where the EPA or government entity is observing cleanup or has been put on notice of the hazardous waste situation while cleanup efforts are in the beginning stages. What happens in those situations where notice is given to the EPA because a party wants to take steps to ensure their cleanup is going well and the EPA tries to overstep their bounds and get parties to settle for no apparent reason? Now, a cost recovery action under section 107(a) would not be available to the responsible parties; only contribution under section 113(f) could occur. CERCLA's goals of encouraging expeditious, voluntary environmental cleanups while holding responsible parties accountable for the response costs of their past activities would be undermined. Although the Seventh Circuit reached a correct decision regarding the use of cost recovery actions for PRPs that voluntarily cleanup up hazardous waste without the threat of suit, it is vital that the environmental policies underlying CERCLA remain in the forefront of a court's reasoning and not be considered as an afterthought for a decision already made.

## VI. CONCLUSION

As demonstrated by the evolution of environmental pollution cases, liability under CERCLA is a difficult and complex area of law. While a potentially responsible party needs to be liable for the cost of

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<sup>177</sup> See CERCLA § 113(f)(2).

<sup>178</sup> *Metro. Water*, 473 F.3d at 837.

cleaning up hazardous waste, they should not be punished, provided they cleanup voluntarily. Cleanup performed without the past execution or present or future threat of liability should not prevent a party from seeking cost recovery under section 107(a). The *Metropolitan Water* decision hoped to solidify the cost recovery action available under section 107(a) for a voluntary cleanup by a PRP without any threat of litigation pending in following the leads of prior decisions by the Second and Sixth Circuits, along with a dissent in the Third Circuit. However, the Seventh Circuit, though reaching a correct decision, leaves the reader wondering about the possibility of a section 107(a) suit if the EPA or a government entity is in any way involved with the cleanup. The policy discussion about CERCLA's environmental aims and the sympathy directed toward the EPA's argument about leverage concerning settlement negotiations with the government should put prospective parties on the lookout that a voluntary cleanup may not result in the cost recovery they seek.

NIKKI MULLINS



