Riding on the CERCLA-Cycle: Is the Third Circuit Backpedaling?
E.I. DePont de Nemours & Co. v. U.S.

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RIDING ON THE CERCLA-CYCLE: IS THE THIRD CIRCUIT BACKPEDALING?

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I. INTRODUCTION

When planning and setting out on a bike ride, you typically have two choices when deciding where to go. You can take a traditional route followed by many, or you can choose to be adventurous and embark on a new, different route, in the hopes of it leading to a new, exciting place. In its 2006 *E.I. DuPont de Nemours & Co. v. U.S.* decision,² the Third Circuit chose to do the latter, by diverging from the path taken by other Circuits of allowing CERCLA § 107(a) cost recovery relief to Potentially Responsible Parties ("PRPs") for voluntary cleanup efforts, and instead deciding to adhere to its own precedents and deny this relief to DuPont.³ However, upon reevaluating its decision in light of intervening U.S. Supreme Court authority, the Third Circuit determined that it was time to stop and "get back on track." In 2007, the Third Circuit joined other Circuits on the path toward increased CERCLA uniformity in overruling its precedents and allowing PRPs to seek cost recovery under § 107(a) for their voluntary cleanups.⁴ This casenote begins by discussing the facts of *DuPont* and the 2007 breakthrough holding that realigned the Third Circuit with other Circuits regarding cleanup cost recovery for PRPs under CERCLA § 107(a). The legal background surrounding the court’s analysis is explored next, followed by the outcome in the instant decision. Finally, this casenote focuses on how the Third Circuit’s 2007 *DuPont* decision benefits CERCLA jurisprudence, the environment, and society at large.

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¹ 508 F.3d 126 (3d Cir. 2007).
⁴ *DuPont*, 508 F.3d at 135. Other Circuits allowing § 107(a) relief include the Second and Eighth Circuits. Greek, *supra* note 2.
II. FACTS AND HOLDING

E.I. DuPont de Nemours & Co., ConocoPhillips Co., and Sporting Goods Properties, Inc. ("DuPont") together sought reimbursement from the United States ("U.S.") for costs associated with hazardous waste cleanup efforts at fifteen industrial facilities located throughout the United States. The U.S. jointly owned the sites with DuPont at various times during World War I, World II and/or the Korean War, and both DuPont and the U.S. contributed to the sites’ hazardous waste pollution. DuPont voluntarily cleaned up the contamination at the sites, and brought suit under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to recoup costs for its efforts and for the U.S.’s contribution to the sites’ pollution.

DuPont filed suit against the U.S. in the U.S. District Court for the District of New Jersey under §§ 107(a) and 113(f)(1) of CERCLA, seeking cost recovery and contribution, respectively.

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5 Id. at 126-28, 130.
6 Id. at 127-28; 130.
7 Id. at 130.
8 Id.; 42 U.S.C. § 9607(a) (2000) states: "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section:
(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for [:] (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

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subsequently chose to dismiss its § 107(a) claim and "‘recoupment’ of costs without prejudice." The District Court used the cleanup at DuPont’s Louisville, Kentucky site as a “test case” to gauge the viability of DuPont’s claim against the U.S. The U.S. moved for summary judgment at the conclusion of discovery, alleging that DuPont had no claim for contribution under § 113 of CERCLA because DuPont, a Potentially Responsible Party (“PRP”), had cleaned up the pollution voluntarily, without being sued or settling its liability for the Louisville facility. The court granted the motion in favor of the U.S., stating that § 113 required a party to have been sued before that party could pursue an action for contribution. The court also granted the U.S. judgment on the pleadings for the other fourteen sites, stating that there was no indication in the pleadings that the circumstances of the other sites would result in a different finding.

The U.S. Court of Appeals for the Third Circuit stayed DuPont’s subsequent appeal pending the U.S. Supreme Court’s decision in Cooper Industries, Inc. v. Aviall Services, Inc. In Cooper, the U.S. Supreme Court held that a party could not pursue a § 113 claim if it had not been sued under either § 106 or § 107 nor entered into a settlement. DuPont’s (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.” Id.

42 U.S.C. § 9613(f)(1) provides that, “[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. 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 9606 of this title or section 9607 of this title.” Id.

9 DuPont, 508 F.3d at 130.
10 Id. at 130-31.
11 Id. at 131.
13 DuPont, 508 F.3d at 131.
14 Id.
15 Id.; Cooper Indus., Inc. v. Aviall Serv., Inc., 543 U.S. 157, 160-61 (2004); 42 U.S.C. §§ 9607, 9613 (2000); 42 U.S.C. § 9606(b)(2)(A)-(E) states: “(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this
claim to the Third Circuit was fourfold: 1) CERCLA provided it a right of contribution separate from § 113 relief, even without § 106 or § 107 liability; 2) CERCLA implied that, as a PRP, DuPont was entitled to recoup a fair share of cleanup costs from another PRP, such as the U.S., as set forth in § 107(a)(4)(B) or the federal common law, even without being sued under § 106 or § 107 or settling under § 113(f)(3)(B); 3) it was error for the District Court to not imply a right of contribution under CERCLA, and that the Third Circuit’s analysis in its prior Reading decision, upon which the District Court relied, was undermined by the Cooper decision; and 4) the District Court’s granting judgment on the pleadings and dismissing the § 113(f) contribution claims for DuPont’s fifteen sites was erroneous.\(^\text{16}\)

section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President’s decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of Title 28." \textit{Id.}

The Third Circuit affirmed the District Court’s judgment, and DuPont petitioned the U.S. Supreme Court for certiorari. Upon granting DuPont’s writ, the U.S. Supreme Court vacated the judgment and remanded the case for the Third Circuit to review in the context of the Supreme Court’s recent decision in Atlantic Research Corp. v. U.S. Thus, the Third Circuit concluded that, under Atlantic Research Corp., a PRP may seek relief under § 107(a) to recover for its cleanup costs, and that § 113 is not the only remedy available to the PRP. The Third Circuit ultimately reversed the District Court’s decision regarding any claim by DuPont for recovery of costs from its voluntary site cleanup, and remanded the case to the District Court.

III. LEGAL BACKGROUND

Enacted in 1980, CERCLA governs the “liability, compensation, cleanup, and emergency response” associated with releasing hazardous substances into the environment and inactive hazardous waste disposal site cleanups. The main goals of CERCLA are to promote quick cleanup of uncontrolled hazardous waste facilities and to ensure that owners and operators of hazardous waste facilities assume the responsibility and costs related to cleaning up the contamination generated by their facilities. Sections 106 and 107 cover administrative orders and cost recovery actions respectively. Contribution actions between PRPs are addressed
in § 113. In § 113, adopted as part of the Superfund Amendments and Reauthorization Act (SARA), was added to CERCLA in 1986. Under § 113(f), a PRP may bring a contribution suit against another PRP with common liability arising from a § 106 or § 107(a) action to recover for an "inequitable distribution" of that liability among those PRPs. This mode of recovery differs from § 107(a) in that § 107(a) does not allow a right to contribution, but allows a party to recover costs resulting from that party's own efforts in cleaning up a facility. In short, the contribution and cost recovery remedies offered under §§ 113(f) and 107(a), respectively, are

24 Id.
25 DuPont, 508 F.3d at 130.
29 Horton, supra note 23 at 213-14. Such parties include the U.S. Government, a State, an Indian tribe or "any other person consistent with the national contingency plan." Id.; Sabnis, supra note 25 at 266.
30 DuPont, 508 F.3d at 129-30.
31 Id. at 134.
32 Id.
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different and depend on the actions a party has undertaken and the party’s circumstances.\textsuperscript{33}

Finally, § 120(a)(1) waives the U.S.’s sovereign immunity against CERCLA actions.\textsuperscript{34} It states that CERCLA, including § 107, applies to the U.S. government as it would to any other non-government party.\textsuperscript{35} The Third Circuit has held in the past that the government would be liable for activities that would subject a private party to liability under CERCLA also.\textsuperscript{36}

\textit{A. Third Circuit Precedent and Cooper Indus., Inc. v. Aviall Serv., Inc.}

Two Third Circuit decisions, \textit{New Castle County v. Halliburton NUS Corp.} and \textit{In re Reading Co.}, played major roles in the court’s reasoning leading up to the instant \textit{DuPont} decision. It is important to examine these two decisions to better understand the Third Circuit’s approach to analyzing the instant case. \textit{New Castle County} involved an appeal brought by a landfill owner, the company responsible for disposing the landfill’s hazardous waste, and another party in charge of the landfill’s disposal against the U.S. government.\textsuperscript{37} The government initially filed suit against the three parties under the Resource Conservation and Recovery Act (RCRA), but modified it to include violations under CERCLA to recover costs for remedial action the EPA took in response to the landfill.\textsuperscript{38} The EPA hired Halliburton NUS Corporation to conduct a study to determine the remedial course of action to take regarding the

\textsuperscript{33} \textit{Id.} at 134-35. For example, if a PRP makes payment as part of a settlement agreement or a court’s judgment, § 113(f) allows that PRP to seek contribution from other parties with common liability for that payment. \textit{Id.} at 135. The PRP, however, cannot seek § 107(a) relief when paying other parties back for their cleanup costs, because the PRP did not incur response costs of its own. \textit{Id.} Thus, although the PRP could seek § 113(f)(1) contribution relief, the same PRP cannot concurrently pursue § 107(a) recovery for those same expenses. \textit{Id.}

\textsuperscript{34} \textit{Id.} at 130 (citing 42 U.S.C. 9620(a)(1) (2000)).

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{Id.} (quoting FMC Corp. v. U.S. Dep’t of Commerce, 29 F.3d 833, 840 (3d Cir. 1994) (en banc)).

\textsuperscript{37} \textit{New Castle County v. Halliburton NUS Corp.}, 111 F.3d 1116, 1119 (3d Cir. 1997).

\textsuperscript{38} \textit{Id.}
landfill.\textsuperscript{39} NUS built monitoring wells, including Well TY-311, which was used to inspect two groundwater formations.\textsuperscript{40}

New Castle claimed NUS installed TY-311 incorrectly, leading to a "window" between the two groundwater formations\textsuperscript{41} and filed suit against NUS under CERCLA § 107(a)(4)(B) to recover response costs New Castle had paid related to the landfill.\textsuperscript{42} NUS argued that New Castle's claim was actually a CERCLA § 113(f)(1) contribution claim that had expired under the three-year statute of limitations, and moved for summary judgment.\textsuperscript{43} The court dismissed the claim with prejudice, and also dismissed New Castle's other common law negligence claim and Delaware environmental law claims without prejudice to be filed in state court.\textsuperscript{44}

On appeal, the Third Circuit held that New Castle, as a PRP, could bring suit under § 113(f) to recover contribution from other PRPs, but that precisely because it was a PRP, New Castle may not use a § 107 claim to recover costs from other PRPs.\textsuperscript{45} The court stated that Congress likely intended for § 107 to be used as a means for innocent parties, not PRPs, to seek recovery of all of their cleanup costs; a suit brought by a PRP to recoup cleanup costs exceeding its portion of the liability or to "reapportion" cleanup costs between itself and another PRP constituted a §

\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} One formation was shallow, and held groundwater containing landfill matter; the other formation also contained groundwater, which was used as drinking water for New Castle County. \textit{Id.} The formations were separated by a clay strata known as "Merchantville Formation;" New Castle believed the "window" in the Merchantville formation could potentially be a "conduit" between the two other formations. \textit{Id.}; New Castle County v. Halliburton NUS Corp., 903 F.Supp. 771, 773 (D.Del. 1995).
\textsuperscript{41} New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1119 (3d Cir. 1997).
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.} at 1119-20. Count I claimed common law negligence for the "window" resulting from the construction of Well TY-311 and for the improper analysis regarding the data collected from the well. New Castle County v. Halliburton NUS Corp., 903 F.Supp. 771, 773 (D. Del. 1995). Count III claimed NUS was also liable under the Delaware Hazardous Substances Cleanup Act ("HSCA") for improper construction of the well resulting in the "window." \textit{Id.}
\textsuperscript{45} New Castle County, 111 F.3d at 1122, 1124, 1126.
contribution claim. The court further reasoned that it would be illogical to allow a PRP held liable under § 107 to sue another PRP under § 107 to recover all its cleanup expenses, without regard to which party was at fault.

The Third Circuit decided In re Reading Co. shortly after New Castle County. In In re Reading Co., Consolidated Rail Corporation ("Conrail") filed suit against Reading Railroad ("Reading"), demanding contribution for any liability Reading might have related to waste sludge spilling from a fifty-acre site in Douglassville, Pennsylvania into the Schuylkill River during the 1970s. The EPA deemed Reading a PRP because Reading boxcars were used to transport sludge from Douglassville pursuant to cleanup efforts. However, Reading was not among the 36 PRPs ordered by the U.S. to partake in cleaning up the Douglassville site nor did the U.S. seek recovery from Reading for costs related to the U.S. response to the Douglassville cleanup. Conrail, by contrast, was named among these 36 PRPs, and subsequently joined the other PRPs in filing a third-party action against Reading and 600 other PRPs to recover contribution for any liability Reading and the other 600 PRPs might have had related to the Douglassville spill. Reading sought an injunction, arguing that any liability it had in connection to the Douglassville site was discharged as part of Reading's 1981 bankruptcy proceedings in a consummation order protecting Reading from prior debts and liabilities.

The district court granted Reading injunctive relief, concluding that contribution necessitated common liability between Reading and Conrail to the U.S., and that the bankruptcy consummation order discharged any liability Reading had to the U.S. warranting contribution to Conrail. The U.S. and Conrail appealed to the Third Circuit. In its

46 Id. at 1120-22.
47 Id. at 1121.
48 DuPont, 508 F.3d at 128.
49 In re Reading Co., 115 F.3d 1111, 1115-16 (3d Cir. 1997).
50 Id. at 1116.
51 Id.
52 Id.
53 Id. at 1114, 1116.
54 Id. at 1116.
decision, the Third Circuit addressed Conrail’s four theories of recovery against Reading: 1) § 107(a)(4)(B) cost recovery; 2) § 113(f) contribution; 3) contribution under common law; and 4) restitution under common law.\(^{56}\) The court held that CERCLA § 113(f) preempted Conrail’s common law contribution and restitution claims, and that CERCLA’s “plain meaning” requires a party seeking contribution to sue under § 113(f), not § 107(a)(4)(B).\(^{57}\) The court next evaluated Conrail’s § 113(f) claim in light of Reading’s bankruptcy discharge.\(^{58}\) Referring to Third Circuit precedent, the court found that Conrail’s CERCLA claims were not discharged as part of Reading’s 1981 bankruptcy consummation order because SARA was enacted afterwards, in 1986; thus, there was no way for Conrail to statutorily assert contribution liability against Reading at the time of Reading’s bankruptcy consummation order in 1981.\(^ {59}\) However, although Conrail’s § 113(f) claim was not discharged, the Third Circuit ultimately held that it could not stand.\(^ {60}\) The court stated that Conrail’s contribution claim required that Reading be liable to the U.S. pursuant to §

\(^{55}\) Id.

\(^{56}\) Id. at 1117.

\(^{57}\) Id. at 1117, 1120. The court found that § 113(f), as “an express provision” addressing contribution, “trumps” § 107(a)(4)(B) in claims regarding the apportionment of cleanup expenditures. Id. at 1117.

\(^{58}\) Id. at 1121.

\(^{59}\) Id. at 1121-23. The Third Circuit referred to its decisions in Schweitzer v. Consolidated Rail Corp. and In re Penn. Cent. Transp. Co. (“Paoli Yard”). Id. In Schweitzer, the court held that employees’ asbestos-injury claims against Reading were not discharged because the injuries driving the claims did not appear until after Reading’s bankruptcy consummation order. Id. In Paoli Yard, since CERCLA had not been enacted at the time of Penn Central Transportation Company’s (PCTC) bankruptcy consummation order, the court found that petitioners’ CERCLA claims could not have been discharged by the order because there was no basis for CERCLA liability at the time the order was issued. Id. at 1121-22. In both Schweitzer and Paoli Yard, the court rejected the idea that there were “contingent claims,” or claims allowing a plaintiff to recover as a creditor in bankruptcy proceedings, that were discharged. Id. Because a legal relationship needs to exist between plaintiff and defendant in order for a contingent claim to be discharged in bankruptcy, and Schweitzer was a personal injury tort case while Paoli Yard involved a CERCLA-related claim brought before CERCLA’s enactment, neither case had the requisite legal relationship for a contingent claim discharge; thus, there were no contingent claims to be discharged by the bankruptcy consumption orders. Id. at 1121-22, 1125.

\(^{60}\) Id. at 1123.
107(a). Guided by the standards set in its Schweitzer and Paoli Yard precedents, the court found that because the U.S.’s claim against Reading existed and had accrued during the period of the bankruptcy proceedings, the U.S.’s claim was discharged as part of the bankruptcy consummation order. Thus, because Reading was not liable to the U.S., the Third Circuit held that, as a matter of law, Conrail’s § 113(f) contribution claim against Reading ultimately could not proceed.

The U.S. Supreme Court’s Cooper Indus., Inc. v. Aviall Serv., Inc. decision undermined the Third Circuit’s precedents, and required a party to have been sued under § 106 or § 107(a) in order to qualify for § 113(f)(1) contribution relief. In Cooper, Cooper Industries owned four aircraft engine maintenance sites which it sold to Aviall. After several years, Aviall found that Cooper Industries and Aviall had both contaminated the site with petroleum seeping into the ground and groundwater. Aviall cleaned up the properties after contacting and being instructed to do so by the Texas Natural Resource Conservation Commission. Although Aviall eventually sold the facilities, it continued remedial efforts, totaling cleanup costs of about $5 million.

Aviall filed suit against Cooper to recoup cleanup costs under CERCLA § 107(a) and § 113(f)(1) separately, as well as state-law claims, but then combined the CERCLA claims into one under § 113(f)(1). The

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61 Id. at 1124 (citing Restatement (Second) of Torts § 886A, cmt. B. (1977), “[a]pplying this traditional meaning of contribution to the current case, we conclude that Reading’s liability to Conrail depends on Reading’s liability to the United States. To be liable for contribution, Reading must be liable to the United States under § 107(a).”).
62 Id. at 1125.
63 Id. at 1126.
64 DuPont, 508 F.3d at 133-34. The Third Circuit’s Reading and New Castle County decisions assumed that § 113(f) relief could be sought by all PRPs, whether the PRPs had been sued or had voluntarily admitted to their liability. Id. at 133. In Cooper Indus., however, the U.S. Supreme Court held that § 113(f) was available only to a party who had actually been held liable – not to a party who had admitted to being a PRP but whose liability had not been determined. Id. at 133.
66 Id. at 163-64.
67 Id. at 164.
68 Id.
69 Id.
District Court held that Aviall could not receive relief under § 113(f)(1) because Aviall had not been subject to a claim under §§ 106 or 107. The Fifth Circuit affirmed, but then reversed on rehearing, holding that § 113(f)(1) does permit a PRP to seek contribution from other PRPs, whether or not the PRPs had been subjected to a § 106 or § 107 claim. However, the Supreme Court disagreed, holding that Aviall had no § 113(f)(1) claim because it had not been sued under § 106 or § 107(a).

B. The Third Circuit's 2006 DuPont decision

The Third Circuit made its first DuPont decision in the aftermath of Cooper Indus. As discussed above, DuPont and two other parties sought recovery from the U.S. for expenses incurred as part of their hazardous waste cleanup efforts of 15 sites co-owned by the U.S. DuPont filed suit against the U.S. under CERCLA §§ 107(a) and 113(f)(1) to recoup costs from its voluntary cleanup efforts, and for the portion representing the U.S.'s share of the pollution. DuPont dismissed its § 107(a) claim and the district court subsequently granted the U.S.'s

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70 Id. at 165.
71 Id.
72 Id. at 165-66, 168. The Court examined the text of § 113(f)(1), finding that the natural meanings of the first sentence "[a]ny person may seek contribution...during or following any civil action under Section 9606...[or] 9607(a) of this title" and the word "may" indicated that contribution actions can be pursued only "during" or "following" an action under § 106 or § 107, and that only those contribution actions meeting this condition are allowed. Id. at 165-66. The Court discussed the last sentence of § 113(f)(1), also known as the savings clause, which states: "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 9606 of this title or section 9607 of this title." Id. at 166. The Court interpreted this as Congress's acknowledgement that other claims for contribution may be available outside of § 113(f), and that this rebuts any presumption that § 113(f) is the only contribution remedy for a PRP. Id. at 166-67. However, the Court also explicitly notes that § 113(f) does not define what contribution claims would be available besides § 113(f), nor defines itself as a cause of action, and does not enlarge the scope of § 113(f)(1) to include contribution claims unaccompanied by or not resulting from a § 106 or § 107 action. Id. at 167.
74 See Section II.
75 Id.
summary judgment motion, indicating that § 113(f) required DuPont to have been sued before it could seek contribution relief from the U.S.\(^{76}\) DuPont appealed to the Third Circuit, but the court reaffirmed the district court, stating that its New Castle County and Reading decisions denied DuPont relief for its voluntary cleanups.\(^{77}\)

The Third Circuit’s dissent acknowledged that the majority opinion honored the court’s New Castle County and Reading precedents; however, the dissent indicated that intervening authority, such as the U.S. Supreme Court’s Cooper Indus. decision required the district court to revisit its precedents.\(^{78}\) Specifically, the dissent noted that Cooper Indus. allowed § 113(f) claims to be brought by parties held responsible by the EPA, but not, however, by parties who admit their responsibility, but had not had their responsibility adjudicated or settled.\(^{79}\) However, in its New Castle County and Reading precedents, the Third Circuit erroneously interpreted “potentially responsible parties” entitled to recovery under § 113(f) as encompassing both previously adjudicated parties and parties who admitted their liability voluntarily.\(^{80}\) Additionally, the dissent observed that, unlike DuPont, the plaintiffs in New Castle County and Reading had been sued before they sought contribution relief; DuPont, on the other hand, undertook cleanup efforts voluntarily.\(^{81}\) The Second and Eighth Circuits also reconsidered some of their precedents in light of Cooper Indus. and allowed § 107(a) cost recovery claims by parties undertaking voluntary cleanups for which they may be liable.\(^{82}\) Finally, the dissent

\(^{76}\) Id.; DuPont, 460 F.3d 515, 525-26 (3d Cir. 2006). DuPont voluntarily dismissed its § 107(a) claim in adherence to the Third Circuit’s prior New Castle Co. and Reading decisions. Id.

\(^{77}\) DuPont, 460 F.3d at 518. Specifically, the Third Circuit concluded that New Castle Co. deemed § 113(f) to be the exclusive remedy for PRPs seeking contribution, as opposed to § 107(a) providing PRPs cost recovery relief also; in Reading, the Third Circuit stated that § 113(f) contribution claims were the exclusive contribution remedy available to PRPs, superseding any common law claims for contribution. Id. The court also indicated that because DuPont was a PRP and had cleaned up the sites voluntarily, they could not pursue a contribution claim against other PRPs. Id.

\(^{78}\) Id. at 545-46.

\(^{79}\) Id. at 546-47.

\(^{80}\) Id. at 546.

\(^{81}\) Id. at 547.

\(^{82}\) Id. at 547-48.
pointed out that CERCLA’s main purpose of combating the U.S.’s hazardous waste pollution problem depended heavily on voluntary cleanups; the dissent expressed concern that the majority’s holding would discourage parties from undertaking voluntary cleanups by the possibility of being denied contribution relief.\(^{83}\)

**C. The Intervening Decision: Atlantic Research Corp. v. U.S.**

In *Atlantic Research Corp.*, Atlantic Research Corp., a PRP, voluntarily cleaned up contamination at one of its sites jointly used and polluted by the United States.\(^{84}\) Atlantic Research Corp. cleaned up the site even though it had not been adjudicated under CERCLA §§ 106 or 107, and sought recovery for the U.S.’s share of the cleanup costs under §§ 107(a) and 113(f).\(^{85}\) The U.S. Supreme Court held that § 113(f) could not be a source of relief because Atlantic Research Corp. had not been subject to suit under §§ 106 or 107, but that Atlantic could seek recovery under § 107(a).\(^{86}\) The Court defined §§ 107(a)(4)(B) and 113(f)(1) as separate remedies complementary to each other, stating that the availability of each remedy depended on the circumstances of the PRP.\(^{87}\) Section 107(a) provides recovery to a private party or PRP only for the cleanup costs that party itself incurred.\(^{88}\) Section 113(f) allows a PRP to bring a contribution action against another jointly liable PRP, following a suit under §§ 106 or 107, to recover from that PRP cleanup costs proportionate to its liability.\(^{89}\)

**IV. THE INSTANT DECISION**

As ordered by the U.S. Supreme Court, given its recent *Atlantic Research Corp. v. U.S.* decision, the Third Circuit began its analysis by

\(^{83}\) *Id.* at 549-50.

\(^{84}\) E.I. DuPont de Nemours & Co. v. U.S., 508 F.3d 126, 134 (3d Cir. 2007).

\(^{85}\) *Id.*

\(^{86}\) *Id.* (citing *Atlantic Research Corp. v. U.S.*, 127 S.Ct. 2331, 2235-39 (2007)).

\(^{87}\) *Id.*

\(^{88}\) *Id.*

\(^{89}\) *Id.*
reviewing its prior *E.I. DuPont de Nemours & Co. v. U.S.* holding.\(^9\) Under *Atlantic Research Corp.*, § 107 of CERCLA allows a party to recover costs incurred for its voluntary hazardous waste cleanup from another party, even the government, without being liable to a third party.\(^9\) However, the Third Circuit had concluded the opposite in its 2006 *DuPont* decision, finding that DuPont could not seek recovery for a portion of its cleanup costs from the U.S. under § 107.\(^9\)

The Third Circuit noted that its *New Castle County* and *Reading* precedents barred DuPont’s claims against the U.S.\(^9\) In both cases, the court found that a PRP could recover cleanup costs *only* under CERCLA § 113.\(^9\) The court’s decisions in these two cases were based on the U.S. Supreme Court’s holding in *Cooper Indus.*, which restricted § 113 recovery to parties who were required under a court order or settlement agreement to clean up sites contaminated with hazardous waste.\(^9\) Since DuPont had cleaned up the sites voluntarily, the Third Circuit concluded in its prior *DuPont* decision that DuPont’s recovery claim could not stand.\(^9\) However, in the present case, the Third Circuit acknowledged the U.S. Supreme Court’s *Atlantic Research Corp.* decision as an intervening authority, requiring the Third Circuit to reconsider its *New Castle County* and *Reading* precedents since the basis for the holdings in those two decisions was irreconcilable with *Atlantic Research Corp.*\(^9\)

In its *New Castle County* decision, the Third Circuit joined the trend of courts that cited § 113, instead of § 107, as the means for a PRP to seek reimbursement of costs exceeding its portion of site cleanup costs.\(^9\) The court also admitted to reading into § 107 an innocence requirement for parties bringing suit to recoup cleanup costs; the court acknowledged

\(^9\) *DuPont*, 508 F.3d at 127; the Third Circuit’s prior decision was *E.I. DuPont de Nemours & Co. v. U.S.*, 460 F.3d 515 (3d Cir. 2006).

\(^9\) Id. at 128.

\(^9\) Id.

\(^9\) Id.

\(^9\) Id. (citing *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997); *Matter of Reading Co.*, 115 F.3d 1111 (3d Cir. 1997)).

\(^9\) Id. (citing *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157 (2004)).

\(^9\) Id.

\(^9\) Id. at 132.

\(^9\) Id. at 133.
this innocence standard overlooked the fact that "any other person," not just the government, state or Indian tribes, could be a private party plaintiff under § 107(a)(4)(B).\textsuperscript{99} The court stated it also held in \textit{Reading} that a PRP may not seek contribution under § 107(a)(4)(B), and that § 113(f)(1) provided a party not being sued under § 107 the opportunity to bring an action for contribution.\textsuperscript{100}

In both its \textit{Reading} and \textit{New Castle County} decisions, the Third Circuit was under the impression that \textit{both} adjudicated PRPs and those PRPs who admitted their liability voluntarily could seek contribution relief under § 113.\textsuperscript{101} However, after the U.S. Supreme Court held in \textit{Cooper Indus.} that a PRP could not recoup cleaning costs under § 113(f) unless it had been held liable, the Third Circuit changed its approach in analyzing the 2006 \textit{DuPont} case; it determined its precedents in \textit{New Castle County} and \textit{Reading}, and the Supreme Court's decision in \textit{Cooper Indus.} together prevented PRPs that had not been adjudicated or settled their liability from recovering for their cleanup costs under CERCLA.\textsuperscript{102}

The Third Circuit noted that the Eighth Circuit considered \textit{Cooper Indus.} in its \textit{Atlantic Research Corp. v. U.S.} decision also.\textsuperscript{103} The results of the \textit{Cooper Indus.} decision denied Atlantic Research Corp. relief under § 113 for its cleanup costs because Atlantic had not been adjudicated nor entered into a settlement agreement.\textsuperscript{104} In \textit{Dico Inc. v. Amoco Oil Co.}, the Eighth Circuit held that a PRP was not an innocent party and therefore could not bring suit under § 107.\textsuperscript{105} However, on Atlantic's appeal and given \textit{Cooper Indus.}, the Eighth Circuit felt it would be unjust to deny Atlantic Research Corp. relief under § 107 on the ground that Atlantic had not been subject to a suit or entered into a settlement agreement and the U.S. Supreme Court affirmed.\textsuperscript{106}

\textsuperscript{99} \textit{Id.} at 133.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.} at 133; \textit{Atlantic Research Corp.} sought cleanup cost relief from the U.S. under CERCLA §§ 107 and 113. \textit{Id.} (citing \textit{Atlantic Research Corp. v. U.S.}, 459 F.3d 827 (8th Cir. 2006)).
\textsuperscript{104} \textit{DuPont}, 508 F.3d at 134.
\textsuperscript{105} \textit{Id.} at 133-34 (citing \textit{Dico Inc. v. Amoco Oil Co.}, 340 F.3d 525 (8th Cir. 2003)).
\textsuperscript{106} \textit{Id.} at 134.
Observing the U.S. Supreme Court's conclusion in *Atlantic Research Corp.*, that any party, including PRPs, can seek cleanup cost recovery relief under §107(a)(4)(B), the Third Circuit overruled its prior *DuPont* decision deeming § 113 the only claim available to PRPs. The Third Circuit noted that, since *Atlantic Research Corp.*, PRPs may bring suit under § 107 to recoup cleanup costs, and that § 113 was not their only option. The Third Circuit concluded that DuPont's § 107(a) claim, although previously dismissed by DuPont, could proceed and the court reversed and remanded the case to the district court for further proceedings.

V. COMMENT

The Third Circuit's 2007 decision in *E.I. DuPont de Nemours & Co. v. U.S.* is a positive development and brings a sigh of relief not only for DuPont as a PRP, but also for CERCLA jurisprudence as a whole and for the public at large. Not only did the decision realign the Third Circuit with the other circuits that had confronted similar § 107(a) cases in the past, it also furthers one of CERCLA's main goals by allowing PRPs to seek recovery for costs they incurred from undertaking voluntary hazardous waste cleanup efforts. To be sure, the case at bar will be one of many to solidify this area of environmental law.

At first glance, it may seem that the Third Circuit is "backpedaling" in the instant case. In its 2006 *DuPont* decision, the court was firm in adhering to its *New Castle Co.* and *Reading* precedents, and even recognized it veered off the "path" taken by other circuits in choosing to prevent DuPont from seeking relief under § 107(a) for its voluntary cleanup efforts. Despite the fact that other circuits revisited

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107 Id. at 135.
108 Id.
109 Id. at 135-36 n.6.
110 Id. at 135. CERCLA seeks "to assure that the current and future costs associated with hazardous waste facilities...will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities." Id.
111 DuPont, 460 F.3d at 543, 547-48. Unlike the Third Circuit, the Second and Eighth Circuits allowed PRPs to pursue cost recovery relief for their voluntary cleanups from other PRPs under §107(a). Id. at 547-48.
their precedents in light of the U.S. Supreme Court's *Cooper Indus.* decision and allowed § 107(a) cost recovery suits by PRPs who undertook cleanup efforts on their own initiative, the Third Circuit remained steadfast, driving a circuit split and raising questions by many.\(^{112}\)

Subsequently, the U.S. Supreme Court decided *Atlantic Research Corp.*, prompting the Third Circuit's reconsideration of its precedents in the instant case.\(^{113}\) Interestingly, the dissent in the 2006 *DuPont* decision foreshadowed the Third Circuit's decision in the present case, especially in stating that *New Castle County* and *Reading* needed to be reconsidered.\(^{114}\) The dissent also observed that the majority refused to acknowledge a key factual difference between its *New Castle Co.* and *Reading* precedents and the circumstances in *DuPont*: the plaintiffs in *New Castle Co.* and *Reading* performed their cleanups in response to being sued, and then filed suit to recover cleanup costs from other PRPs, whereas *DuPont* conducted the cleanup voluntarily.\(^{115}\) Additionally, many of the dissent's arguments in favor of allowing § 107(a) relief to those who conduct voluntary cleanups were discussed in the present case as well.\(^{116}\) In the end, however, any unfavorable perceptions associated

\(^{112}\) Id. at 547-48; Greek, *supra* note 3 at 685, 690.

\(^{113}\) *DuPont*, 508 F.3d at 128.

\(^{114}\) *DuPont*, 460 F.3d at 545-46. The dissent found that the U.S. Supreme Court's *Cooper Indus.* weakened *New Castle County* and *Reading* because *Cooper Indus.* brought to light the Third Circuit's misunderstanding of who is a "potentially responsible party" for § 113(f) recoupment purposes. *Id.* at 546-47. In its *New Castle County* and *Reading* decisions, the Third Circuit was under the impression that all PRPs, whether they had been sued or had admitted their liability voluntarily, could recuperate their cleanup costs under § 113(f). *DuPont*, 508 F.3d 126, 133. However, *Cooper Indus.* clarified that § 113(f) is available only to those parties who had actually been held liable; parties who admitted to being a PRP but had not been held liable could not seek relief under § 113(f). *Id.*

\(^{115}\) *DuPont*, 460 F.3d. at 547; Rachel E. Avey, *Precedent versus Plain Meaning: Resolving the CERCLA §107 Controversy after Cooper Indus., Inc. v. Aviall Servs., Inc.* 46 Washburn L.J. 573, 596-97 (2007). In particular, *New Castle County* involved plaintiffs seeking recovery for cleanups they conducted as ordered by an EPA consent decree, and the cleanup performed by the plaintiff in *Reading* was in response to § 106 and § 107 suits. *DuPont*, 460 F.3d 515, 530 n. 19; Avey, *supra* at 597 n.210.

\(^{116}\) *DuPont*, 460 F.3d at 548-49; *DuPont*, 508 F.3d at 135. These arguments include: "[P]ermitting parties who voluntarily incur cleanup costs to bring suit under § 107 comports with the fundamental purposes of CERCLA" and "The purpose of CERCLA is
with "backpedaling" disappear because the Third Circuit rectified the circuit split caused by its 2006 DuPont opinion with the instant decision, thereby promoting stability in this area of CERCLA jurisprudence.

More importantly, this decision promotes voluntary cleanups, which is central to CERCLA's purpose, benefiting the environment and community at large. This decision affords parties, including PRPs, two different means of recouping their voluntary cleanup costs: § 107(a) cost recovery or § 113(f) contribution. Now, it is more likely that parties will engage in voluntary cleanups, because these remedies provide assurance that the parties will be able to recoup expenses incurred from their voluntary cleanup efforts. Additionally, it is interesting to note that the Fifth Circuit also remanded its controversial Cooper Indus. decision to the Northern District Court of Texas, Dallas Division for reconsideration within the context of the U.S. Supreme Court's decision in Atlantic Research Corp. Moreover, as recently as April 2008, the Ninth Circuit overruled one of its prior decisions in light of Atlantic as well, and allowed PRPs cleanup cost relief under § 107(a). In effect, it may be that the Third Circuit is not the only one "backpedaling" as a result of the U.S. Supreme Court's Atlantic Research Corp. decision.

"to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities." Id.
117 DuPont, 508 F.3d at 135-36. Congress has stated, "[V]oluntary cleanups are essential to a successful program for clean up of the Nation's hazardous substance pollution problem." Id. at 135 (quoting H.R. Rep. No. 99-253, pt. 5, at 58 (1985)).
118 DuPont, 508 F.3d at 134-35.
119 Aviall Serv., Inc. v. Cooper Indus., No. 06-10996, 2007 WL 1959147, at *1 (5th Cir. 2007).
120 Kotrous v. Goss-Jewett Co. of N. Cal., 523 F.3d. 924 (9th Cir. 2008). In its 1997 Pinal Creek Group v. Newmont Mining Corp. decision, the Ninth Circuit held that "§ 107 entitles PRPs to seek only contribution, not cost recovery, from other PRPs." Id. at 927. The Ninth Circuit overruled Pinal Creek in its 2008 Kotrous decision, stating, "The holding in Atlantic Research that a PRP may sue for cost recovery under § 107 undermines our holding in Pinal Creek that an action between PRPs is necessarily for contribution... We therefore conclude that Pinal Creek's holding that an action between PRPs is necessarily for contribution has been overruled." Id. at 932-33.
VI. CONCLUSION

The Third Circuit caused quite a stir in 2006 when it departed from its sister circuits and denied relief under §107(a) to PRPs seeking recoupment for voluntary cleanup costs. The U.S. Supreme Court's subsequent Atlantic Research Corp. decision pressured the court to revisit its prior analysis in DuPont, steering the Third Circuit toward the same route taken by other circuits in allowing PRPs to seek § 107(a) relief for their voluntary cleanup efforts. Not only will the Third Circuit's return to the main "path" of CERCLA jurisprudence promote consistency and stability in this area of the law, society as a whole will reap the benefits of this decision in the form of a cleaner, safer environment resulting from PRPs being incentivized to voluntarily cleanup hazardous waste at their sites. The Third Circuit's 2007 E.I. DuPont de Nemours & Co. v. U.S. decision shows that in some cases, backpedaling is not such a bad thing.

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