

NOTE

WILL THE CERCLA BE UNBROKEN?: *E.I. DUPONT DE NEMOURS & CO. V. UNITED STATES*

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I. INTRODUCTION

In *E.I. DuPont De Nemours & Co. v. United States*,¹ the United States Court of Appeals for the Third Circuit ruled on the availability of a contribution claim by DuPont against the government for the voluntary cleanup of a contaminated site.² This was an appeal from the district court where DuPont, a polluter, sued the federal government, also a polluter, under section 107 and section 113³ of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁴ Section 107 and section 113 provide the two remedies available for private parties to seek recovery from other private parties for costs associated with the cleanup of a hazardous site. The application of these two sections has confounded courts as evidenced by *DuPont* and the cases related to it.

In *DuPont*, the Third Circuit denied relief under section 113 because DuPont did not conform to the statutory requirements and held section 107 inapplicable because DuPont was not an innocent party.⁵ This decision resulted in a circuit split as the Third Circuit, unlike the Second and Eighth Circuits, refrained from recognizing the principles of the December 2004 Supreme Court decision *Cooper Industries, Inc. v. Aviall Services, Inc.*⁶ It took another

1. *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515 (3d Cir. 2006), *vacated*, 127 S. Ct. 2971 (2007).

2. DuPont and two other companies, ConocoPhillips Co. and Sporting Goods Properties, Inc., sought contribution from the United States for costs associated with the voluntary cleanup of fifteen sites in nine states contaminated with hazardous waste. *Id.* at 525. Following the plaintiffs' voluntary dismissal of a section 107 claim, the district court selected one of the thirteen DuPont sites for the claim under section 113. Therefore, DuPont was the only plaintiff in the district court "test case." *DuPont*, 460 F.3d at 525.

3. Although the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was codified under 42 U.S.C. §§ 9601-9675, this court and other courts frequently refer to sections of the CERCLA rather than sections of the United States Code.

4. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2000).

5. *DuPont*, 460 F.3d at 526, 532-33.

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

Supreme Court decision in June 2007 to harmonize the circuits and seemingly resolve the issue in *DuPont*.⁷

The substantive portion of this Note focuses on the Third Circuit's reasoning and the interpretation of precedents to split from its sister circuits following the Supreme Court decision in *Cooper*. The first section briefly describes the background of *DuPont* before examining the history of the CERCLA, the applicability of the common law in CERCLA remedies, and the effect of the *Cooper* decision. The Note compares the relevant precedents of each deciding circuit, a landmark decision by the Second Circuit, and the dissenting opinion in *DuPont* to understand the difference in holdings between the circuits. Finally, this Note examines the Supreme Court's June 2007 decision abrogating *DuPont*.

II. DISPUTED CERCLA SECTIONS AND ESTABLISHED PRECEDENTS

In 1980, Congress passed the CERCLA, more commonly known as the Superfund law, to address the "serious environmental and health risks posed by pollution."⁸ The "CERCLA is a comprehensive federal law governing the remediation of sites contaminated with pollutants."⁹ Two stated purposes of the statute include enabling the recovery of costs for cleanup from liable parties and convincing those parties to pursue response actions voluntarily.¹⁰ To achieve these purposes, the CERCLA "authorizes parties to recoup money spent to cleanup and prevent future pollution at contaminated sites or to reimburse others for cleanup and prevention at contaminated sites"¹¹ CERCLA section 107(a), as codified under 42 U.S.C. § 9607(a), defines the persons who may be held liable and provides a cause of action for the reimbursement of costs for cleanups and prevention incurred by them.¹² It states:

- (a) Covered persons . . .
- (4) any person who accepts or accepted any hazardous substances . . . 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
 - (D) the costs of any health¹³ assessment or health effects study carried out under section 9604(i) of this title.

Thus, section 107(a)(B)(4) permits any person, other than the sovereigns pronounced in section 107(a)(4)(A), to bring a cause of action.¹⁴ Subsequent to

7. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 831 (8th Cir. 2006), *aff'd*, 127 S. Ct. 2331 (2007).

8. *DuPont*, 460 F.3d at 518 (quoting *United States v. Bestfoods*, 524 U.S. 51, 55 (1998)).

9. *Consolidated Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 94 (2d Cir. 2005).

10. *Id.* (citing H.R. REP. NO. 96-1016(I), at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120).

11. *Consolidated*, 423 F.3d at 94.

12. *Id.*

13. 42 U.S.C. § 9607(a)(4)(A)-(D) (2000).

14. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 832 (8th Cir. 2006).

the enactment of the CERCLA, some courts held that this section allowed “certain private parties that, if sued, would be held liable under section 107(a)- - often called ‘potentially responsible persons,’ or ‘PRPs’- -to sue other parties to recover response costs incurred voluntarily.”¹⁵ However, under section 107(a), a party imposed with liability had no express right to file suit against others for contribution.¹⁶ In addition, section 107 provides either a three or six-year statute of limitations, depending on the characterization of the action as either remedial or removal, and permits a party to recover 100% of response costs from other liable parties, even those parties who settled their liability with the government.¹⁷

It is important to note, however, that the exact right available under section 107 remained ambiguous following the passage of the CERCLA. In fact, the Supreme Court in *Cooper* declined to define the particular right created under section 107 as either cost recovery or contribution.¹⁸ Contribution is defined as “[t]he right that gives one of several persons who are liable on a common debt the ability to recover ratably from each of the others when that one person discharges the debt for the benefit of all.”¹⁹ Without any express language in the CERCLA, some courts nevertheless held that a CERCLA contribution right existed under federal common law.²⁰ Further, some courts interpreted the CERCLA as creating an implied right of action for contribution.²¹ This trend continued until Congress passed the Superfund Amendments and Reauthorization Act of 1986 (SARA), which amended the CERCLA and created an express right of contribution.²²

Specifically, the SARA created an express cause of action by stating in section 113(f)(1):

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [107(a)] of this title, during or following any civil action under section 9606 [106] of this title or under section 9607(a) [107(a)] of this title . . . 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 [106] of this title or section 9607 [107] of this title.²³

Further, the act contained a settlement provision that provided “[a] person who has resolved its liability to the United States or a State in an administrative

15. *Consolidated*, 423 F.3d at 97; *see also* *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890-92 (9th Cir. 1986); *Pinole Point Props., Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 290-91 (N.D. Cal. 1984); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1143 (E.D. Pa. 1982).

16. *Id.*

17. *Atlantic*, 459 F.3d at 831 (citing 42 U.S.C. §§ 9613(g)(2), 9607(a) (2000)).

18. *Cooper*, 543 U.S. at 170.

19. BLACK’S LAW DICTIONARY 352 (8th ed. 2004).

20. *Consolidated Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 98 (2d Cir. 2005); *see also* *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916-917 (N.D. Okla. 1987); *United States v. New Castle County*, 642 F. Supp. 1258, 1265-66 (D. Del. 1986).

21. *Cooper*, 543 U.S. at 162 (referencing *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985)).

22. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 113, 100 Stat. 1613 (1986).

23. 42 U.S.C. § 9613(f)(1) (2000).

or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.”²⁴ This latter provision is also known as the “savings clause.”²⁵ According to the Supreme Court in *Cooper*, “[t]he sole function of the sentence is to clarify that [section] 113(f)(1) does nothing to ‘diminish’ any cause(s) of action for contribution that may exist independently of [section] 113(f)(1).”²⁶ Under section 113, parties may only recover those costs above their equitable share and have no right of recovery against settled parties.²⁷ In addition, section 113 provides a three-year statute of limitations.²⁸

With the SARA, Congress created an express right of contribution under CERCLA section 113(f)(1) that some courts already accepted as an implied right. Further, Congress remained silent in SARA provisions regarding the implied right courts previously recognized, which left courts confused about the overlap of the two remedies. Courts struggled with the obvious: two different provisions appeared to offer competing remedies. Adding to the confusion, the language in the first sentence of § 113(f)(1) seemed to support those decisions that recognized a cause of action existed under § 107(a).

Some distinction was necessary because the more favorable provisions of section 107, i.e. longer statute of limitations and joint and several liability, might make section 113 irrelevant.²⁹ Indeed, the courts often analyzed both sections together irrespective of which section a party claimed.³⁰ Therefore, post-SARA precedents focused on narrowing section 107, and this section gradually began to apply to “innocent” plaintiffs and not a potentially responsible person (PRP) because the statute provided defenses to liability for innocent plaintiffs.³¹ These precedents held that section 107(a) was only available to an innocent party and that section 113(f)(1) governed recovery of costs for potentially liable parties and replaced any previous implied right of contribution.³²

III. FACTUAL BACKGROUND AND THE *COOPER* FACTOR

After the Supreme Court decided *Cooper*, the Second, Third, and Eighth Circuit Courts of Appeals reexamined these precedents. The appeal arose from a divided Fifth Circuit’s interpretation of section 113(f)(1), which it held did not require a section 106 administrative order or a section 107 cost recovery action.³³ The Supreme Court found otherwise. The *Cooper* Court established the principle that a party could only seek contribution under section 113(f)(1) if

24. *Id.* § 9613(f)(2).

25. *Cooper*, 543 U.S. at 166.

26. *Id.*

27. *Atlantic*, 459 F.3d at 832 (citing 42 U.S.C. § 9613(f)(1), (f)(2), (g)(3) (2000)).

28. *Id.*

29. *Atlantic*, 459 F.3d at 832 (citing *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997)).

30. *Id.*

31. *Atlantic*, 459 F.3d at 832; *see, e.g.*, *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998).

32. *See generally* *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003); *Bedford*, 156 F.3d at 416; *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997); *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997).

33. *Cooper*, 543 U.S. at 165.

it is the subject of a section 106 or section 107(a) suit.³⁴ Importantly, *Cooper* did not address whether section 107(a) authorized an implied right of contribution for a liable party with the Court noting it would be “more prudent to withhold judgment on these matters.”³⁵ The *Cooper* Court addressed the relationship between section 107 and section 113 and re-iterated a previous observation regarding the two remedies. “The cost recovery remedy of [section] 107(a)(4)(B) and the contribution remedy of [section] 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties. But the two remedies are clearly distinct.”³⁶

The *Cooper* Court strictly construed the first sentence of section 113 to mean that contribution is only available “namely, ‘during or following’ a specified civil action.”³⁷ Thus, section 113 does not permit a contribution action if a party voluntarily cleans up the site. Although the Supreme Court did not address the availability of section 107 for a liable party, the circuit courts had cases pending and would make this determination.

After the *Cooper* decision, the Second Circuit determined that a potentially liable party who voluntarily cleans up a site without compulsion could file suit for response costs under section 107 of the CERCLA.³⁸ The Second Circuit specifically held that a party is entitled to recover response costs under section 107(a) absent a lawsuit or administrative proceeding when the party would be liable under section 107(a) if sued.³⁹ In August 2006, the Eighth Circuit similarly held that a potentially liable private party, who voluntarily cleaned up a site, could pursue a claim for cost recovery under section 107.⁴⁰ Further, as the Eighth Circuit case involved the United States, the court noted the federal government waived sovereign immunity with the passage of the SARA.⁴¹

After *Cooper*, DuPont argued four issues on appeal. The first two issues are the principle arguments.⁴² First, it argued section 107 expressly provided a PRP a right to seek contribution from other PRPs separate from the cause of action under section 113. Conversely, it argued that such a claim is either implied in section 107 or originates from federal common law.⁴³

Less than three weeks after the Eighth Circuit’s decision, a divided Third Circuit ruled that DuPont could not seek cleanup costs under CERCLA section 107 from the federal government after voluntarily cleaning up the polluted site.⁴⁴ In the 2-1 panel decision, the court held DuPont could not prevail under CERCLA section 107 because it was not an innocent party as required by Third Circuit precedents, and the Third Circuit did not recognize the existence of an

34. *Id.* at 166.

35. *Cooper*, 543 U.S. at 169-70.

36. *Id.* at 163 n.3.

37. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004).

38. *Consolidated Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 100 (2d Cir. 2005).

39. *Id.*

40. *Atlantic*, 459 F.3d at 835.

41. *Id.* at 837 (citing 42 U.S.C. § 9620(a) (2000)).

42. The third and fourth issues raised by DuPont on appeal considered district court errors and are not relevant to this paper.

43. *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 527-28 (3d Cir. 2006).

44. *Id.* at 543.

implied right of contribution under section 107 or the common law.⁴⁵ Therefore, the Third Circuit, unlike the Second and Eighth Circuits, precluded direct recovery or contribution for a liable private party who funded a voluntary cleanup of a contaminated site.

IV. THE TWISTING AND TURNING OF PRECEDENTS

The Third Circuit made an initial crucial determination before proceeding in the *DuPont* case: *Cooper* did not overrule Third Circuit precedents. The court ruled that two 1997 Third Circuit decisions, *New Castle County v. Halliburton NUS Corp.* and *Matter of Reading Co.*, controlled the case.⁴⁶ *DuPont* argued the precedents were distinct from its case because *DuPont* voluntarily cleaned up the site, while the parties in those cases already satisfied the requirements of section 113.⁴⁷ Meaning, by cleaning up the sites pursuant to a consent decree, section 106 order, and section 107 suit, the *New Castle* and *Reading* plaintiffs complied with section 113 which requires a civil action under section 106 or section 107.⁴⁸ The court re-iterated the holdings of *New Castle* and *Reading*;

New Castle County and *Reading* stand jointly for the proposition that a PRP seeking to offset its cleanup costs must invoke contribution under [section] 113; the express cause of action under [section] 107 (cost recovery) is limited to governments and Indian tribes (acting in their enforcement capacity) and innocent landowners, and no implied cause of action for contribution for PRPs- under either [section] 107 or the common law- survived the passage of [section] 113.⁴⁹

This rule applied unless the Third Circuit agreed *DuPont* was distinguishable from *New Castle* and *Reading*. If the Third Circuit recognized the factual differences, then *DuPont* would be decided under *Cooper*.

After *Cooper*, the Second Circuit⁵⁰ reasoned it no longer made sense to view section 113(f)(1) as the sole cause of action for a liable party because a party could not proceed under section 113(f)(1) absent a civil action.⁵¹ Thus, a cause of action under section 107 must be available to parties who undertook a voluntary cleanup, but who would be liable if sued under section 107(a).⁵² The primary precedent of the Second Circuit⁵³ was strikingly similar to the Third Circuit precedents. All three cases involved a plaintiff who cleaned up sites according to a consent order or civil action.⁵⁴ Therefore, none of the plaintiffs

45. *DuPont*, 460 F.3d at 543.

46. *Id.* at 528.

47. *DuPont*, 460 F.3d at 529-30.

48. 42 U.S.C. § 9613(f)(1) (2000).

49. *DuPont*, 460 F.3d at 528-29 (explaining *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997); *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997)).

50. The *DuPont* majority focused primarily on the Second Circuit decision because the Eighth Circuit decision was filed just weeks before this opinion. Further, the Eighth Circuit adopted the reasoning of the Second Circuit for its holding; therefore, the Third Circuit's discussion regarding the Second Circuit applies equally to the Eighth Circuit. Although the Eighth Circuit decision also involved the federal government as a party, the Third Circuit was "underwhelmed" by the arguments of the Eighth Circuit. *DuPont*, 460 F.3d at 529 n.18.

51. *Consolidated*, 423 F.3d at 101.

52. *Id.* at 102.

53. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

54. *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 529 (3d Cir. 2006).

undertook a voluntary cleanup and therefore, all of the plaintiffs were free to seek contribution under section 113.

While the Second Circuit limited its precedent and recognized *Cooper* as intervening authority, the Third Circuit distinguished its precedents from *Cooper*. The Third Circuit claimed nothing in its precedents relied on the motivations of the parties for the cleanups.⁵⁵ Meaning, the cleanup of the sites following an order or civil action was unrelated to the court's decisions.

Puzzlingly, the Third Circuit in *DuPont* dismissed any notion the voluntary aspect of the cleanups was a material difference.⁵⁶ The *DuPont* majority stated, "when the rule in a prior case by its terms controls the outcome of a current case, we will not reach out to distinguish the prior case on the basis of factual differences that were not 'material' to the earlier holding."⁵⁷ Thus, to avoid a distinction, the *DuPont* court determined the motive irrelevant. In contrast, the Second Circuit recognized motivation as a key factor to distinguish its current holding from its precedents.⁵⁸

A particular statement of the Third Circuit majority remains perplexing. The *DuPont* court stated the rules of *New Castle* and *Reading* "apply directly to this case, and may not be distinguished based on facts that were not material to the earlier decision, especially since the terms of the statute have not changed."⁵⁹ Seemingly, the statutory language was paramount to the holdings of its precedents.

However, the *Reading* decision may have incorrectly interpreted the statutory language. The *Reading* principle stated "[section] 113(f)(1) specifically permits an action for contribution to be brought 'in the absence of a civil action under . . . section [107]'. . . ."⁶⁰ This language is seemingly inconsistent with the first sentence of section 113(f)(1), which states, "[a]ny person may seek contribution from any other person . . . during or following any civil action under section 9606 [106] of this title or under section 9607(a) [107(a)] of this title."⁶¹ Likewise, *Cooper* does not appear to support the *Reading* interpretation because it stated the opposite: a section 113(f)(1) claim required a "specified civil action."⁶² Simply, the two decisions, *Cooper* and *Reading*, cannot be reconciled.

The Third Circuit stated, "*Cooper Industries* did not explicitly or implicitly overrule our precedents"⁶³ Curiously, the Third Circuit then proceeded to re-define its precedents to fit with the principles of *Cooper*. Clearly, the *Cooper* holding removed any doubt as to the meaning of the statutory language. Therefore, since the statute did not change, the Third Circuit proposed other justifications to uphold the application of *Reading* to *DuPont*.

55. *Id.* at 530.

56. *DuPont*, 460 F.3d at 530.

57. *Id.*

58. *Consolidated*, 423 F.3d at 101.

59. *DuPont*, 460 F.3d at 531.

60. *Id.* at 532 (quoting *In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997)).

61. 42 U.S.C. § 9613(f)(1) (2000).

62. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004).

63. *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 532 (3d Cir. 2006).

In *Cooper*, the Supreme Court noted the savings clause⁶⁴ refutes any contention that the enabling clause, the first sentence of section 113(f)(1),⁶⁵ provides the only cause of contribution available to a PRP.⁶⁶ As *Cooper* observed, the purpose of the savings clause is to explain that section 113(f)(1) does not extinguish a contribution claim separate from section 113(f)(1).⁶⁷ Therefore, the *DuPont* majority reasoned that since the savings clause allows for other contribution actions, then the principle advanced in *Reading* might be correct.⁶⁸

The *DuPont* majority stated the settlement clause made the apparent inconsistency in *Reading* plausible because section 113(f)(1) “does not foreclose contribution actions when the PRP has not been sued, because [section] 113(f)(3)(B) remains available if the party chooses to settle.”⁶⁹ However, the *DuPont* dissent referred to *Cooper*, considering it intervening authority,⁷⁰ and noted a problem with using PRP in that context. The dissent noted the Third Circuit in *New Castle* and *Reading* “assumed that all potentially responsible parties- -those whose responsibility had been adjudicated and those who voluntarily admitted their responsibility- -fell into the same category of ‘potentially responsible parties’ who could recoup losses by bringing suit pursuant to [section] 113(f).”⁷¹ However, *Cooper* clearly limits who may seek recovery under section 113(f). As the *DuPont* dissent noted, *Cooper* held “a party who has in fact been held responsible (via adjudication or settlement with the [Environmental Protection Agency] EPA) may bring an action under [section] 113(f), while a party who admits responsibility but whose responsibility has not been established may not.”⁷² Therefore, the majority’s defense of *Reading* seems further strained.

In addition, the Third Circuit stated that its holding in *Reading* relied on other grounds, including the holding of *New Castle*, statutory construction, legislative history, and the decisions by other Circuit Courts of Appeals.⁷³ Yet, at the time of the *DuPont* ruling, it seemed decisions of other circuit courts were not applicable or persuasive as the Third Circuit majority rejected the arguments of post-*Cooper* Second and Eighth Circuit decisions, which involved plaintiffs similarly situated to DuPont. The majority also claimed it was Congress’ intent that a PRP settle rather than perform a voluntary cleanup.⁷⁴ However, Congress did not state this intention in the text of the statute and the *DuPont* majority noted CERCLA’s legislative history was “vague” regarding voluntary

64. 42 U.S.C. § 9613(f)(2) (2000).

65. *Id.* § 9613(f)(1).

66. *Cooper*, 543 U.S. at 166-67.

67. *Id.*

68. *DuPont*, 460 F.3d at 532.

69. *Id.*

70. *DuPont*, 460 F.3d at 545 (Sloviter, J., dissenting).

71. *Id.* at 546.

72. *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 546-47 (3d Cir. 2006) (Sloviter, J., dissenting).

73. *Id.* at 532.

74. *DuPont*, 460 F.3d at 537.

cleanups.⁷⁵ Therefore, it is difficult to understand how the court relied on Congress's intent if it was noticeably absent or vague.

DuPont urged the Third Circuit to adopt the reasoning of *Cooper* on two theories. First, DuPont argued that the *Cooper* decision overruled the fundamental presumption for the holding of *Reading*: that a PRP could pursue contribution from another PRP absent a civil action or settlement.⁷⁶ Second, DuPont proposed *Cooper* changed expectations for recovery and *New Castle* and *Reading* no longer reflected the purposes of the CERCLA.⁷⁷ Therefore, DuPont argued *Cooper* provides a basis for relief in a contribution claim under either section 107 or the common law.⁷⁸

After refusing to limit or overrule *Reading*, the Third Circuit majority turned to DuPont's second theory to support reliance on *Cooper*. The Third Circuit relied on the legislative history of the CERCLA to reject this argument. "While it is clear that CERCLA's drafters intended common law principles to govern liability, we have not found evidence in the legislative history that Congress contemplated this would extend a contribution right to PRPs engaged in entirely voluntarily cleanups."⁷⁹ Further, the Third Circuit reasoned the settlement scheme of section 113 showed Congress did not intend for a PRP to seek contribution under the common law or an implied right.⁸⁰

DuPont's argument seems more persuasive. DuPont reasoned Congress knew about the judicially recognized approach and did not expressly reject it in the statute.⁸¹ Specifically, DuPont argued that Congress' lack of expression equaled lack of intention to preclude a PRP from recovery under an implied right of contribution.⁸² However, the *DuPont* majority remained unconvinced.⁸³

Further, the precedents of the Third Circuit, *New Castle* and *Reading*,⁸⁴ also did not imply a right of contribution to any person beyond an innocent person. In *Cooper*, the Supreme Court refrained from addressing this issue, but cited numerous circuit cases standing for the proposition that a PRP could not pursue a section 107(a) action against another PRP.⁸⁵ However, the Second Circuit noted a significant factor among the cited cases.⁸⁶ In every case but one, the court considered plaintiffs who either were already liable or faced impending liability.⁸⁷ Thus, the Second Circuit stated that the cases were not relevant to the status of a party who performed a voluntary cleanup.⁸⁸

75. *Id.*

76. *DuPont*, 460 F.3d at 531.

77. *Id.*

78. *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 531 (3d Cir. 2006).

79. *Id.* at 535.

80. *DuPont*, 460 F.3d at 538-39.

81. *Id.* at 539 n.27.

82. *DuPont*, 460 F.3d at 539 n.27.

83. *Id.*

84. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997); *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997).

85. *Cooper*, 543 U.S. at 169 (citations omitted).

86. *Consolidated Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 102 (2d Cir. 2005).

87. *Id.*

88. *Consolidated*, 423 F.3d at 102.

The Second and Eighth Circuits both addressed the procedural circumstances of a PRP seeking recovery of costs for a cleanup. Both courts focused on the language of *Cooper* regarding the distinct quality of the available remedies under section 107 and section 113. “Each of those sections, 107(a) and 113(f)(1), embodies a mechanism for cost recovery available to persons in different procedural circumstances.”⁸⁹

The Third Circuit did not appear to consider the procedural circumstances faced by DuPont. DuPont voluntarily cleaned up the site with the expectation of recovery while the parties of the Third Circuit precedents appeared to have the opposite procedural circumstances of DuPont. To diminish the significance of the procedural circumstances, the Third Circuit indicated the legislative history of section 113 reflected Congress’s intent to encourage voluntary settlements rather than voluntary cleanups.⁹⁰ The Third Circuit’s reasoning is problematic; a perception about the legislative history does not replace the reality in the statutory text. The reality is section 107 does not forbid the recovery by DuPont for the voluntary cleanup of a site polluted in part by another party.

In contrast, the Second and Eighth Circuits focused on the explicit language of section 107.⁹¹ Specifically, the Second Circuit stated section 107(a) is available “to *any* person” regardless of its liability.⁹² The *DuPont* dissent accurately noted the majority *imposed* the word “innocent” on the statutory text.⁹³ As the dissenter stated, “[t]his court-created standard ignores the fact that section 107(a)(4)(B) plainly allows a private party plaintiff to be ‘any other person’ besides the government, state, and Indian tribes and does not expressly exclude parties that may be responsible for a spill.”⁹⁴ Imposition suggests an extra burden, which seems appropriate given the majority’s added weight upon the statute.

V. HARMONY FROM THE SUPREME COURT

The *DuPont* decision of the Third Circuit created a split in the Circuit Court of Appeals and a looming question for the Supreme Court. The high cost associated with the cleanup of Superfund sites warrants uniformity among the circuits. The language of CERCLA section 107(a) does not contain the word innocent or bar voluntary cleanups; yet, the Third Circuit adopted that interpretation and appeared to diminish the importance of the Supreme Court’s decision in *Cooper*. This split necessitated further Supreme Court involvement.

In June 2007, the Supreme Court decided *Atlantic*, the Eighth Circuit case,⁹⁵ referenced by the majority and the dissent in *DuPont*. By not specifically addressing the availability of a section 107(a) claim for a PRP in *Cooper*, the Court left the door open for the *DuPont* decision and a split in circuits. In fact, the Supreme Court referenced the *DuPont* decision by noting, “at least *one* court

89. *Id.* at 99.

90. *DuPont*, 460 F.3d at 537-38.

91. *Consolidated*, 423 F.3d at 100.

92. *Id.*

93. *DuPont*, 460 F.3d at 546 n.34 (Sloviter, J., dissenting).

94. *Id.*

95. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 831 (8th Cir. 2006), *aff’d*, 127 S. Ct. 2331 (2007).

continues to hold that [section] 113(f) provides the exclusive cause of action available to PRPs.”⁹⁶

The issue in *Atlantic* was who are the “other person[s]” with the right to a cause of action under section 107(a)(4)(B).⁹⁷ Similar to the *DuPont* majority, the government sought to exclude PRPs as “other person[s]” while *Atlantic* echoed the argument of the *DuPont* dissent that section 107(a)(4)(B) applied to all persons except those listed in section 107(a)(4)(A).⁹⁸ The Supreme Court noted subparagraph B was only meaningful when coupled with subparagraph A.⁹⁹ Thus, the Supreme Court held the “plain language of subparagraph (B) authorizes cost-recovery actions by *any* private party, including PRPs.”¹⁰⁰

The Supreme Court observed several problems with the government’s interpretation. First, the Court explained it was incomprehensible that the phrase “any other necessary costs” from subparagraph B referenced costs in subparagraph A while the phrase “any other person” in subparagraph B did not reference persons in subparagraph A.¹⁰¹ Next, the Court examined the breadth of the four categories of PRPs listed in section 107(a)(1-4) and concluded any private party who incurred cleanup costs might be classified as a PRP, even if the party was innocent.¹⁰² Thus, practically no one would be eligible under section 107(a)(4)(B) and any cause of action would lay dormant.¹⁰³

These arguments highlight the problem with imposing the word “innocent” on section 107(a)(4)(B), as noted by the *DuPont* dissent.¹⁰⁴ The government next contended the PRPs would choose the joint and several liability under section 107(a) over the equitable apportionment of section 113(f) and create tension between the two remedies.¹⁰⁵ The Court reiterated that section 113(f) expressly grants PRPs a right to contribution and further found nothing in section 113(f) extended contribution beyond its traditional definition.¹⁰⁶ The Court observed that “a PRP’s right to contribution under [section] 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties.”¹⁰⁷

Next, the Court finally defined whether section 107 provided for cost recovery or contribution, which it refrained from doing in *Cooper*. The Court held section 107(a) authorizes the availability of cleanup costs but no right of contribution in part because a party can recover under section 107(a) without the assignment of liability.¹⁰⁸ Further, the Court observed section 107(a) allows

96. *Id.* at 2334 (emphasis added).

97. *Atlantic*, 127 S. Ct. at 2335 (quoting 42 U.S.C. § 9607(a)(4)(B) (2000)).

98. *DuPont*, 460 F.3d at 546 n.34 (Sloviter, J., dissenting).

99. *Atlantic*, 127 S. Ct. at 2336.

100. *Id.* (emphasis added).

101. *Atlantic*, 127 S. Ct. at 2336 (quoting 42 U.S.C. § 9607(a)(4)(B) (2000)).

102. *Id.*

103. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 831 (8th Cir. 2006), *aff’d*, 127 S. Ct. 2331, 2337 (2007).

104. *DuPont*, 460 F.3d at 546 n.34 (Sloviter, J., dissenting)

105. *Atlantic*, 127 S. Ct. at 2337.

106. *Id.* at 2338.

107. *Atlantic*, 127 S. Ct. at 2338.

108. *Id.*

only costs incurred with the cleanup.¹⁰⁹ Consequently, the Court stated section 107 and section 113 apply “to persons in different procedural circumstances,” a concept the Court acknowledges the dissent in *DuPont* recognized.¹¹⁰ The Court also dismissed the concern about the longer statute of limitations offered under section 107(a) by explaining that a PRP who pays to satisfy a settlement or judgment can recover via section 113(f), but cannot chose section 107(a) because the PRP did not have its own response costs.¹¹¹ The Court is even more precise by stating, “costs incurred voluntarily are recoverable only by way of [section] 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under [section] 113(f).”¹¹² Interestingly, the Court chose not to discuss the alternative holding from the Eighth Circuit which recognized an implied right of contribution for a PRP under section 107(a) when the PRP did not meet the requirements of section 113(f).¹¹³

VI. CONCLUSION

United States v. Atlantic Research Corp. validated many of the arguments offered by the *DuPont* dissent. With the Supreme Court addressing the statutory language of the CERCLA, the favorable provisions of section 107, and the procedural circumstances of the parties, no ambiguity should remain regarding the recovery of expenses following a cleanup of a hazardous site. Further, by defining the exact right available under section 107, the Supreme Court should prevent further circuit splits. With the remand, the Third Circuit should no longer be the court singled out by the Supreme Court for standing for the improper interpretation, and *DuPont* should finally see the recovery for the expenses associated with its voluntary cleanup of a contaminated site. For now, the CERCLA remains unbroken.

*Marina K. Greek*¹¹⁴

109. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 831 (8th Cir. 2006), *aff'd*, 127 S. Ct. 2331, 2338 (2007) (citing 42 U.S.C. § 9607(a)(4)(B) (2000)).

110. *Id.* (citations omitted).

111. *Atlantic*, 127 S. Ct. at 2338.

112. *Id.*

113. *Atlantic*, 127 S. Ct. at 2339.

114. J.D. Candidate, May 2008, University of Tulsa College of Law. The author sincerely appreciates the contributions to this Note from Stu Conrad, Stephen Matthews, Anthony Craiker, and in particular Jeffrey Baxter.