

# Environmental

COMMENTARY

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## ***Cooper Industries v. Aviall: The Aftermath***

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### **I. Introduction**

In December 2004 the U.S. Supreme Court decided in *Cooper Industries v. Aviall Services*,<sup>1</sup> that the plain language of Section 113(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act<sup>2</sup> does not allow liable parties to bring contribution actions unless and until a related civil action is brought under either Section 106 or 107. The court reserved judgment on, and remanded to the lower federal courts, the question of whether liable parties who are not authorized to pursue contribution under Section 113(f) may, instead, seek equivalent relief under Section 107, as either standard cost-recovery claims or as “implied” contribution claims.<sup>3</sup>

This article reports on the aftermath of the *Cooper Industries* decision and examines issues that counsel should consider when advising a potentially responsible party in the uncertain regulatory climate post-*Cooper Industries*.

#### **A. Development of Contribution Action Under CERCLA**

As first enacted in 1980, CERCLA liability provisions were limited to Sections 106 and 107,<sup>4</sup> as well as a few key definitions in Section 101.<sup>5</sup> These provisions did not offer private parties explicit, clearly enunciated rights to seek contribution from other liable parties under the statute. Prior to the addition of Section 113 to CERCLA in 1986 (under the Superfund Amendments and Reauthorization Act), however, several courts had construed Section 107(a)(4)(B) to permit suits by liable parties seeking equitable recovery of their costs. Those court decisions before SARA treated such suits as either cost-recovery claims equivalent to equitable-restitution claims (subject to a “setoff” defense) or as implied-contribution claims read into CERCLA as interstitial federal common law. Prior to the enactment of Section 113, only one court had held squarely to the contrary.

Following SARA, every federal circuit court to consider the matter construed the newly added Section 113(f)(1) to permit contribution actions by PRPs, even in the absence of a civil action. Understandably, with the enactment of Section 113, the courts also concluded that Congress did not intend to allow liable parties to pursue at the same time what were essentially redundant Section 107 claims, which had been deemed *de facto* contribution claims.

Thus, the process by which PRPs could pursue contribution from other PRPs appeared to be resolved. The government and non-liable parties could proceed under Section 107, at least in most instances, and PRPs could seek contribution under Section 113.

Then came *Cooper Industries*. In overturning the Section 113 appellate, the Supreme Court explicitly declined to rule on whether Section 107 provides an avenue of equitable relief for liable parties. Recognizing that its reversal of precedents in several circuit courts and in district courts in other circuits would prompt revisitation of the Section 107 issue, the majority declined to rule because of problems with the record below in *Cooper Industries*.

Justice Ruth Bader Ginsberg’s dissent, joined by Justice John Paul Stevens, took issue not only with the majority’s construction of Section 113(f)(1), but also with the majority’s unwillingness to address the Section 107 issue, which had become critical as a result of the decision on Section 113. The dissent, without contradiction, noted that the majority decision would likely yield confusion and delay in a substantial number of the hundreds of CERCLA cases pending in federal courts.

#### **B. The Fallout From Cooper for the Regulated Community**

Pre-*Cooper Industries*, potentially responsible parties regularly proceeded with voluntarily cleanup actions, comfortable

in the circuit and district court precedents that their rights to seek contribution from other liable parties were secure under Section 113. Now, after *Cooper Industries*, PRPs who have not yet been sued in a civil action or settled their liability with the government face a substantial disincentive to act on their own initiative to clean up contamination for which other parties may share responsibility.

Absent a lawsuit qualifying under Section 113(f)(1) or a settlement in final form qualifying under Section 113(f)(3)(B), PRPs who respond to hazardous-substance problems are no longer ensured a right to seek equitable recovery from other liable parties. Compounding the problem, PRPs who remediate under state supervision or even pursuant to a federal consent decree face uncertainties because the question of what qualifies a party to seek contribution under Sections 113(f)(1) and (f)(3)(B) is not clearly defined.<sup>6</sup>

As a result, the Environmental Protection Agency now finds itself in the position of receiving requests from cooperative PRPs that their commitments to conduct response activities be memorialized in consent decrees. Unless and until the courts or Congress act to improve the situation, recalcitrant and undiscovered PRPs are better off because they are shielded from suit from proactive parties, a fact that will hinder future voluntary action. This is the remedial and equitable intent of the Superfund law turned on its ear.

## II. Congress and EPA to the Rescue?

Congress and the EPA have not addressed the confusion and inequities resulting from *Cooper Industries*. To date, Congress has not held hearings on the fallout from the Supreme Court's decision, and the EPA has not proposed any model legislation for Congress to consider.

The EPA has taken two steps. First, the agency amended its model language for administrative consent orders to clarify the government's intent that such orders would be recognized as settlements triggering a right to sue for contribution under Section 113(f)(3)(B).<sup>7</sup> With *Cooper Industries* limiting which PRPs may sue under Section 113(f)(1), defendant PRPs have been asking courts to also examine what qualifies a PRP as having "settled," such that it may pursue a contribution claim under Section 113(f)(3)(B).<sup>8</sup>

Further litigation in this area is expected, as PRP defendants challenge lawsuits brought by liable party plaintiffs who have entered into administrative settlements or consent decrees with either the EPA or state agencies. Of course, if PRPs otherwise prohibited from suing under Section 113 are entitled to seek contribution under Section 107, this issue would be largely irrelevant.

Second, the U.S. Department of Justice, on behalf of the EPA in a pending appeal before the U.S. Court of Appeals for the 7th Circuit and the U.S. Department of Defense in the 9th Circuit, has advocated that Section 107 does not provide liable parties with an implied right of contribution. In those cases, the United States argues that, as a matter of policy, liable parties should be restricted to suit under Section 113 because liable parties who have overpaid their equitable share would be more likely to settle promptly with the government in order to qualify to sue others under Section 113(f)(3)(B). This view is both inequitable and flawed from a policy perspective.

If liable parties may only sue for contribution under Section 113, the lesson for PRPs who have not yet incurred response costs is that they should not respond to contamination for which other parties may share responsibility until after they have either been sued or have settled their liability with the government, as required under Section 113. To do otherwise would risk that they might never be able to seek contribution from other liable parties.

While denying liable parties a right to proceed under Section 107 may induce PRPs who have already incurred substantial response costs to settle with the government, as the Justice Department suggests in its appeals, it does nothing to remove the disincentive to action by parties who have not yet incurred response costs or who have paid less than their fair share under a preliminary agreement with other PRPs.

In addition, the EPA's position implies — optimistically — that the United States has the capacity in all matters involving site response to settle promptly with any and all PRPs who may be ready to address shared hazardous-substance problems, and it will do so in a manner that takes into account fairness to any PRPs who have already incurred response costs on their own initiative. Thus, denying liable parties the right to sue under Section 107 would discourage PRPs inclined to act voluntarily and consistent with the National Contingency Plan, but who have not yet settled. They and the public would be forced to wait until a settlement could be reached in final form before any action is taken.

The EPA is vested with increased bargaining power under *Cooper Industries* because the agency decides which PRPs to name in an order and whether to grant settlement. Not only does this potentially affect all contaminated sites, it raises particular questions at the many sites where the United States is itself a PRP. Under *Cooper Industries*, a PRP cannot sue the federal government for contribution unless the government first brings an en-

forcement action against the PRP or enters into an approved settlement with the PRP. This seemingly presents a conflict of interest for the U.S. government and it is unclear how the EPA will address this issue at sites where the federal government is a PRP.

### III. Post-Cooper Litigation: Can PRPs Sue Under Section 107(a)?

Following *Cooper Industries*, many defendant PRPs filed motions to dismiss PRP claims brought under Section 113(f)(1). Plaintiff PRPs who had relied on circuit or district court precedent and proceeded solely under Section 113(f)(1) moved to amend their complaints to add claims under Section 107, thereby asking courts to reconsider the availability of Section 107(a)(4)(B) claims to private and municipal liable parties not entitled to sue under Section 113 as the result of *Cooper Industries*.<sup>9</sup> Defendant PRPs also began to challenge whether liable parties who had incurred response costs under state or federal oversight were qualified to sue under Section 113(f)(3)(B).

#### A. District Courts Split

The district courts have essentially split post-*Cooper Industries* on whether liable parties unable to sue under Section 113 may bring suit pursuant to Section 107(a). A number of the district courts first to address the issue concluded that they were bound to follow the unambiguous, post-SARA precedent of their circuits that Section 113 provides the only available CERCLA cost-recovery remedy to liable parties. These district courts then summarily disposed of plaintiffs' Section 113 claims in the absence of a government suit under Section 106 or 107.<sup>10</sup>

Other district courts dismissed Section 113 contribution claims, but granted leave to amend to add Section 107 claims. These courts rejected arguments that amendment would be futile as a matter of law, reasoning either that post-SARA decisions had presupposed that Section 113 provided a comprehensive right of action for PRP cost recoveries and should be reconsidered in light of *Cooper Industries* or that the addition of Section 113 — whatever its limitations — did nothing to strip liable parties of their rights to proceed in the alternative under Section 107.<sup>11</sup>

A number of district courts, perhaps constituting an emerging trend, have held that PRPs who do not meet the specific requirements to state a claim for contribution under Section 113 have an independent cause of action under Section 107(a)(4)(B).<sup>12</sup>

#### B. The 2d Circuit Rules

On Sept. 9, 2005, the 2d Circuit held in *Consolidated Edison Co. v. UGI Utilities Inc.* that Section 107(a) permits

a party who has not yet been sued or participated in an administrative proceeding to sue another PRP to recover response costs it incurred voluntarily, even if that party itself would be found liable under Section 107(a).<sup>13</sup> Thus, the 2d Circuit became the first federal appeals court to decide, post-*Cooper Industries*, whether liable parties have a cause of action under CERCLA Section 107(a), holding that they did based on the facts of the case.<sup>14</sup>

The 2d Circuit reasoned that the causes of action created by Sections 107(a)(B) and 113(f) were "distinct," with each embodying a mechanism for cost recovery available to persons in different procedural circumstances.

Accordingly, though Consolidated Edison could not sue under Section 113(f)(1) because it was a liable party not yet subject to a civil action, the court applied the plain language of the statute and concluded that Con Ed had a cause of action under Section 107(a)(4)(B) because it was a "person" who had incurred "costs of response."

Moreover, the court found no basis for drawing a distinction under Section 107(a) between "innocent" persons and those parties who, if sued, would be held liable under Section 107(a). It also recognized that any other conclusion on the Section 107 issue would frustrate the purposes of CERCLA by discouraging parties from undertaking voluntary cleanups. The 2d Circuit said its holding was consistent with the view that courts took of Section 107(a) before Section 113 was adopted in 1986.

UGI Utilities has petitioned the Supreme Court to review the 2d Circuit's ruling.<sup>15</sup> That petition is pending.

#### C. 7th and 9th Circuits Ready to Hear Section 107 Issue

Two more federal appellate courts — the 7th Circuit and 9th Circuit — will soon weigh in on the Section 107 issue.

In the 7th Circuit, the Section 107 issue is before the court on an interlocutory appeal of a trial court ruling that allowed a liable party to bring suit under Section 107(a) where the PRP was not eligible to sue under Section 113(f). In *Metropolitan Water Reclamation District v. Lake River Corp.*, a plaintiff landowner sought cost recovery for a voluntary cleanup of hazardous substances released by a tenant.<sup>16</sup> The plaintiff could not, following *Cooper Industries*, bring an action under Section 113(f), and it was not an "innocent landowner" eligible to bring an action under Section 107 under prior 7th Circuit precedent.

The U.S. District Court for the Northern District of Illinois relied heavily on Supreme Court dicta from *Key Tronic Corp. v. United States*<sup>17</sup> to support its finding of an implied

right of contribution. Noting that Section 107(a) provides that not only the government but also “any other person” is entitled to seek to recover costs, the court said the *Key Tronic* court “read that language to mean that ‘Section 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs.’”<sup>18</sup>

The District Court also noted that SARA explicitly preserved all state and federal contribution rights that pre-existed the amendment, stating that “if the implied right existed before Section 113(f)(1) was added and the right was not encompassed by Section 113(f)(1), then it must still lie in Section 107(a).”<sup>19</sup>

In addition, the 9th Circuit is set to hear appeals from two conflicting lower court rulings and issue a joint ruling on the Section 107 issue. In *Kotrous v. Goss-Jewett Co.*, a PRP precluded from bringing an action under Section 113(f) sought cost recovery under Section 107.<sup>20</sup> Noting that prior holdings of the 9th Circuit found that the right of contribution originated in Section 107 and that the savings clause found in Section 113(f)(1) explicitly preserved pre-existing rights of contribution, including those under Section 107, the U.S. District Court for the Eastern District of California held that PRPs retained a right of contribution under Section 107(a).<sup>21</sup>

In *City of Rialto v. U.S. Department of Defense*, on the other hand, the U.S. District Court for the Central District of California held that PRPs could not file Section 107 claims unless they first met the requirements for suit under Section 113, including those set forth in *Cooper Industries*.<sup>22</sup> In this case, the city of Rialto sued the U.S. Department of Defense for contaminating area drinking water with perchlorate. Finding that the 9th Circuit decision in *Pinal Creek Group v. Newmont Mining Corp.*<sup>23</sup> imposed Section 113 requirements on parties bringing suit under Section 107, the District Court dismissed the city’s claims against the DOD because a claim was not available to the city under Section 113.

The United States, both in an EPA *amicus* brief before the 7th Circuit and on behalf of the Defense Department before the 9th, argues that the theory that PRPs possess an implied right of contribution under Section 107(a)(4)(B) is no longer tenable after *Cooper Industries*. “Even assuming the court could still find an implied right of contribution under Section 107(a)(4)(B), such a right cannot plausibly be construed to be independent of the substantive requirements for contribution claims that Congress included in Section 113(f). Both [*Cooper Industries*] and the settled principle that statutory provisions should not be treated as surplusage preclude such an interpretation.”<sup>24</sup>

#### **IV: Pleading in Uncertain Times and Other Considerations for the PRP**

In response to *Cooper Industries*, legal counsel must do their creative best to help clients caught in the unenviable position of having incurred significant response costs in the absence of a pending or prior civil action under Section 106 or 107(a), clients who incurred costs confident that 25 years of decisional law would continue to ensure the availability of contribution from other liable parties “lying in the weeds.”

Moreover, those clients may have substantial potential claims against the United States as a PRP — the one PRP that has regularly and successfully asserted that it may, on behalf of the EPA, bring full, joint and several liability cost-recovery actions, regardless of the magnitude of its broader potential liability at a site.<sup>25</sup>

One area of keen interest following *Cooper Industries* has been whether prior or planned administrative or judicially approved settlements with the EPA or a state provide a basis for asserting contribution claims pursuant to Section 113(f)(3)(B). Judicially approved settlements with the U.S. government or a state involving resolution of claims under either Section 106 or 107(a) will involve the filing of a suit under those provisions, clearing the way for the assertion of contribution claims under Section 113(f)(1).

In such cases, counsel likely will want to allege a right to sue under both provisions. Where Section 113(f)(3)(B) may provide the only basis for asserting a contribution claim, however, questions may arise as to whether a prior settlement was entered into under CERCLA and resolved CERCLA liabilities and whether the prior settlement will support contribution claims of the breadth asserted.

Some courts have declined to allow claims based on prior cost-recovery settlement agreements with the EPA that did not refer to its Section 122 cost-recovery settlement authority.<sup>26</sup> Others have declined to allow claims to proceed based on settlements with a state that were not clearly based on a resolution of CERCLA claims. As previously described, the EPA and Justice Department have modified some language of their model settlement agreements with the intent to make clear that post-*Cooper Industries* settlements will provide a sound basis for future contribution claims.<sup>27</sup> Counsel should make sure that the most appropriate helpful language is included in future settlements — especially in settlements with a state.

Circumstances prior to *Cooper Industries* gave the courts little or no reason to consider whether response cost con-

tribution claims might be limited to matters addressed in a prior administrative or judicial settlement with the federal government or a state. Now that Section 113(f)(3)(B) may provide the only basis for asserting such claims, counsel and the courts should expect to hear arguments that the contribution rights afforded in that section extend only to matters addressed in the prior settlement.<sup>28</sup> The stronger argument — whether based on statutory construction, judicial economy or equity — is that the federal court, its jurisdiction having been appropriately invoked, should consider and resolve simultaneously all claims for monetary contribution and related declaratory relief concerning future costs of response.<sup>29</sup>

If they have not done so, PRP plaintiffs also should consider pleading a Section 107(a) claim — at least one characterized as an “implied right of contribution” claim — together with any appropriate related claim for declaratory relief. In relatively uncommon circumstances in which a PRP plaintiff may enjoy the benefit of an exclusion from or defense to liability under CERCLA, counsel should consider pleading a straight Section 107(a) cost-recovery claim in the alternative to a Section 107(a) implied-right-of-contribution claim, and counsel should look carefully at precedents concerning the pleading of Section 107 claims under such circumstances.

In general, Section 107(b) defenses, such as an act of God or an act or omission of an unrelated third party, including an “innocent landowner” or “innocent purchaser” defense, must be affirmatively pleaded and should be pleaded with sufficient detail to inspire the confidence of the court that they are solidly grounded.<sup>30</sup> The same is likely true of pleading the petroleum exclusion, the secured-creditor exemption and the “federally permitted release” exclusion.

Following *Cooper Industries*, PRPs pleading under Section 107 should consider including allegations that the underlying liability is not joint and several. Counsel for such PRPs should keep in mind that contribution is only in play where an underlying liability is joint and several, which is not necessarily true of all CERCLA liability. Thus, counsel should consider not only whether their client may enjoy a defense to or an exclusion from liability under CERCLA, but also whether to allege that some or all of any liability the client may have is several from that of the defendants it is suing.

Joint and several liability under CERCLA typically has been challenged by defendants sued by the U.S. government or a state. But, in the world shaken by *Cooper Industries*, fairly disputing joint and several liability may be more important than ever in cases involving Section 107 claims among potentially liable parties.

Post-*Cooper Industries*, allegations of divisible harm and reasonable basis for apportionment of liability also may provide to PRP plaintiffs a means of sustaining their Section 107 claims. These allegations are fact-based and, especially as to “reasonable basis for apportionment,” turn on potentially elastic and subjective legal standards. They are decided by courts sitting in equity, courts that have an interest in encouraging cooperation and settlement among PRPs who may respond to and litigate over hazardous-substance problems.

For these reasons, disputes over divisibility of harm and reasonable basis for apportionment are not as likely to be resolved early in litigation as some issues. If not settled, they may have to be tried. They can be pleaded and pursued as a basis for a “straight” Section 107 claim and, in the alternative, to an implied-contribution claim under Section 107 or any arguable Section 113 contribution claim.

## V. Conclusion

Following *Cooper Industries*, the resulting litigation moving through the district and circuit courts has put in play a variety of issues related to whether Section 113 is the sole avenue available for PRPs to sue and what precisely is required for suit under Sections 107, 113(f)(1) and 113(f)(3)(B). If Congress does not act to address the problem, these issues surely will make their way back to the Supreme Court.

## Notes

<sup>1</sup> 125 U.S. 577 (2004).

<sup>2</sup> CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), reads, in part: “Any 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 such Section 9606 of this title or under Section 9607(a) of this title. ... 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.”

<sup>3</sup> The U.S. District Court for the Northern District of Texas in Dallas heard oral arguments June 30 regarding why summary judgment should be granted to *Cooper Industries* on *Aviall Services*’ Section 107 claims. *Aviall Servs. Inc. v. Cooper Indus. Inc.*, No. 97-1926 (N.D. Tex.).

<sup>4</sup> CERCLA § 107(a), 42 U.S.C. § 9607(a), lists four classes of potentially responsible parties and provides in part that they “shall be liable” for, among other things, “all costs of removal or remedial action incurred by the U.S. government ... not inconsistent with the national contingency plan.” Section 107(a)(4)(B) further provides that PRPs shall be liable for “any other necessary costs of response incurred by any other person consistent with the national contingency plan.”

<sup>5</sup> Congress enacted Superfund in 1980 at the very end of a lame-duck session, leaving very little useful legislative history. To avoid the

constitutional barrier to an appropriations law originating in the Senate, the Senate gutted an unrelated stalled House bill, inserted its proposed Superfund law, and sent it back to the House with a warning that it could either enact without amendment or kill the bill. The House passed CERCLA, which became the last consequential law signed by President Jimmy Carter. Some of CERCLA's most important provisions, particularly those concerning liability, were left incomplete or ambiguous as a part of the hurried compromising of which it was born. This poor draftsmanship has contributed to billions of dollars of litigation to determine what the statute means and how it should be applied.

<sup>6</sup> The 2d Circuit, for example, recently held that Section 113(f)(3)(B) does not permit contribution actions based solely on the resolution of liability for violations of state environmental law because Section 113(f)(3)(B) creates a contribution right only when CERCLA liability is resolved. See *Consol. Edison Co. of N.Y. Inc. v. UGI Utils. Inc.*, 423 F.3d 90, 95-96 (2d Cir. 2005) (quoting *W.R. Grace & Co. v. Zotos Int'l Inc.*, No. 98-CV-8385(F) 2005 WL 1076117, at \*6 [W.D.N.Y. May 3, 2005]) (stating that "[j]ust as a party must be sued under CERCLA before it can maintain a Section 113(f)(1) contribution claim, it must settle CERCLA liability before it can maintain a claim under Section 113(f)(3)").

<sup>7</sup> CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B), provides a right of contribution for "[a] person who has resolved its liability to the United States or a state for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." See EPA Memorandum, Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f) (Aug. 3, 2005), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf>.

<sup>8</sup> See, e.g., *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F. Supp. 2d 1079, 1085 (S.D. Ill. 2005) (EPA-issued "administrative order on consent" was an "administrative order" and not a "settlement" for purposes of Section 113(f)(3)(B), where the AOC failed to rely on settlement authority of CERCLA Section 122).

<sup>9</sup> Indeed, *Cooper Industries* itself is set for rehearing on the Section 107 issue later this year in U.S. district court in Dallas. The 5th Circuit recently and unremarkably ruled that liability under Section 113(f)(1) for contribution necessarily is several, not joint and several. *Elementis Chromium LP v. Coastal States Petroleum Co.*, No. 04-20519, 450 F.3d 607 (5th Cir. May 26, 2006). However, in doing so, the court contrasted Section 113(f)(1) claims with Section 107 claims in which liability typically is joint and several, and it may have opened the door for groundless speculation concerning a question not before the court — whether PRPs may have residual contribution rights under Section 107 — by quoting the 11th Circuit's broad pre-*Cooper Industries* holding in *Redwing Carriers Inc. v. Saraland Apartments*, 94 F.3d 1489, 1513-14 (11th Cir. 1996), that "[w]hen one liable party sues another liable party under CERCLA, the action is not a cost-recovery action under Section 107(a)' and the imposition of joint and several liability is inappropriate." *Elementis Chromium* cannot be reasonably read as foreshadowing of how the 5th Circuit will rule if it revisits the Section 107 issue. Frenzied parsing and speculation concerning this language say much, however, about the huge stakes in play concerning the Section 107 issue.

<sup>10</sup> In the 3d Circuit, see, e.g., *Boarhead Farm Agreement Group v. Advanced Envtl. Tech. Corp.*, 381 F. Supp. 2d 427, 435-36 (E.D. Pa.

2005) (PRP's motion to amend to add Section 107 claim "futile" in light of 3d Circuit precedent) (citing *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119 [3d Cir. 1997] [holding that PRPs cannot bring contribution claims based on Section 107(a), but must proceed under section 113(f)(1)]; *Champion Labs. Inc. v. Metex Corp.*, No. Civ. 02-5284 (WHW), 2005 WL 1606921, at 3 (D.N.J. July 8, 2005) (bound by 3d Circuit precedent); *Monteville Twp. v. Woodmont Builders LLC*, No. Civ. A. 03-2680DRD, 2005 WL 2000204, at \*13 (D.N.J. Aug. 17, 2005) (bound by *New Castle County*, 111 F.3d 1116). In the 4th Circuit, see, e.g., *R.E. Goodson Constr. Co. Inc. v. Int'l Paper Co.*, No. C/A 4:02-4184-RBH, 2005 WL 2614927 at \*6, 8 (D.S.C. Oct. 13, 2005) (noting that pursuant to applicable 4th Circuit precedent, a private party cannot bring a Section 107(a) claim unless it can show it has an affirmative defense under Section 107(b), and although *Cooper Industries* "leaves a void in the contribution mechanism," the court followed 4th Circuit precedent and denied the Section 107 claim) (citing *New Castle County*, 111 F.3d at 1120); see also *Mercury Mall Assocs. Inc. v. Nick's Mkt. Inc.*, 368 F. Supp. 2d 513, 518 (E.D. Va. 2005). In the 7th Circuit, see, e.g., *City of Waukesha v. Viacom Int'l Inc.*, 362 F. Supp. 2d 1025, 1027-28 (E.D. Wis. 2005) (motion to add a Section 107 claim denied as futile in light of 7th Circuit precedent) (citing *Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 764 [7th Cir. 1994]).

<sup>11</sup> See, e.g., *Pharmacia Corp.*, 382 F. Supp. 2d at 1091 (S.D. Ill. 2005) (Finding that it was not yet in a position to determine whether PRPs' leave to amend would be futile, the District Court reserved comment on the validity of the action until later in the case.); *Metro. Water Reclamation Dist. v. Lake River Corp.*, 365 F. Supp. 2d 913, 918 (N.D. Ill. 2005) (PRP allowed to seek contribution under Section 107(a) despite 7th Circuit precedent to the contrary); *Gen. Motors Corp. v. United States*, No. Civ. A. 01-CV-2201, 2005 WL 548266, at \*4 (D.N.J. Mar. 2, 2005) (PRP allowed to amend because the same issue was on appeal from a pre-*Cooper Industries* case and because *Cooper Industries* raised the possibility that post-SARA precedent barring Section 107 claims would be reconsidered) (referencing *DuPont Co. v. United States*, 297 F. Supp. 2d 740 [D.N.J. 2003]); *In re Reading Co.*, 115 F.3d 1111, 1119 (3d Cir. 1997) (addition of Section 113(f) by SARA replaced judicially created right to contribution under Section 107)).

<sup>12</sup> See, e.g., *Viacom Inc. v. United States*, 404 F. Supp. 2d 3, 7 (D.D.C. 2005) (PRP sued the federal government for recovery of response costs under Section 107(a), and court concluded that a "plain reading" of Section 107 and the Supreme Court's prior ruling in *Key Tronic* compelled a conclusion that a right of cost recovery existed under Section 107(a) for those PRPs not subject to Section 113(f)) (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 [1994]; *Vine St. LLC v. Keeling*, 362 F. Supp. 2d 754, 763-64 (E.D. Tex. 2005) (A PRP property owner who had not yet been sued or settled for purposes of Section 113(f) had an independent cause of action under Section 107(a)(4)(B) for equitable allocation of costs with other PRPs. In so holding, the District Court said "a potentially responsible party that voluntarily works with a government agency to remedy environmentally contaminated property should not have to wait to be sued to recover cleanup costs since Section 113(f)(1) is not meant to be the only way to recover cleanup costs."); *Metro. Water Reclamation*, 365 F. Supp. 2d 913; *Kotrous v. Goss-Jewett Co.*, No. Civ. S02-1520 FCD JFM, 2005 WL 1417152, at \*3 (E.D. Cal. June 16, 2005); *Aggio v. Estate of Aggio*, No. C 04-4358 PJH, 2005 WL 2277037, at \*5 (N.D. Cal. Sept. 19, 2005).

<sup>13</sup> See *Consol. Edison*, 423 F.3d 90.

<sup>14</sup> The scope of *Consolidated Edison* is limited, however, because the 2d Circuit declined to revisit *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), in light of factual differences between the plaintiffs in the two cases. In *Bedford Affiliates* the plaintiff had incurred response costs pursuant to a government consent decree and had been involved in a proceeding apportioning its liability, while the plaintiff in *Consolidated Edison* had incurred its costs voluntarily and was not subject to suit or an administrative proceeding. Finding no conflict, the 2d Circuit read *Bedford Affiliates* to hold that a party who has incurred or is incurring expenditures under a consent order with a government agency and has been found partially liable under Section 113(f)(1) may not seek to recoup those expenditures under Section 107(a). In *Consolidated Edison*, by contrast, the court held that "Section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under Section 107(a), to recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment." *Consol. Edison*, 423 F.3d at 100.

<sup>15</sup> *UGI Utils. Inc. v. Consol. Edison Co. of N.Y. Inc.*, No. 05-1323, petition for cert. filed (U.S. Apr. 14, 2006).

<sup>16</sup> *Metro. Water Reclamation*, 365 F. Supp. 2d 913; *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings*, No. 05-3299, appeal docketed (7th Cir. Aug. 8, 2005).

<sup>17</sup> *Key Tronic*, 511 U.S. 809.

<sup>18</sup> *Metro. Water*, 365 F. Supp. 2d 913.

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

<sup>20</sup> *Kotrous*, 2005 WL 1417152.

<sup>21</sup> See *Kotrous*, 2005 WL 1417152 at \*3; No. 05-80120, appeal docketed (9th Cir. Oct. 21, 2005). See also *Aggio*, 2005 WL 2277037, at \*5; *Adobe Lumber v. Taecker*, No. CV S02-186 GEB GGH, 2005 WL 1367065 (E.D. Cal. May 24, 2005); *Ferguson v. Arcata Redwood Co.*, No. C 03-05632, 2005 WL 1869445, at \*6 (N.D. Cal. Aug. 5, 2005).

<sup>22</sup> *City of Rialto v. U.S. Dep't of Defense*, No. EDCV 04-00079, at \*18-19 (C.D. Cal. Aug. 16, 2005); No. 05-56749, appeal docketed, (9th Cir. Nov. 8, 2005).

<sup>23</sup> *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997).

<sup>24</sup> *City of Rialto v. U.S. Dep't of Defense*, No. 05-56749, brief filed (9th Cir. Apr. 28, 2006).

<sup>25</sup> See, e.g., *United States v. Hunter*, 170 F. Supp. 2d 100 at \*6-7 (C.D. Cal. Nov. 11, 1999); *United States v. Wallace*, 961 F. Supp. 969, 974-75 (N.D. Tex. 1996).

<sup>26</sup> See, e.g., *Pharmacia Corp.*, 382 F. Supp. 2d at 1091.

<sup>27</sup> See EPA Memorandum (Aug. 3, 2005).

<sup>28</sup> Let's say, for example, that company A entered into a consent order with a state to conduct a remedial investigation/feasibility study, or RI/FS, at a former waste disposal site and then went on, under the state's voluntary remediation program and brownfields laws and consistent with the national contingency plan, to remove contaminated source material from the site and install and operate a long-term groundwater monitoring program. Suppose also that company B disposed of an equally large and toxic volume of wastes at the site and declined to respond to the state's call for its participation in the consent order or to company A's repeated demands that it share the costs of implementing the needed remediation program. Suppose also that company B, consistent with the NCP, did segregate and remove from the site the 20 percent of its drums that had not been buried, placed in overpacks several of company A's intermingled drums, and removed and disposed of visibly contaminated soil from beneath all of the drums. When company A sues company B for contribution under Section 113(f)(3)(B), may it seek contribution concerning all of its response costs, the substantial majority of which were incurred on remedial action rather than the RI/FS? Or will company A's claim be limited to contribution for the RI/FS because that was the only "matter addressed" in the consent order?

<sup>29</sup> Interestingly, recognition that a PRP is entitled, in the alternative, to pursue cost recovery under Section 107(a) concerning any response costs it might not be entitled to pursue under Section 113(f)(3)(B) would open the door for resolution of a CERCLA-based contribution counterclaim by the defendant PRP.

<sup>30</sup> See, e.g., *Nutrasweet v. X-L Eng'g Corp.*, 227 F.3d 776, 783-84 (7th Cir. 2000); *Matthews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1520 (D. Colo. 1996); *Volunteers of Am. of W. N.Y. v. Heinrich*, 90 F. Supp. 2d 252, 256-57 (W.D.N.Y. 2000).

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