
Robert P. Redemann

Michael F. Smith

Repository Citation
THE EVOLUTION OF PRP STANDING UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

ROBERT P. REDEMANN & MICHAEL F. SMITH*

INTRODUCTION

The current "hotly-debated legal question"1 under the Comprehensive Environmental Response, Compensation, and Liability Act of 19802 ("CERCLA") is whether potentially responsible parties ("PRPs")3 can pursue

---

* Robert Redemann is a partner in the Tulsa, Oklahoma law firm of Rhodes, Hieronymus, Jones, Tucker & Gable. Mr. Redemann received his B.S. from the University of Wisconsin-Madison in 1973 and his J.D. from the University of Tulsa College of Law in 1978. Michael F. Smith is an associate with the Tulsa, Oklahoma law firm of Rhodes, Hieronymus, Jones, Tucker & Gable. Mr. Smith received his B.S. from Oklahoma State University in 1987 and his J.D. from the University of Tulsa College of Law in 1991.

3 See 42 U.S.C. § 9607(a) (1994). That section lists four categories of PRPs:

(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 . . . .

Id.
a cost recovery action under section 107(a) of CERCLA, or whether PRPs are limited to a contribution action under section 113(f) of CERCLA. The federal courts are split on the resolution of this issue. The inconsistency among the federal courts of appeals can be explained by categorizing the cases based on whether there has been an adjudication of liability with respect to the Superfund site prior to the PRP seeking costs. Where there has not been an adjudication of liability, a PRP who cleans up a site is permitted to seek response costs under section 107(a) as an initial action. Where a PRP’s liability with respect to a Superfund site has been adjudicated, however, whether through a consent decree or a trial, then any subsequent action for costs is truly a contribution action and should be brought pursuant to section 113(f). A recent trend, however, has emerged in the federal district courts indicating that PRPs can pursue cost recovery actions under section 107(a) based on the plain language of CERCLA, without need for categorizing the authority based upon whether liability with respect to the Superfund site has been adjudicated.

4 Id. That section provides that PRPs are 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 health assessment or health effects study carried out under section 9604(i) of this title.

Id. § 9607(a)(4).

5 Id. § 9613(f). That section provides:
   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 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. § 9613(f)(1).
This article argues that a PRP who finances a Superfund cleanup without an adjudication of liability, regardless of that PRP's motivation, should be permitted to pursue a cost recovery action under section 107(a) as an initial action. This interpretation of CERCLA is consistent with the plain language of the statute, Congress' intent in enacting CERCLA, and the public policy behind CERCLA. Despite the plain language of the statute, numerous courts have limited PRPs to contribution actions under section 113(f). The ultimate resolution of the issue of PRP standing under section 107(a), either by Congress or the U.S. Supreme Court, will have a monumental impact on the future effectiveness of the cleanup of Superfund sites throughout the United States. A resolution which permits PRPs to pursue a cost recovery action as an initial action under section 107(a) would encourage PRPs to cooperate with the government and finance the prompt cleanup of Superfund sites. Such a result would be consistent with Congress' objectives in enacting CERCLA.

I. A COMPARISON OF COST RECOVERY ACTIONS UNDER SECTION 107(a)
AND CONTRIBUTION ACTIONS UNDER SECTION 113(f)

Section 107(a)(4)(B) of CERCLA provides a cause of action for persons to seek recovery of cleanup costs. Under section 107(a)(4)(B), any person who conducts the cleanup of a Superfund site can file a cost recovery action to seek any "necessary costs of response incurred by [that] person consistent with the national contingency plan" ("NCP"). That cost recovery action may be brought against any PRP.

Section 107(a)(4)(B) offers an attractive cause of action to those who funded the cleanup of a Superfund site and are subsequently seeking response costs from PRPs. Under section 107(a)(4)(B), defendants are held jointly and severally liable for all costs incurred. Such liability enables the person who

6 See Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994).
8 See id. § 9607(a).
funded the cleanup to hold all PRPs liable for the entire amount of the cleanup costs consistent with the NCP. Additionally, a cost recovery action under section 107(a) has a lengthy six-year statute of limitations for remedial actions, which begins to run upon the "initiation of physical on-site
construction of the remedial action,"11 and a three-year statute of limitations from completion of a removal action.12

Contribution actions, on the other hand, are less favored by those persons who funded the cleanup of a Superfund site and are subsequently seeking response costs from PRPs. Under contribution, liability is arguably several only.13 Furthermore, numerous apportionment issues become relevant under contribution’s several liability which generally are not at issue when defendants face joint and several liability.14 The presence of these issues

---

11 See 42 U.S.C. § 9613(g)(2). That section pertinently provides:

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

Id.


14 Frequently, some defendants will settle their liability prior to trial. As some defendants settle, the issue arises regarding the appropriate credit rule to be applied to account for the amounts for which liability has been settled. There are two possible methods for allocating the response costs still owing after some, but not all, defendants negotiated settlements. Courts can either apply the pro tanto allocation method adopted by section 2 of the Uniform Contribution Among Tortfeasors Act (“UCATA”), 12 U.L.A. 194, 246 (1996), and section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), or the proportionate allocation method adopted by section 2 of the Uniform Comparative Fault Act (“UCFA”), 12 U.L.A. 126, 135-36.

Under pro tanto allocation, defendants who refuse to settle prior to trial are held jointly and severally liable for all remaining costs. When pro tanto allocation is used, the defendants bear the settlement risk. Defending parties may elect to forego settlement and
places a greater burden on the plaintiff-PRP at trial. Finally, contribution actions have a shorter, three-year statute of limitations which accrues upon the occurrence of one of four liability-fixing events.\textsuperscript{15}

have their liability fully adjudicated. They bear the risk, however, that the negotiated settlements will be lower than the settling defendants’ collective fault. This results from subtracting the settling defendants’ settlement amounts from the plaintiffs’ total damages, not from subtracting the settling defendants’ liability percentage. Therefore, non-settling defendants could be found jointly and severally liable for the remainder of the damages not settled, regardless of their actual collective percentage of fault. \textit{See, e.g.}, Atlantic Richfield Co. v. American Airlines, Inc., 836 F. Supp. 763, 771 n.11 (N.D. Okla. 1993).

Under proportionate allocation, all defendants’ percentage of liability is determined at trial, and each non-settling defendant can be held liable for no more than the percentage attributable to them based on the determination at trial. The amount of settlements is irrelevant in that each non-settling defendant pays only its percentage of liability, regardless of the settlement amounts. The plaintiff bears the settlement risk under proportionate allocation. If a plaintiff chooses to settle with a defendant, the plaintiff runs the risk that at trial, the percentage of that settling party’s liability will be deemed higher than the percentage for which the plaintiff settled. Because the non-settling defendants will only be liable for an amount the court determines, a non-settling defendant bears no risk when other parties settle. As a result, plaintiffs and defendants are adverse to settlement, and trials become longer and more complicated.

\textsuperscript{15} \textit{See} 42 U.S.C. § 9613(g)(3). That section pertinently provides:

\noindent No action for contribution for any response costs or damages may be commenced more than 3 years after—

\begin{enumerate}
\item[(A)] the date of judgment in any action under this chapter for recovery of such costs or damages, or
\item[(B)] the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.
\end{enumerate}

\textit{Id.}

Recently, the United States District Court for the Northern District of Oklahoma held that, where none of the express triggering events under section 113(g)(3), 42 U.S.C. § 9613(g)(3), have occurred, such as where an alleged PRP cleans up a Superfund site based on an EPA unilateral administrative order pursuant to section 106, 42 U.S.C. § 9606, then a “gap” exists in the statute of limitations which the court must fill in. \textit{See} Sun Co. v. Browning-Ferris, Inc., 919 F. Supp. 1523 (N.D. Okla. 1996). In \textit{Sun Co.}, the court borrowed statute of limitations analysis from admiralty jurisprudence and concluded that the statute of limitations began running when plaintiffs paid more than their fair share of the costs of cleaning up the Superfund site. \textit{See} 919 F. Supp. at 1531. This ruling is inconsistent with the express triggering events provided by Congress in section 113(g)(3), which all have in common a concrete, liability-fixing event through adjudication or finalized settlement. \textit{See} 42 U.S.C. § 9613(g)(3). Plaintiffs petitioned for and obtained interlocutory appeal to the
PRPs who have funded costly cleanups of Superfund sites prefer the advantageous cost recovery action under section 107(a)(4)(B) over the more restrictive contribution action under section 113(f). As such, the courts have become the battleground for PRPs fighting for joint and several liability and the longer statute of limitations in cost recovery actions against other PRPs. Thus far, the courts have been inconsistent in resolving this seemingly straightforward, but critically important, issue.

II. THE HISTORICAL DEVELOPMENT OF PRP STANDING UNDER SECTION 107(a) OF CERCLA

As originally enacted, CERCLA provided only one cause of action—a cost recovery action under section 107(a). Courts concluded this cause of action existed on behalf of PRPs who financed Superfund cleanups, noting that under the plain language of CERCLA, PRPs are liable for all response costs incurred by governmental entities or by "any other person" who funded the cleanup.\(^\text{16}\) Courts held defendants jointly and severally liable for the total cost of the Superfund cleanup.\(^\text{18}\) Courts also found an implied right of contribution in favor of the defendants in a section 107(a) action to balance the inequities created when one or only a few PRPs were targeted in the initial cost recovery action.\(^\text{19}\)

Congress enacted the Superfund Amendments and Reauthorization Act of 1986\(^\text{20}\) ("SARA"), which amended CERCLA, to clarify and confirm

---


\(^{19}\) See e.g., County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1515-16 (10th Cir. 1991).

the judicially created right of contribution under CERCLA. Congress added the right of contribution under section 113(f). Congress did not, however, delineate the relationship between section 107(a) and section 113(f). It is the indistinct interplay between these two provisions that has caused problems for courts confronting the issue of whether, in light of the 1986 amendments to CERCLA, a PRP has standing to pursue a cost recovery action under section 107(a). When CERCLA’s provisions are read as a whole, in statutory and historical context, it becomes clear that PRPs are permitted to pursue cost recovery actions under section 107(a) in initial actions. Any other conclusion rewrites CERCLA and seriously undermines the future effectiveness of Superfund cleanups in the United States.

III. THE PLAIN LANGUAGE OF CERCLA PERMITS PRPs TO PURSUE RESPONSE COSTS FROM OTHER PRPs UNDER SECTION 107(a)(4)(B) OF CERCLA

A comprehensive and critical review of CERCLA’s relevant provisions leads to only one logical conclusion: where liability has not been adjudicated with respect to a Superfund site, a PRP which cleaned up that site can seek response costs from other PRPs under section 107(a) as an initial action.

The relevant CERCLA language is clear and unambiguous when read as a whole. CERCLA classifies four categories of persons as PRPs: (1) current owners and operators of sites; (2) past owners or operators of sites; (3) arrangers for the treatment or disposal of hazardous substances; and (4) transporters of hazardous substances to disposal or treatment facilities. These four categories of PRPs are 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; [and] (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan." Under the plain language of section 107(a)(4)(B), PRPs are liable for any necessary response costs incurred by

22 See 42 U.S.C. § 9613(f) (1994); see also supra note 5.
23 See id. § 9607(a).
24 Id.; see also supra note 4.
"any other person" consistent with the NCP. The term "person" is broadly defined under CERCLA: "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." There is no requirement in the statute that "any other person" must be someone other than a PRP.

The "other" in the "any other person" language refers to persons other than the United States government, states, or Indian tribes, to which PRPs are liable for costs of removal or remedial actions under section 107(a)(4)(A). Courts have consistently held that the "other" does not mean non-PRPs. PRPs are liable to "the United States Government or a State or an Indian tribe" for "costs of removal or remedial action" under section 107(a)(4)(A). Pursuant to section 107(a)(4)(B), however, PRPs are liable to "any other person" who incurred "any other necessary costs of response" consistent with the NCP. "Any other person" refers to some person other than the United States government, states, or Indian tribes, rather than to a person other than a PRP.

Based on the plain language of CERCLA, a PRP is liable to any person who incurs response costs consistent with the NCP. Incurring response costs which are consistent with the NCP are the only two conditions placed on a plaintiff's right to seek response costs under section 107(a). "[T]he test as to whether a private party may utilize Section 107 does not rest on whether that party is liable, or potentially liable. Rather, it depends on whether such party has incurred 'necessary costs of response.'" Adding an "innocent" element to the liability scheme "adds needless confusion to the determination of who may utilize Section 107. It involves the Court in predicting, prior to trial, whether a party may also share liability with

---

26 Id. § 9601(21).
27 See id. § 9607(a)(4)(A).
30 Id. § 9607(a)(4)(B).
31 See id.
defendants for the environmental cleanup." Even if a party's liability for hazardous substances at a site is undisputed, that party's ability to seek response costs from other PRPs is not limited to contribution actions under the plain language of CERCLA.

IV. RECENT JUDICIAL INTERPRETATIONS OF CERCLA HAVE NOT CONSISTENTLY PERMITTED PRPs TO PURSUE COST RECOVERY UNDER SECTION 107(a)(4)(B) OF CERCLA

A common theme emerges upon a close review of the body of case law that has confronted PRP standing under section 107(a). A PRP is permitted to pursue cost recovery actions under section 107(a) if that PRP cleaned up a Superfund site without an adjudication of liability and subsequently, in an initial action, seeks to recover the costs expended in cleaning up the site. Where there has been an adjudication, however, the action truly sounds in contribution and should be brought under section 113(f).

Two lines of case law support this interpretation of CERCLA. The first line of case law comes from those cases which have allowed PRPs to seek response costs from other PRPs under section 107(a) when there has not been a prior "civil action." The second line of case law comes from those cases which have limited PRPs to contribution actions when the PRP's claim

33 Id. at 363-64.

was preceded by a "civil action" under sections 106 or 107, where liability with respect to the Superfund site had been adjudicated.\textsuperscript{35}

No inconsistency exists in grouping these cases based upon this method of analysis.\textsuperscript{36} Rather, a common theme emerges. If a "civil action" has been filed by any governmental or private party (whether or not such party is a PRP) which results in an adjudication of liability, then a PRP can only seek reimbursement through contribution under section 113(f). However, where no "civil action" has been filed and there has been no adjudication of liability, a PRP can seek response costs in an initial civil action under section 107(a). Any defendant-PRP in this initial action will be limited to a contribution action against any other PRP, including the plaintiff-PRP, pursuant to section 113(f).

This interpretation gives meaning to the language of the statute of limitations provision in section 113(g)(2) that "[a]n initial action for recovery of costs referred to in section 9607... must be commenced... for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action."\textsuperscript{37} Actions by PRPs other than the "initial" action are contribution actions subject to the three-year statute of limitations of section 113(g)(3).\textsuperscript{38}

\section{A. The United States Supreme Court Impliedly Permits PRPs to Pursue Cost Recovery Actions Against Other PRPs Under Section 107(a)}

In \textit{Key Tronic Corp. v. United States},\textsuperscript{39} the U.S. Supreme Court impliedly ruled that one PRP could seek response costs from another PRP under section 107(a) where there had been no prior initial action as to those costs.\textsuperscript{40} The Supreme Court concluded that "[section] 107 unquestionably

\begin{itemize}
\item \textsuperscript{36} But see Adhesives Research Inc. v. American Inks & Coatings Corp., 931 F. Supp. 1231, 1241 (M.D. Pa. 1996) (noting that "[t]he contradictory outcomes appear to derive more from two differing interpretations of CERCLA, its policy goals, and the proper means of effectuating those goals, than from factual distinctions in the cases").
\item \textsuperscript{37} 42 U.S.C. § 9613(g)(2) (1994) (emphasis added).
\item \textsuperscript{38} \textit{Id.} § 9613(g)(3); see also supra note 15.
\item \textsuperscript{39} 511 U.S. 809 (1994).
\item \textsuperscript{40} See \textit{id.} at 811.
\end{itemize}
provides a cause of action for private parties to seek recovery of cleanup costs" in a suit where one PRP had sued other PRPs for cost recovery under section 107(a).\textsuperscript{41}

In \textit{Key Tronic}, various lawsuits arose out of a Superfund site cleanup, including formal proceedings against Key Tronic, the United States Air Force, and other parties.\textsuperscript{42} Two of those proceedings concluded in settlements.\textsuperscript{43} In one settlement with EPA, Key Tronic agreed to contribute $4.2 million to an EPA cleanup fund.\textsuperscript{44} In the other settlement with EPA, the Air Force agreed to pay EPA $1.45 million.\textsuperscript{45}

Key Tronic subsequently brought suit pursuant to section 107(a)(4)(B), seeking $1.2 million for response costs that it incurred before, and were not part of, the settlements.\textsuperscript{46} On appeal to the Supreme Court, the relevant issue was whether Key Tronic, a PRP,\textsuperscript{47} was entitled to recover attorneys' fees as part of "response costs" under section 107(a).\textsuperscript{48} The Supreme Court had to resolve the attorneys' fees issue in the context of a suit by one PRP against another PRP seeking response costs under section 107(a)(4)(B).

The Supreme Court concluded that one PRP could sue other PRPs under section 107(a)(4)(B) to seek response costs where those response costs were incurred before, and independently of, any settlements.\textsuperscript{49} The Court concluded that the 1986 amendments supported the pre-amendment cases which permitted a PRP to seek response costs under section 107(a) from other PRPs.\textsuperscript{50} The majority opinion stated section 107(a) "unquestionably" provides a private cause of action by a PRP.\textsuperscript{51} Hence, response costs incurred before a CERCLA initial action are not part of a civil action referred to in

\textsuperscript{41} Id. at 818.
\textsuperscript{42} See id. at 811.
\textsuperscript{43} See id.
\textsuperscript{44} See id.
\textsuperscript{45} See id.
\textsuperscript{46} See id. at 812.
\textsuperscript{47} See id. at 813.
\textsuperscript{48} See id.
\textsuperscript{49} See id. at 819.
\textsuperscript{50} See id. at 816.
\textsuperscript{51} Id. at 818. The majority concluded that the private right of action on behalf of PRPs was implicit under section 107(a). \textit{See id.} at 818 n.11. Justice Scalia, joined by Justices Blackmun and Thomas, dissenting on the attorneys' fees issue, stated that section 107(a) expressly provides a private cause of action that extends to PRPs. \textit{See id.} at 821.
section 113(f)(1) and, therefore, recovery of those costs is not limited to a contribution action.\textsuperscript{52}

B. The Circuit Courts of Appeals Actually Confronting the Issue of Whether PRPs Can Pursue Cost Recovery Actions Under Section 107(a) Have Been Few and Inconsistent

Some circuit courts of appeals have concluded that PRPs cannot seek response costs under section 107(a). There is no clear majority, however, in the circuit courts denying PRP standing under section 107(a). Indeed, the number of circuit courts to squarely confront this issue is minimal.

Numerous circuit courts of appeals\textsuperscript{53} have issued opinions which seemingly confront the issue of PRP standing under section 107(a): General Electric Co. v. Litton Industrial Automation Systems, Inc.;\textsuperscript{54} Control Data Corp. v. S.C.S.C. Corp.;\textsuperscript{55} Velsicol Chemical Corp. v. Enenco, Inc.;\textsuperscript{56} United States v. Colorado & Eastern Railroad Co.;\textsuperscript{57} Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.;\textsuperscript{58} In re Dant & Russell, Inc. v. Burlington Northern Railroad Co.;\textsuperscript{59} United Technologies Corp. v. Browning-Ferris Industries, Inc.;\textsuperscript{60} Akzo Coatings, Inc. v. Aigner Corp.;\textsuperscript{61}

\textsuperscript{52} See id. at 816.

\textsuperscript{53} The Court of Appeals for the Second Circuit has not yet addressed this issue. Consequently, the district court opinions in that circuit have reached inconsistent conclusions. Compare Idylwoods Assocs. v. Mader Capital, 915 F. Supp. 1290, 1314 (W.D.N.Y. 1996), and Town of Wallkill v. Tesa Tape Inc., 891 F. Supp. 955, 959 (S.D.N.Y. 1995) (holding that PRPs may pursue cost recovery actions under section 107(a)), with Town of New Windsor v. Tesa Tuck, Inc., 919 F. Supp. 662, 681 (S.D.N.Y. 1996) (holding that PRPs are limited to contribution actions under section 113(f)). Likewise, neither the Fourth Circuit nor the Eleventh Circuit have issued opinions dealing with the issue of PRP standing under section 107(a). But see notes 235-41 and accompanying text for a discussion of the district court opinions from the Fourth Circuit confronting this issue.

\textsuperscript{54} 920 F.2d 1415 (8th Cir. 1990); see infra Part IV.B.1.

\textsuperscript{55} 53 F.3d 930 (8th Cir. 1995); see infra Part IV.B.2.

\textsuperscript{56} 9 F.3d 524 (6th Cir. 1993); see infra Part IV.B.3.

\textsuperscript{57} 50 F.3d 1530 (10th Cir. 1995); see infra Part IV.B.4.

\textsuperscript{58} 100 F.3d 792 (10th Cir. 1996); see infra Part IV.B.5.

\textsuperscript{59} 951 F.2d 246 (9th Cir. 1991); see infra Part IV.B.6.

\textsuperscript{60} 33 F.3d 96 (1st Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995); see infra Part IV.B.7.

\textsuperscript{61} 30 F.3d 761 (7th Cir. 1994); see infra Part IV.B.8.
Amcast Industrial Corp. v. Detrex Corp.;\textsuperscript{62} Amoco Oil Co. v. Borden, Inc.;\textsuperscript{63} and Smith Land & Improvement Corp. v. Celotex Corp.\textsuperscript{64} Each opinion will be discussed separately. As will be shown, the authority which actually supports the proposition that PRPs can only seek contribution under section 113(f) is minimal.


In \textit{General Electric Co. v. Litton Industrial Automation Systems, Inc.},\textsuperscript{65} the Court of Appeals for the Eighth Circuit, without confronting the issue head on, permitted a PRP to pursue a cost recovery action under section 107(a). Litton's predecessor in interest operated a typewriter plant on a site in Missouri.\textsuperscript{66} As part of that plant process, cyanide-based electroplating wastes, sludge, and other pollutants were dumped on the plant site.\textsuperscript{67} Litton eventually closed down the plant and sold the property to General Electric ("GE").\textsuperscript{68} The Missouri Department of Natural Resources ("MDNR") learned of the hazardous substances at the site and notified GE.\textsuperscript{69} MDNR and GE concluded that there was no potential for ground water contamination and performed no cleanup of the site.\textsuperscript{70} GE thereafter sold the contaminated portion of the property to Enterprise Park without disclosing the contamination at the property.\textsuperscript{71} Subsequently MDNR changed course and pursued the cleanup of the site.\textsuperscript{72} GE, as the former owner of the site, conducted the cleanup following a threat of a lawsuit by Enterprise Park based on GE's failure to disclose the condition of the property.\textsuperscript{73} Upon completion of the cleanup, GE filed a cost recovery action pursuant to section 107(a).\textsuperscript{74}

\textsuperscript{62} 2 F.3d 746 (7th Cir. 1993); see infra notes 180-81 and accompanying text.
\textsuperscript{63} 889 F.2d 664 (5th Cir. 1989); see infra Part IV.B.9.
\textsuperscript{64} 851 F.2d 86 (3d Cir. 1988); see infra Part IV.B.10.
\textsuperscript{65} 920 F.2d 1415 (8th Cir. 1990).
\textsuperscript{66} See id. at 1416.
\textsuperscript{67} See id.
\textsuperscript{68} See id.
\textsuperscript{69} See id.
\textsuperscript{70} See id.
\textsuperscript{71} See id.
\textsuperscript{72} See id.
\textsuperscript{73} See id. at 1417-18.
\textsuperscript{74} See id. at 1417.
The court permitted the section 107(a) action by GE, a former landowner and thus a PRP, against Litton. Litton raised the defense of unclean hands, claiming that GE’s motivation for cleaning up the site was the threat of a lawsuit by Enterprise Park. Rejecting the unclean hands defense to CERCLA liability, the court held:

[T]he motives of the private party attempting to recoup response costs under 42 U.S.C. § 9607(a)(4)(B) are irrelevant. The purpose of allowing a private party to recover its response costs is to encourage timely cleanup of hazardous waste sites. This purpose would be frustrated if a plaintiff’s motives were subject to question. We will not look at the impetus behind a plaintiff’s decision to begin the cleanup process; we will look only to see if there has been a release or threatened release for which the defendant is responsible.

Therefore, the Eighth Circuit permitted a cost recovery action under section 107(a) by one PRP against another PRP, concluding that such an action was consistent with Congress’ intent in enacting CERCLA.

2. Control Data Corp. v. S.C.S.C. Corp.

In Control Data Corp. v. S.C.S.C. Corp., the Court of Appeals for the Eighth Circuit again did not squarely confront the issue of whether a PRP may pursue a cost recovery action under section 107(a). In Control Data, a PRP entered into a consent decree with a state governmental agency

---

75 See id. at 1418.
76 See id. at 1417-18.
77 Id. at 1418.
78 53 F.3d 930 (8th Cir. 1995).
79 See Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc., 925 F. Supp. 624, 630 (E.D. Mo. 1996) (noting that the Eighth Circuit in Control Data did not address the issue of PRP standing under section 107(a)). The inconsistency of the Eighth Circuit’s opinions in Control Data and General Electric has led to inconsistent district court opinions within that circuit. Compare Laidlaw Waste Sys., 925 F. Supp. 624 (holding that PRPs may assert cost recovery claims under section 107(a)), with Reynolds Metals Co. v. Arkansas Power & Light Co., 920 F. Supp. 991 (E.D. Ark. 1996) (stating that PRPs are limited to contribution claims under section 113(f)).
agreeing to clean up a hazardous substance contamination. Subsequently, that PRP sued another PRP for response costs under CERCLA and Minnesota’s state law equivalent. The trial court allocated the costs of remediating the site between the two PRPs and awarded the plaintiff-PRP attorneys’ fees. On appeal, the defendant-PRP challenged the method of allocation and the award of attorneys’ fees.

The court of appeals affirmed the trial court, holding generally that once liability is established, the issue becomes one of allocation, which entails a contribution claim controlled by section 113(f). The opinion contains no other discussion of the balance or interplay between sections 107(a) and 113(f), nor the competing interests presented when deciding whether PRPs should be permitted to pursue cost recovery actions under section 107(a). The opinion does not squarely confront the issue of PRP standing under section 107(a).

Control Data does not support the proposition that one PRP may never pursue a cost recovery action against other PRPs under section 107(a). The decision is consistent with the theory behind the two line of cases suggested above: a cost recovery action is permitted by a PRP as an initial action; however, “[o]nce liability is established, the focus shifts to

---

80 See Control Data, 53 F.3d at 933. The site had been contaminated with 1,1,1 trichloroethane (“TCA”) and tetrachloroethylene (“PERC”). See id. at 932. Control Data had deposited the TCA at the site, but claimed that it was not responsible for the PERC contamination. See id. at 933. After Control Data denied any responsibility for the PERC, the state environmental agency searched for other contributors. See id. It located S.C.S.C. Corporation, a successor in interest to a corporation which deposited the PERC at the site. See id.

81 See id. at 932; see also Minnesota Environmental Response and Liability Act, MINN. COMP. LAWS ANN. §§ 115B.01-.51 (West 1987 & Supp. 1997). It is unclear from the opinion whether the plaintiff alleged a cause of action for cost recovery or contribution, or both.

82 See Control Data, 53 F.3d at 932. Even though the defendant-PRP contributed 10% of the chemical contamination, the trial court allocated one-third of the liability to the defendant-PRP because the chemical that PRP contributed to the site was more toxic than the chemical contributed to the site by the plaintiff-PRP. See id. at 933.

83 See id. The trial court awarded attorney fees under CERCLA and the state equivalent. See id.

84 See id. at 939. The court of appeals reversed that portion of the attorneys’ fees award under CERCLA, relying on the U.S. Supreme Court’s opinion in Key Tronic. See id.

85 See id. at 935.
allocation,\textsuperscript{86} and the only cause of action available at that juncture is contribution under section 113(f). In \textit{Control Data}, the liability of the plaintiff-PRP with respect to the site had previously been adjudicated, as evidenced by the fact that the PRP had entered into a consent decree with the Minnesota Pollution Control Agency,\textsuperscript{87} and the fact that the court turned to allocation only after noting that "liability [had been] established."\textsuperscript{88} \textit{Control Data} does not support the proposition that a PRP can only sue other PRPs for contribution under section 113(f).

3. Velsicol Chemical Corp. v. Enenco, Inc.

Similarly, in \textit{Velsicol Chemical Corp. v. Enenco, Inc.},\textsuperscript{89} without squarely confronting this issue, the Court of Appeals for the Sixth Circuit permitted one PRP to seek response costs from other PRPs under section 107(a).\textsuperscript{90} Velsicol and other hazardous substance contributors cleaned up a municipal landfill at the insistence of the EPA.\textsuperscript{91} Subsequently, Velsicol sued other PRPs for recovery of response costs under section 107(a), and for contribution under section 113(f).\textsuperscript{92} The district court granted summary

\textsuperscript{86} Id.
\textsuperscript{87} See id. at 933. The Court noted that Control Data, the plaintiff-PRP, had entered into a consent decree that required Control Data to investigate, monitor, and clean up the contamination by installing a remediation system to remove the hazardous contaminants. See id.
\textsuperscript{88} Id. at 935. The court did not analyze the issue further, other than merely to note that liability had been established. See id.
\textsuperscript{89} 9 F.3d 524 (6th Cir 1993).
\textsuperscript{91} See Velsicol, 9 F.3d at 526.
\textsuperscript{92} See id. at 527.
judgment for Enenco on both claims, concluding that Velsicol’s cost recovery action was barred by the statute of limitations and the doctrine of laches.93

The Sixth Circuit reversed the district court, concluding that the statute of limitations did not apply retroactively and that there were no equitable defenses, such as laches, to CERCLA liability.94 Thus, the appellate court reinstated Velsicol’s cost recovery action under section 107(a).95 Therefore, despite Velsicol’s status as a PRP, Velsicol was permitted to pursue a cost recovery action under section 107(a).96


Similarly, United States v. Colorado & Eastern Railroad Co.97 does not support the proposition that a PRP may never pursue a cost recovery action under section 107(a). Rather, Colorado & Eastern stands for the limited proposition that once the EPA obtains a judgment in a civil action adjudicating a PRP’s liability, that PRP may not sue other PRPs for cost

93 See id.
94 See id. at 530. The Sixth Circuit commented that CERCLA liability is barred only “by a limited number of enumerated causation-based affirmative defenses.” Id. The defenses listed in section 107(a) constitute the “universe of defenses” to CERCLA liability. Id. (citing General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1418 (8th Cir. 1990)).
95 See id. The district court also dismissed Velsicol’s section 113(g) contribution claim because that claim was dependant upon a valid cost recovery claim under section 107(a). See id. at 527. In reinstating Velsicol’s cost recovery claim, the appellate court also reinstated Velsicol’s contribution claim. See id. at 531.
97 50 F.3d 1530 (10th Cir. 1995).
recovery under section 107(a), but instead, may only sue for contribution under section 113(f).\(^9\)

In *Colorado & Eastern*, EPA sued four PRPs—Farmland, McKesson, Colorado & Eastern Railroad Co. ("CERC"), and Maytag—seeking response costs under section 107(a).\(^9\) As a result of EPA's suit, Farmland and McKesson entered into a judicaily approved consent decree, thereby agreeing to finance and perform all remediation of the site and to pay a portion of EPA's past response costs.\(^10\) Farmland and McKesson completed the remediation at a cost in excess of $15 million.\(^11\) That figure included money spent for additional remediation work made necessary because CERC made a cut in a drainage ditch, and because CERC failed to fence portions of the site.\(^12\)

In EPA's initial cost recovery suit, all four defendants asserted cross-claims against each other.\(^13\) Farmland asserted a cross-claim against CERC seeking a portion of the additional remediation costs caused by CERC's actions at the site.\(^14\) All of the defendants' cross-claims were settled before trial except Farmland's cross-claim against CERC.\(^15\) Therefore, after the court adjudicated liability and entered judgment for the EPA, the only remaining issue was CERC's liability to Farmland for a portion of the additional remediation costs.\(^16\)

Under these circumstances, the Court of Appeals for the Tenth Circuit concluded that Farmland's claim against CERC was really a contribution

---


\(^9\) *See* *Colorado & Eastern*, 50 F.3d at 1533.

\(^10\) *See* id.

\(^11\) *See* id.

\(^12\) *See* id. at 1533 n.1.

\(^13\) *See* id. at 1533.

\(^14\) *See* id.

\(^15\) *See* id.

\(^16\) *See* id.
claim under section 113(f). Because the judicially approved consent decree was for all remedial work, it included the additional remedial work for which Farmland sought reimbursement from CERC. Therefore, the court held that Farmland could not seek response costs under section 107(a), but rather, was limited to a section 113(f) action. Tellingly, in Colorado & Eastern the court did not cite to any of the case law available at that time which limited a PRP to contribution actions based on the PRPs' status as a PRP. Rather, the court based its decision on the unique facts presented: a PRP seeking response costs from other PRPs following a prior adjudication of liability with respect to a Superfund site.

The principle to be derived from Colorado & Eastern is that, where there has been an "initial action" which is a civil action, a PRP seeking response costs is limited to a contribution action. If a civil action, such as a section 107(a) action, is filed by any person, then a defendant-PRP can only seek reimbursement from other PRPs through contribution. However, where no prior civil action has been filed, a PRP can seek reimbursement through section 107(a) as an "initial action."

At least one district court opinion has criticized Colorado & Eastern for ignoring Key Tronic. However, the factual and procedural distinctions between Colorado & Eastern and Key Tronic are such that the two cases can easily be reconciled within the context of permitting PRPs to pursue cost recovery actions under section 107(a), unless there has been some other initial action.

In Colorado & Eastern, a defendant-PRP in a section 107(a) civil action sought response costs from another defendant-PRP for additional remediation work conducted as part of the consent decree entered in that suit. Because there was a prior civil action covering the costs the plaintiff-PRP sought, that PRP's action against the defendant-PRP was truly a contribution action. In Key Tronic, however, the plaintiff-PRP sought response costs from the defendant-PRP which the plaintiff-PRP had incurred before settlement with the EPA, and which costs were not part of EPA's

107 See id. at 1536.
108 See id.
109 See id.
111 See Colorado & Eastern, 50 F.3d at 1533.
section 107(a) action or the consent decree arising as a result of that action.\(^\text{112}\)

In *Key Tronic*, because the response costs were incurred independently of the consent decree and before the civil action by EPA, the plaintiff-PRP was permitted to pursue cost recovery against the defendant-PRP under section 107(a).\(^\text{113}\)

5. Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.

In *Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.*,\(^\text{114}\) the Court of Appeals for the Tenth Circuit wrote dicta which seemingly supports the proposition that a PRP should be limited to a contribution action under section 113(f).\(^\text{115}\) Upon a closer review, however, *Bancamerica* does not support limiting PRP standing to section 113(f), and is, in fact, consistent with the delineation of the two lines of cases discussed in this article. In *Bancamerica*, liability with respect to the Superfund site had been adjudicated, as evidenced by the consent decree.\(^\text{116}\) Under these circumstances, when Bancamerica sought costs it had incurred at the site for which it had settled its liability, the claim was a “quintessential claim for contribution.”\(^\text{117}\)


In *In re Dant & Russell, Inc. v. Burlington Northern Railroad Co.*,\(^\text{118}\) the Court of Appeals for the Ninth Circuit dealt indirectly with the PRP standing issue in the context of a bankruptcy matter. Burlington Northern Railroad (“BNR”) filed a claim against the bankruptcy estate of Dant & Russell (“D&R”).\(^\text{119}\) BNR sought recovery of cleanup costs incurred and

\(^\text{112}\) See *Key Tronic Corp. v. United States*, 511 U.S. 809, 813 (1994).

\(^\text{113}\) See *id.* at 819.

\(^\text{114}\) 100 F.3d 792 (10th Cir. 1996).

\(^\text{115}\) See *id.* at 800-01.

\(^\text{116}\) See *id.* at 795.

\(^\text{117}\) *Id.* at 800 (quoting United States v. Colorado & E. R.R. Co., 50 F.3d 1530, 1536, 1538 (10th Cir. 1995)).

\(^\text{118}\) 951 F.2d 246 (9th Cir. 1991).

\(^\text{119}\) See *id.* at 247.
expected under section 107(a) based on an EPA order for a site owned by BNR and leased to D&R. The bankruptcy court awarded all costs requested by BNR against the bankruptcy estate.

On appeal, the sole issue before the court was the bankruptcy court’s award of future cleanup costs. D&R claimed that the future costs award should have been disallowed pursuant to section 502(e)(1)(B) of the Bankruptcy Code. The court began its analysis by noting that a claim against a bankruptcy estate will only be disallowed under section 502(e)(1)(B) where: (1) the claim is for reimbursement or contribution; (2) the party asserting the claim is liable with the debtor on the claim; and (3) the claim is contingent. The court concluded that BNR’s claim failed to satisfy the second co-liability requirement, and therefore it allowed BNR’s claim against the bankruptcy estate.

In so holding, the court acknowledged that it is well settled that section 107(a) “permits a private party to recover from a responsible party response costs it incurs itself in conducting cleanup pursuant to CERCLA—even absent intervention by the state.” Permitting private actions encourages quick, voluntary remediation of environmental hazards.

---

120 BNR sought a total of $14,235,700 from D&R. See id. Only about $1 million of that amount had actually been expended by BNR at the time it filed its claim in the bankruptcy action. See id.

121 See id. D&R operated the leased premises as a wood treatment plant from 1971 to 1983. See id. Previous tenants on the property similarly had used the premises for wood treatment. See id. D&R filed for bankruptcy under chapter 11 in 1982. See id.

122 See id.

123 See id.

124 See id. Section 502(e)(1) provides:

[T]he court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured, the claim of a creditor, to the extent that—

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution . . . .


125 See Dant & Russell, 951 F.2d at 248 (citation omitted).

126 See id.

127 Id. (citing Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986)).

128 See id.
The court’s language indicates a broad interpretation of CERCLA to further public policy goals of quickly cleaning up hazardous substances.

Despite this public policy statement, however, it is possible to read *Dant & Russell* as narrowing the court’s interpretation of CERCLA. This narrowing occurred when the court indicated that section 113(f) applied because: (1) BNR admitted CERCLA liability; (2) D&R’s action was a civil action under section 107(a); and (3) D&R argued that BNR should contribute to the cleanup costs.\(^{129}\)

The *Dant & Russell* opinion is confusing. It is impossible to predict, based on *Dant & Russell*, whether the Ninth Circuit, when squarely confronted with the issue, will permit a PRP to pursue a cost recovery action under section 107(a).\(^{130}\) Indeed, other courts have acknowledged that the *Dant & Russell* opinion is unclear, noting that “[c]ourts have read this opinion as both endorsing and prohibiting a PRP cost recovery action.”\(^{131}\)

---

\(^{129}\) *See id.* at 249.

\(^{130}\) The lack of clarity provided by the Ninth Circuit’s opinion in *Dant & Russell* has led to inconsistent district court opinions within that circuit. *Compare* Pinal Creek Group *v.* Newmont Mining Corp., 926 F. Supp. 1400 (D. Ariz. 1996), *and* Transportation Leasing Co. *v.* California, 861 F. Supp. 931 (C.D. Cal. 1993) (holding that PRPs may assert cost recovery actions under section 107(a)), *with* Boyce *v.* Bumb, 944 F. Supp. 807 (N.D. Cal. 1996), *and* TH Agric. & Nutrition Co. *v.* Aceto Chem. Co., 884 F. Supp. 357 (E.D. Cal. 1995) (stating that PRPs are limited to claims for contribution under section 113(f)). The opportunity to clarify the issue of PRP standing under section 107(a) in the Ninth Circuit is currently before the court. National Am. R.R. Passenger Corp. *v.* BPJ Int’l, No. CV-92-2818-WMB (C.D. Cal. May 10, 1995), *interlocutory appeal docketed*, No. 95-56734 (9th Cir. Dec. 8, 1995); *see also* Pinal Creek, 926 F. Supp. at 1403 n.3. Briefing has been completed and oral arguments were held on Thursday, December 12, 1996. A decision by that Court is expected soon.

\(^{131}\) Adhesives Research Inc. *v.* American Inks & Coatings Corp., 931 F. Supp. 1231, 1245 n.16 (M.D. Pa. 1996). The court instructed: *Compare* Pinal Creek Group, 926 F. Supp. at 1412-13 (finding that *Dant & Russell* “appears to support Plaintiffs’ argument that PRPs have standing to assert Section 107 cost recovery claims”), *with* Akzo [Coatings, Inc. *v.* Aigner Corp.], 30 F.3d at 761 [(7th Cir. 1994)] (citing *Dant & Russell* for the proposition that CERCLA claims brought by liable parties are “quintessential” contribution claims).

*Id.* Ultimately, the court in *Adhesives Research* declined to speculate about the Ninth Circuit’s opinion, but rather preferred to wait until that court clarified the issue itself. *See id.; see also* Boyce *v.* Bumb, 944 F. Supp. 807, 811-12 (N.D. Cal. 1996) (noting that the Ninth Circuit’s “position on the relationship between § 9607(a) and § 9613(f)(1) is not entirely clear”).

In *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, United Technologies Corporation ("UTC") and other PRPs cleaned up a Superfund landfill site pursuant to a judicially approved consent decree. EPA placed the landfill on the NPL in 1981 after discovering hazardous substance contaminants at the site. Through an investigation with state authorities, EPA discovered that Inmont Corporation, a company acquired by UTC, had operated and contaminated the site from 1950 to 1975. In 1982, EPA notified Inmont that it was liable for the cleanup of the site. Inmont and other PRPs negotiated and agreed to settlements with EPA and drafted a consent decree. EPA then filed a section 107(a) action against Inmont and these other PRPs, and EPA obtained judicial approval of the consent decree. Under the judicially approved consent decree, UTC and other PRPs agreed to complete the cleanup of the site and reimburse the federal and state governments $475,000 for costs previously incurred with respect to treatment of the site.

More than five years after the court approved the consent decree, UTC and others sued several other PRPs to recover response costs. UTC sought cost recovery under section 107(a) and contribution under section 113(f). The defendants sought summary judgment, claiming that UTC’s claims were time-barred. Defendants argued that plaintiffs, as PRPs, were limited to contribution claims under CERCLA, and that the plaintiffs’ contribution claims were time-barred by the three-year statute of limitations in section 113(g)(3).
The district court accepted defendants’ argument.\textsuperscript{145} The trial court concluded that a PRP which has settled its liability with respect to a site is limited in its own future recovery to a contribution action under section 113(f).\textsuperscript{146} Because UTC had settled its liability with the government, UTC was limited to a contribution action.\textsuperscript{147} That contribution action, however, was time-barred.\textsuperscript{148}

The Court of Appeals for the First Circuit affirmed the trial court’s decision, but using a different rationale.\textsuperscript{149} The court noted that its first recourse in statutory construction was to the statute’s text and structure.\textsuperscript{150} With that canon as its starting point, the court concluded that it was “sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures.”\textsuperscript{151} A “non-innocent” party on the other hand is only entitled to recoup “that portion of his expenditures which exceeds his pro rata share of the overall liability.”\textsuperscript{152}

The court concluded that the term “contribution” in section 113(f) was a “standard legal term that enjoys a stable, well-known denotation.”\textsuperscript{153} The court defined “contribution” as an action “by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.”\textsuperscript{154} Because UTC’s cause of action fit within that definition of contribution, UTC’s cost recovery action was a contribution action under section 113(f) rather than a cost recovery action under section 107(a).\textsuperscript{155} UTC’s contribution action was thus subject to the restrictive three-year statute of limitations in section 113(g)(3), and was therefore untimely.\textsuperscript{156}

\textsuperscript{146} See id. at *4.
\textsuperscript{147} See id. at *5.
\textsuperscript{148} See id.
\textsuperscript{149} See United Techs., 33 F.3d at 103 n.13.
\textsuperscript{150} See id. at 99.
\textsuperscript{151} Id. at 100.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id. (quoting Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994)).
\textsuperscript{155} See id. at 103.
\textsuperscript{156} See id.
Interestingly, the court rejected an interpretation of the relevant provisions offered by UTC\textsuperscript{157} because UTC’s proffered interpretation would, the court said, rewrite CERCLA.\textsuperscript{158} The court’s interpretation of CERCLA, on the other hand, supposedly left the unqualified language of CERCLA intact “as Congress wrote it, that is without qualification.”\textsuperscript{159} To the contrary, the court rewrote CERCLA to include an “innocent” qualification in the liability section, where no such qualification exists, but noted later that it should not rewrite CERCLA with respect to the scope of incurred costs.\textsuperscript{160}


In Akzo Coatings, Inc. v. Aigner Corp.,\textsuperscript{161} the Court of Appeals for the Seventh Circuit ruled that a PRP’s action against another PRP is an action for contribution under section 113(f) rather than a cost recovery action under section 107(a).\textsuperscript{162} There, EPA issued a unilateral administrative order under section 106 of CERCLA, compelling Akzo Coatings Corporation to clean up the Fisher-Calo site in Indiana.\textsuperscript{163} Akzo Coatings complied with the unilateral administrative order, incurring cleanup costs in excess of $1.2 million.\textsuperscript{164} In 1990, EPA issued a Record of Decision (“ROD”) covering areas including, but not limited to, the area cleaned up by Akzo Coatings.\textsuperscript{165} EPA negotiated and finalized settlements with more than 200 PRPs to

\textsuperscript{157} UTC argued that the phrase “incurred by” in 42 U.S.C. § 9607(a) meant that section 107(a) “only cover[ed] actions to recoup cleanup costs directly paid (i.e., ‘incurred’) by a responsible party,” as opposed to the reimbursement of costs some other entity paid in conducting the cleanup. \textit{Id.} at 101.

\textsuperscript{158} \textit{See id.} at 102.

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} Undoubtedly, the interpretation UTC proffered would have rewritten CERCLA. Such judicial legislation should not occur. However, the court wholly failed to acknowledge that its interpretation of the relationship between sections 107(a) and 113(f) likewise rewrote CERCLA by imposing an “innocence” requirement on PRPs pursuing a cost recovery action. \textit{See id.} at 100.

\textsuperscript{161} 30 F.3d 761 (7th Cir. 1994).

\textsuperscript{162} \textit{See id.} at 764.

\textsuperscript{163} \textit{See id.} at 762. The Fisher-Calo site refers to various hazardous waste facilities within the Kingsbury Industrial Park in Kingsbury, Indiana. \textit{See id.} More than 200 businesses generated hazardous wastes that were sent to the Fisher-Calo site between 1972 and 1985. \textit{See id.}

\textsuperscript{164} \textit{See id.} at 762-63.

\textsuperscript{165} \textit{See id.} at 763.
implement the cleanup outlined in the ROD. In December 1991, EPA filed suit against those settling PRPs, seeking and obtaining judicial approval of the proposed consent decree. The judicially approved consent decree included Aigner Corporation, but not Akzo Coatings.

Akzo Coatings subsequently filed a CERCLA action against Aigner. Akzo Coatings sought a portion of the costs it incurred in conducting the initial cleanup work performed pursuant to the unilateral administrative order. Aigner sought dismissal of Akzo Coatings' complaint because it sought recovery of matters addressed by the judicially approved consent decree. The district court granted summary judgment for Aigner.

On appeal, the Seventh Circuit affirmed in part, reversed in part, and remanded the case to the district court. The Seventh Circuit concluded that Akzo Coatings' claim was one for contribution. In so ruling, the court acknowledged that "it is true that section 107(a) permits any 'person'—not just the federal or state governments—to seek recovery of appropriate costs incurred in cleaning up a hazardous waste site." Such standing under section 107(a), however, was implicitly restricted by the court to innocent PRPs, such as "a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands." The court imposed this "innocent" requirement on PRP standing under section 107(a), noting that a party which is liable for a portion of the hazardous substance contamination at a site is actually seeking to have its response costs equitably apportioned between itself and other PRPs. "That is the quintessential claim for contribution." CERCLA's contribution provision confirmed this "innocent" requirement, the court held, by

---

166 See id. Akzo Coatings was not one of those more than 200 PRPs who settled with the EPA. See id.
167 See id.
168 See id.
169 See id.
170 See id.
171 See id.
172 See id.
173 See id. at 764.
174 Id.
175 Id.
176 See id.
177 Id. (citing RESTATEMENT (SECOND) OF TORTS § 886A (1979)).
“permitting a firm to seek contribution from ‘any other’ party liable under sections 106 or 107.”

Because Akzo Coatings was itself a liable party under CERCLA, the court restricted Akzo Coatings to a contribution action.

Despite this ruling, other courts have criticized the Seventh Circuit for not reconciling its ruling in Akzo Coatings with its ruling less than one year earlier in Amcast Industrial Corp. v. Detrex Corp. In Amcast, the Seventh Circuit recognized that section 107(a) “permits one responsible person to recover all or part of its response costs from another.” This inconsistency within the Seventh Circuit has yet to be explained by that court.


In Amoco Oil Co. v. Borden, Inc., Amoco brought a private action to recover projected response costs to clean up radioactive phosphogypsum wastes at a property it purchased from Borden. The phosphogypsum was a by-product of a phosphate fertilizer plant operated on the property by Borden. The Court of Appeals for the Fifth Circuit did not squarely confront the issue of whether Borden, as an owner-PRP, may pursue a cost recovery action under section 107(a) against other PRPs. The court did, however, note that the hazard on the property constituted an “indivisible harm.” Since Amoco owned a facility that continued to release a hazardous substance, Amoco shared joint and several liability for remedial actions. Without further explanation, the court proceeded to note that “[w]hen one liable party sues another to recover its equitable share of the response costs, the action is one for contribution, which is specifically

---

178 Id. (emphasis added).
179 See id.
180 2 F.3d 746 (7th Cir. 1993).
181 Id. at 748.
182 889 F.2d 664 (5th Cir. 1990).
183 See id. at 666.
184 See id.
185 See, e.g., Pinal Creek Group v. Newmont Mining Corp., 926 F. Supp. 1400, 1411 (D. Ariz. 1996) (noting that the Fifth Circuit in Amoco Oil “merely endorsed the application of Section 113(f) in discussing the allocation of cleanup costs among the parties”).
186 Amoco Oil, 889 F.2d at 672 (citing United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988)).
187 See id.
recognized under CERCLA. The court did not otherwise discuss the public policy behind permitting PRPs to pursue cost recovery actions under section 107(a).

10. Smith Land & Improvement Corp. v. Celotex Corp.

In Smith Land & Improvement Corp. v. Celotex Corp., the Court of Appeals for the Third Circuit did not squarely confront the issue of whether a PRP could pursue cost recovery under section 107(a). There, one PRP sought response costs from another PRP. The plaintiff-PRP cleaned up the hazardous substance site after being informed by EPA that if it did not take corrective action, the government would perform the work and then seek reimbursement. After the cleanup, plaintiff sought costs from defendant-PRPs who had created and deposited the hazardous substance at the site. It is unclear from the opinion whether the plaintiff-PRP was pursuing such costs under section 107(a) or section 113(f). The court proceeded under section 113(f); the opinion contained no discussion, however, regarding the issue of whether a PRP can pursue a cost recovery action under section 107(a).

188 Id.
189 851 F.2d 86 (3d Cir. 1988).
191 Smith Land, 851 F.2d at 87.
192 See id.
193 See id. at 88.
194 See id. at 88-89.
V. THE RECENT TREND OF DISTRICT COURT OPINIONS PERMITS PRPS TO PURSUE COST RECOVERY ACTIONS UNDER SECTION 107(a) BASED ON THE PLAIN LANGUAGE OF THE STATUTE

The recent trend among federal district courts permits PRPs to pursue cost recovery actions under section 107(a). The district court opinions base their conclusion on the plain language of CERCLA, and do not require an analysis based on whether liability has been adjudicated with respect to a Superfund site.


For example, plaintiffs who were also PRPs were permitted to seek response costs under section 107(a) in *Charter Township of Oshtemo v. American Cyanamid Co.*\(^{197}\) In that case, the plaintiffs and other PRPs had resolved their liability to the government through a consent decree.\(^{198}\) Plaintiffs then filed a response cost recovery action pursuant to section 107(a).\(^{199}\) Defendants sought dismissal of the claim based on the plaintiffs’ status as PRPs.\(^{200}\)

The district court originally denied defendants motion to dismiss in 1993.\(^{201}\) On defendants’ motion for reconsideration, the court again rejected defendants’ argument, concluding that CERCLA’s plain language “provides that parties meeting the definition of liable persons ‘shall be liable for . . . (B) any other necessary costs of response incurred by any other person.’”\(^{202}\) To reach this conclusion, the court relied on language from the Supreme Court’s decision in *Key Tronic*,\(^{203}\) which stated that the “any other person” language of section 107(a) implicitly granted a cause of action to parties

---


\(^{198}\) See id. at 334.

\(^{199}\) See id.

\(^{200}\) See id.


\(^{203}\) 511 U.S. 809 (1994); see also supra Part IV.A.
including PRPs, and that such cause of action was "somewhat overlapping" with the contribution right of action expressly provided in section 113(f).\textsuperscript{204} The court adopted a plain language approach to CERCLA and permitted a PRP to seek response costs under section 107(a):

An interpretation that there is no longer a right of action under section 107 for parties that themselves were liable under that section renders the Supreme Court’s reasoning and legal conclusions [in Key Tronic] concerning section 107 meaningless. Such an interpretation also draws a distinction between the rights of "innocent" private parties and the rights of potentially liable parties to recover from other liable parties that does not appear in the statute itself.\textsuperscript{205}

The district court concluded that interpreting CERCLA so as to bar section 107(a) cost recovery actions by PRPs "ignores the plain language of section 107, serves some of the purposes of CERCLA less well, and appears to conflict with the Supreme Court’s language in Key Tronic."\textsuperscript{206} Permitting PRPs to sue other PRPs for response costs under section 107(a), the court held, better served the purposes of CERCLA:

[T]he purpose of CERCLA in having potentially liable parties promptly undertake cleanup activities, rather than having governmental agencies performing the cleanup activities and later seeking reimbursement from potentially liable parties for costs incurred, is better served by permitting private parties that perform cleanup activities to seek joint and several liability of other liable parties under section 107.\textsuperscript{207}

Similarly, in Companies for Fair Allocation v. Axil Corp.,\textsuperscript{208} the U.S. District Court for Connecticut permitted PRPs to seek response costs from other PRPs under section 107(a).\textsuperscript{209} Interpreting the plain language of

\textsuperscript{204} Oshtemo, 910 F. Supp. at 337 (citing Key Tronic, 511 U.S. at 816, 818 n.11).
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 338.
\textsuperscript{208} 853 F. Supp. 575 (D. Conn. 1994).
\textsuperscript{209} See id. at 576.
CERCLA, the court concluded that Congress’ use of the phrase “any other person,” combined with the narrow categories of defenses to CERCLA liability, mandated the interpretation that Congress intended the liability provision of CERCLA to sweep broadly, so as to permit cost recovery actions by PRPs under section 107(a).210

A federal district court in Missouri reached the same conclusion in *Laidlaw Waste Systems, Inc. v. Mallinckrodt, Inc.*,211 stating:

> The plain language of sections 107 and 113 does not indicate that PRPs are prohibited from bringing claims pursuant to Section 107. Section 107 imposes liability on PRPs for necessary response costs “incurred by any other person.” While the private right of action under section 107 is implied, there is no indication that the private right of action is limited to “innocent” private parties.212

The court held that this conclusion was appropriate because “the text of § 113(f) provides a right of action for contribution, but does not provide that it is the exclusive remedy for PRPs.”213

In *Adhesives Research Inc. v. American Inks & Coatings Corp.*,214 a Pennsylvania federal district court similarly followed the plain language approach when confronted with the issue of PRP standing under section 107(a). There, plaintiffs-PRPs sought cleanup and other response costs from numerous defendants pursuant to section 107(a).215 The Pennsylvania Department of Environmental Protection (“PDEP”) targeted more than 900 PRPs, including plaintiffs, regarding a release or threatened release of

---

210 *See id.* at 579.


212 *Id.* at 630 (citations omitted).

213 *Id.* at 631; *see also* Pinal Creek Group v. Newmont Mining Corp., 926 F. Supp. 1400, 1406 n.7 (D. Ariz. 1996) (noting that Congress created section 113 to confirm the existing case law which “generally interpreted Section 107 broadly to afford a cause of action to liable and non-liable parties alike”); *Companies for Fair Allocation*, 853 F. Supp. at 579.


215 *See id.* at 1235.
hazardous substances at a site in Pennsylvania. The plaintiffs agreed to act as site response providers to facilitate and finance the cleanup of the site. Subsequently, the plaintiffs sued other PRPs pursuant to sections 107(a) and 113(f), seeking to recover the cleanup costs incurred with respect to the site.

The defendants opposed plaintiffs’ request for relief, arguing that plaintiffs, as PRPs under CERCLA, could not bring a section 107(a) cost recovery action. The defendants based their argument on those cases suggesting that CERCLA, as amended by SARA, prohibited cost recovery actions by PRPs. In response, the plaintiffs argued that, despite such case law, the plain language of CERCLA and SARA, and Congress’ intent behind those acts permit PRPs to pursue cost recovery actions under section 107(a).

The court agreed with the plaintiffs. After reviewing the statutory framework and the policies behind CERCLA, the court agreed with the “growing body of case law” and concluded that “the ‘any other person’ language of section 107(a)(4)(B) confers standing on persons who incur response costs regardless of their own potential liability.” To conclude otherwise, the court noted, would amount to improperly rewriting CERCLA to add an innocent requirement where no such requirement could be found in the statute itself: “The court finds no reason to give the phrase ‘any other person’ other than its plain meaning. While the phrase may be expansive, its meaning is not unclear. . . . [T]he court ‘refuses to engraft the word

---

216 See id. The site, known as the Industrial Solvent & Chemical Company ("ISCC") site, is located in Newberry Township, York County, Pennsylvania. See id. PDEP placed the ISCC site on the Pennsylvania Priority List for remedial response on October 26, 1991. See id. at 1236.

217 See id. Plaintiffs accomplished this by entering into three separate consent orders and agreements. See id.

218 See id. at 1235. Plaintiffs also asserted various claims under Pennsylvania’s version of CERCLA and other state laws. See id.

219 See id. at 1236.

220 See id.

221 See id.

222 See id. at 1246.

223 Id. at 1238.
"innocent" onto the phrase "any [other] person" set forth in Section 107(a)(4)(B)."

In so concluding, the Pennsylvania district court expressly rejected the supposed majority line of cases. The court explained that those rulings rest upon an interpretation of the statute which concludes that section 107(a) governs liability and section 113 governs allocation of damages. One of the primary concerns of the courts following that line of cases is that, if one PRP were permitted to recover costs from another PRP under section 107(a), then section 113(f) would be eviscerated. Rejecting this unfounded concern, the court recognized the interplay between cost recovery actions under section 107(a) and contribution actions under section 113(f). When read together, any person who initiates a Superfund site cleanup may seek response costs under section 107(a) from other PRPs. When the plaintiffs in that initial section 107(a) action happen to also be PRPs, any defendant-PRP can assert a contribution counterclaim pursuant to section 113(f). The contribution counterclaim ensures that a plaintiff-PRP does not avoid paying its equitable share of the cleanup costs. This two-step framework, the court held, "effectuates CERCLA’s goals by providing incentives for private parties to promptly initiate cleanup, while simultaneously ensuring that costs will eventually be allocated in an equitable manner."

Permitting PRPs to pursue cost recovery actions, the court concluded, was consistent with the plain language of the statute and better served Congress’ intent behind enacting CERCLA:

The court finds that the “any other person” language in § 107 means “any other person” regardless of that person’s CERCLA culpability. According the language of the statute

224 Id. at 1239 (citation omitted) (quoting Pinal Creek Group v. Newmont Mining Corp., 926 F. Supp. 1400, 1407 (D. Ariz. 1996)).
225 See id. at 1241.
226 See id.
229 See id.
230 See id.
231 See id.
232 Id.
its plain meaning is consistent with effectuating the broad remedial goals of CERCLA by encouraging parties to promptly and voluntarily initiate cleanup or settlement, and discouraging parties from refusing to participate in voluntary cleanup efforts or avoiding settlement. In permitting PRPs to pursue cost recovery actions, the court provides PRPs who initiate cleanup or settlement with two valuable procedural tools—the longer six-year statute of limitations, and the shifting of the burden of proof as to divisibility of harm to the defendant PRPs. Contrary to what some would argue, the court does not thereby provide plaintiff PRPs with a windfall. Defendant PRPs may cross-claim for contribution pursuant to § 113, thereby permitting the court to ultimately apportion liability equitably between the parties. Such an interpretation and application of CERCLA merely assists in accomplishing CERCLA's goals by providing all parties with a strong incentive to put the environment first.233

Likewise, in Chesapeake & Potomac Telephone Co. v. Peck Iron & Metal Co., 234 EPA issued an administrative order under section 106235 requiring a PRP, Chesapeake & Potomac Telephone Company (“C&P”), who allegedly arranged-to dispose. of hazardous substances, to clean up a contaminated site.236 C&P then filed a private cost recovery action under section 107(a).237 The defendants in the cost recovery action moved for partial summary judgment arguing that a PRP could not maintain a section

233 Id. at 1246 (footnote omitted).
235 42 U.S.C. § 9606 (1994). An administrative order issued pursuant to section 106 of CERCLA is not a "civil action." See Fed. R. Civ. P. 2 ("There shall be one form of action to be known as 'civil action'.") "Civil action," though not defined in CERCLA, "is a term of art judicially and statutorily defined as one 'commenced by filing a complaint with [a] court,' not an executive board." Oppenheim v. Campbell, 571 F.2d 660, 663 (D.C. Cir. 1978) (quoting N.V. Philips Gloeilampenfabrieken v. Atomic Energy Comm'n, 316 F.2d 401, 406 (D.C. Cir. 1963)). It has been held that the phrase "civil action" does not refer to administrative proceedings. See Toner v. Commissioner, 629 F.2d 899, 901 (3d Cir. 1980) (holding that the term "civil action" under the Civil Rights Attorney's Fees Awards Act of 1976 does not apply to administrative actions).
237 See id. at 1273.
107(a) cost recovery action against other PRPs.\textsuperscript{238} Disagreeing, the district court concluded that nothing in the language of the statute precludes a PRP from seeking response costs from other PRPs under section 107(a):

Nothing in the statute supports the assertion that only the United States Government or an "innocent" plaintiff can bring a cost recovery action under Section 107(a). To the contrary, the statute specifically provides that covered persons shall be liable to both the United States Government, among others, and to "any other person" who incurs response costs . . . .

. . . In the absence of a "clearly expressed legislative intention to the contrary," the language of the statute itself "must ordinarily be regarded as conclusive." Nothing in the statute indicates that only "innocent" persons fall within the definition of "any other person."\textsuperscript{239}

Based on the plain language of the statute, the court permitted one PRP to sue other PRPs for cost recovery under section 107(a) where that PRP cleaned up the site pursuant to a section 106 administrative order.\textsuperscript{240} Therefore, under \textit{C&P Telephone}, a plaintiff-PRP who cleans up a Superfund site pursuant to an EPA administrative order issued under section 106 can maintain a section 107(a) cost recovery action against other PRPs. Forcing a PRP to step into the EPA's shoes and conduct costly remedial action under section 106, but denying that PRP the ability to seek response costs under section 107, would discourage PRPs from cooperating with the EPA.\textsuperscript{241}

\textsuperscript{238} See \textit{id.}
\textsuperscript{239} \textit{Id.} at 1277 (citations omitted).
\textsuperscript{241} See, \textit{e.g.,} United States v. SCA Servs. of Indiana, Inc., 849 F. Supp. 1264, 1283 (N.D. Ind. 1994). In \textit{SCA}, the court permitted a PRP, who cleaned up a site pursuant to a consent decree, to seek response costs from other PRPs under section 107 because the plaintiff's liability had not been determined in the consent decree. \textit{See id.} at 1282-83. The court noted that the plaintiff "is not a 'liable' party as that term is generally used in the legal setting." \textit{Id.} at 1283. The court further stated that a contribution claim is "a claim in which one \textit{liable} party attempts to recover from another potentially \textit{liable} party for its share of the cost." \textit{Id.}
In *United States v. Taylor*, a federal district court in North Carolina concluded that nongovernmental PRPs which were compelled to conduct a cleanup by a section 106 order should be entitled to seek response costs under section 107(a) from other PRPs. Explaining its rationale, the court noted:

Such a party may not be an "innocent or noble volunteer." However, without an adjudication of guilt, a party under a Section 106 order must comply with the administrative order or face fines of up to $25,000 per day. It is difficult to understand why being the target or victim of such a draconian order should disqualify one from seeking out others who are also liable. Such parties play a vital role in achieving the important goals of CERCLA.

The plain language of CERCLA permits one PRP to seek response costs from other PRPs pursuant to section 107(a). Section 107(a)(4)(B) does not limit a PRP's liability to non-PRPs. Nor does section 107(a)(4)(B) limit a PRP's liability to "innocent" PRPs. The clear language of CERCLA provides, without limitation, that a PRP shall be liable to "any other person." Barring PRPs from pursuing cost recovery actions under section 107(a) improperly engrafts an "innocence" requirement to the "any other person" language which CERCLA does not support.

Imposing the "innocent PRP" limitation to CERCLA liability completely ignores the "any other person" statutory language from CERCLA because no "innocent" party would risk paying millions of dollars for Superfund cleanup and be subject to potential reimbursement limited to a contribution action under section 113(f). "Any other person" who cleans up hazardous substances and incurs response costs will virtually always be a PRP. That person's "innocence" or "guilt" should not be a basis for determining liability under CERCLA where Congress provided for no such consideration. Such an interpretation is consistent with other provisions of CERCLA.

(citations omitted) (emphasis in original).

243 Id. at 364 (citations omitted).
VI. **The Different Statutes of Limitations Under CERCLA Support the Conclusion That PRPs Can Seek Response Costs from Other PRPs Under Section 107(a)(4)(B)**

A comparison of the statutes of limitations for cost recovery and contribution actions also reinforces the conclusion that a PRP should be permitted to sue other PRPs under section 107(a) of CERCLA. The statute of limitations for a contribution claim begins to run on the date of judgment, administrative order, or entry of a judicially approved settlement concerning costs or damages.\(^{245}\) By contrast, the statute of limitations on a claim to recover removal costs begins to run after completion of the removal, and a claim to recover remedial costs begins to run after initiation of physical on-site construction of the remediation.\(^{246}\) If PRPs that clean up a site without being sued by the government, for example at the insistence of a section 106 order, are only permitted to raise claims under section 113(f), then arguably no statute of limitations applies to these parties' claims. Such an anomaly cannot, and should not, be presumed to have been written into CERCLA by Congress.

Rather, an interpretation of CERCLA that avoids such an anomaly in the statutory language should be adopted by the courts. For example, the court in *United States v. Taylor\(^{247}\)* confronted this dilemma. There, the court construed the differing statutes of limitations in section 113(g) and concluded that the PRP who initiates and conducts a cleanup, regardless of the PRP's motivation, is taking the type of remedial action referred to in section 113(g)(2), subject to the six-year statute of limitations as an initial action.\(^{248}\) Where, however, a party has been subjected to a judgment or a court approved settlement, such party is subject to the three-year statute of limitations under section 113(g)(3) for that party's contribution action.\(^{249}\) This interpretation, the court noted, avoided a reading of CERCLA which would leave a class of PRPs without a statute of limitations for their cause of action.\(^{250}\) Additionally, such interpretation would not render section 113(f) meaningless because when a PRP does not conduct a cleanup, that PRP has

\(^{245}\) See id. § 9613(g)(3).

\(^{246}\) See id. § 9613(g)(2).


\(^{248}\) See id. at 365.

\(^{249}\) See id.

\(^{250}\) See id.
not incurred response costs and cannot therefore bring a section 107(a) action.\textsuperscript{251}

When read in context, CERCLA’s various statutes of limitations cover all possible causes of action under CERCLA. The existence of the different statutes of limitations supports the conclusion that Congress intended PRPs, in certain situations, to have standing to seek response costs under section 107(a).

VII. THE FACT THAT CONGRESS PROVIDED ONLY THREE DEFENSES TO CERCLA LIABILITY SUPPORTS THE CONCLUSION THAT PRPs CAN SEEK RESPONSE COSTS FROM OTHER PRPs UNDER SECTION 107(a)(4)(B)

Additional support for the broad interpretation of CERCLA’s liability provision, such that PRPs can seek response costs from other PRPs under section 107(a), is found in the narrow statutory defenses to CERCLA liability. There is no liability where the release or threat of release of hazardous substances was caused solely by: “(1) an act of God; (2) an act of War; (3) an act or omission of a third party other than an employee or agent of the defendant.”\textsuperscript{252} Courts have consistently held that these three statutory defenses are the only defenses to CERCLA liability.\textsuperscript{253} These limited defenses do not draw a distinction between innocent and culpable plaintiffs. For example, in \textit{Companies for Fair Allocation v. Axil Corp.},\textsuperscript{254} the court concluded that the narrow categories of defenses to CERCLA liability demonstrated Congress’ intent that the liability provision sweep broadly, including permitting PRP cost recovery actions against other PRPs.\textsuperscript{255} To allow the innocence or guilt of a plaintiff to be a defense to CERCLA liability constitutes an impermissible judicial revision of CERCLA.\textsuperscript{256}

\textsuperscript{251} \textit{See id.}
\textsuperscript{252} 42 U.S.C. § 9607(b) (1994).
\textsuperscript{253} \textit{See, e.g., Kelley v. Thomas Solvent Co.}, 714 F. Supp. 1439, 1445-46 (W.D. Mich. 1989) (citing other cases that support this notion).
\textsuperscript{254} 853 F. Supp. 575 (D. Conn. 1994).
\textsuperscript{255} \textit{See id.} at 579.
\textsuperscript{256} \textit{See id.} The innocence of a plaintiff does not constitute a complete defense to CERCLA liability. Rather, it would only prohibit that plaintiff from seeking response costs under section 107(a), but would not prohibit that plaintiff from seeking contribution under section 113(f).
VIII. THE FACT THAT CONGRESS LIMITED REIMBURSEMENT FROM THE SUPERFUND TO INNOCENT PARTIES, BUT IMPOSED NO SIMILAR INNOCENCE RESTRICTION ON COST RECOVERY ACTIONS, SUPPORTS THE CONCLUSION THAT PRPS HAVE STANDING UNDER SECTION 107(a)

Additional support for the proposition that Congress did not intend to have the innocence of the plaintiff in a cost recovery action be a relevant consideration is found in section 106(b)(2)(C).

In that provision, Congress restricted reimbursement from Superfund to a person who can "establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a)." The fact that Congress expressly limited Superfund reimbursement to those "not liable for response costs" demonstrates that Congress considered the guilt or innocence of a plaintiff under CERCLA to be relevant only in the context of reimbursement from Superfund. That Congress provided no similar "innocence" restriction under section 107(a) bolsters the conclusion that the guilt or innocence of the plaintiff is irrelevant under a section 107(a) cost recovery action.

IX. CONCLUDING THAT ONE PRP MAY NOT SUE ANOTHER PRP FOR COST RECOVERY UNDER SECTION 107(a) IS INCONSISTENT WITH THE PUBLIC POLICY BEHIND CERCLA

Congress passed CERCLA with the intention of providing a "solution to the environmental and health problems created by decades of reckless and irresponsible disposal of chemical wastes." Congress had two overriding objectives in enacting CERCLA: (1) to immediately give the federal government the tools to promptly and effectively respond to the national hazardous waste problem; and (2) to hold those who caused chemical harm responsible for the costs associated with hazardous waste cleanup.

258 Id. A person who is liable for response costs may seek reimbursement from Superfund only where that person can demonstrate that "the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." Id. § 9606(b)(2)(D).
259 Id.
Permitting PRP cost recovery actions serves both of Congress' goals in enacting CERCLA by encouraging the timely cleanup of Superfund sites by liable and potentially liable parties.²⁶²

Permitting a PRP to recover response costs against other PRPs under section 107(a) furthers Congress' intent in enacting CERCLA. For example, the federal district court in Companies for Fair Allocation held that:

If PRPs were precluded from pursuing claims for joint and several liability under § 107, and limited to contribution claims and several liability, "a PRP who is otherwise amenable to cleanup may be discouraged from doing so if it knows that, where the harm is indivisible, its only recourse for reimbursement is contribution from the solvent PRPs."²⁶³

Likewise, in Kelley v. Thomas Solvent Co.,²⁶⁴ the court concluded that "[f]inding that potentially responsible and responsible parties have standing to seek reimbursement for their response costs under section 9607(a) supports the underlying policy of encouraging prompt and complete response actions to this extremely dangerous contamination."²⁶⁵ "To conclude otherwise would discourage voluntary clean-up by PRPs."²⁶⁶

Permitting PRPs to seek response costs under section 107(a) is also consistent with the broad remedial purposes of CERCLA.²⁶⁷ Insofar as CERCLA is a remedial statute, it should be interpreted broadly to permit PRPs to seek response costs from other PRPs under section 107(a). The district court in Pneumo Abex Corp. v. Bessemer & Lake Erie Railroad

²⁶² See id.
²⁶⁵ Id. at 717.
²⁶⁶ Barmet Aluminum Corp. v. Doug Brantley & Sons, Inc., 914 F. Supp. 159, 164 (W.D. Ky. 1995) (concluding that a PRP should not be limited to a contribution action under § 113).
²⁶⁷ See, e.g., Atlantic Richfield Co. v. American Airlines, Inc., 98 F.3d 564 (10th Cir. 1996); see also Idylwoods Assocs. v. Mader Capital, Inc., 915 F. Supp. 1290, 1314 (W.D.N.Y. 1996) ("Given the broad remedial purpose of CERCLA, and construing the statute in this broad fashion, this court will follow [those decisions] that have permitted a PRP which has entered into a consent order to bring an action under both § 107 and § 113 of CERCLA.").
Co.,\textsuperscript{268} for example, concluded that permitting PRPs to seek response costs under section 107(a) enabled the court “to accomplish several of the statute’s goals at once.”\textsuperscript{269} There, the court permitted PRPs to seek response costs under section 107(a) because such action: (1) preserves the statute’s incentives for PRPs to settle and settle early; (2) allows plaintiffs to avoid litigation costs by settling with the United States through a consent decree; (3) subjects parties that refuse to settle with the United States to joint and several liability; and (4) enables non-settling parties to be held liable for any orphan shares.\textsuperscript{270} Congress’ goals in enacting CERCLA, and the benefits to the public health and the environment, outweigh any potential prejudice or inconvenience to non-settling defendants which may arise as a result of permitting PRPs to pursue cost recovery actions under section 107(a) of CERCLA.

X. Conclusion

Under the plain language of section 107(a) of CERCLA, PRPs are liable for all necessary response costs, consistent with the NCP, incurred by another in cleaning up a Superfund site. CERCLA does not impose an “innocence” requirement upon standing to seek response costs under section 107(a). Despite CERCLA’s plain language, numerous courts have rewritten CERCLA to impose an “innocence” requirement for standing under section 107(a). These courts improperly conclude that an action for response costs by one PRP against other PRPs is really an action for contribution governed by section 113(f).

Restricting PRPs who clean up Superfund sites, whether voluntarily or through force, to contribution actions under section 113(f) discourages PRPs from taking a cooperative role in cleaning up Superfund sites. No PRP will voluntarily conduct a cleanup of a Superfund site knowing that its recovery of the expenses for that cleanup will be limited to the more restrictive contribution action under section 113(f), with its shorter statute of limitations and arguably several liability. Reading an “innocence” requirement into the statute impermissibly rewrites CERCLA, seriously undermines Congress’ objectives in enacting CERCLA, and jeopardizes the

\textsuperscript{269} Id. at 347.
\textsuperscript{270} See id. at 347-48.
future effectiveness of the cleanup of Superfund sites throughout the United States.

The better reasoned view is that which has been adopted by a recent trend in district courts: under CERCLA's plain language, a PRP has standing to seek response costs under CERCLA and is wholly consistent with Congress' intent behind enacting CERCLA. Permitting PRPs to seek cost recovery under section 107(a), with its generous statute of limitations and liability provisions, encourages PRPs to step forward and finance Superfund cleanups. The end result is that PRPs conduct Superfund cleanups, rather than the government, thereby accomplishing Congress' primary goals behind CERCLA—cleaning up the environment at the expense of those who caused the contamination.