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RUMPKE OF INDIANA, INC. v. CUMMINS ENGINE CO.:
 THE POTENTIALLY RESPONSIBLE PARTY'S RIGHT
 TO FULL COST RECOVERY IS EXPANDED

I. INTRODUCTION

Industrialism in the United States expanded at such a rapid rate in the first half of the Twentieth Century that Congress was eventually forced to enact several statutes to protect the environment.¹ In 1980, after several other statutes had already been passed, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).² With the pas-

1. See 1 ALLAN J. TOPOL & REBECCA SNOW, *SUPERFUND LAW AND PROCEDURE* § 1.1 (1992). The United States became the world leader in industrial power in the 1970s. See *id.* Congress addressed the social problems caused by the industrialization movement by regulating securities, antitrust, labor and transportation through legislation. See *id.* Environmental concerns were not addressed until after the first "Earth Day," which took place on April 22, 1970. See *id.* In response to this showing of public concern for the environment, Congress passed the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act (RCRA). See *id.* While these laws have played significant roles in protecting the environment, they did not address the contamination that resulted from the release of chemicals nor did they address the problems associated with abandoned and inactive disposal sites. See *id.*

2. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1994)) [hereinafter CERCLA]. Congress enacted CERCLA in response to the severe harms to the environment and public health that resulted from the improper disposal of hazardous waste. See *Borough of Sayreville v. Union Carbide Corp.*, 923 F. Supp. 671, 676 (D.N.J. 1996); see also Michael P. Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 CASE W. RES. L. REV. 65, 68 (1992). During the 1970s, several well-publicized incidents of improper disposal of large amounts of hazardous wastes occurred. See *id.* at 68-69. These incidents were significant because they each caused serious health problems which led to an interest in and support for the establishment of CERCLA. See *id.* "Among these incidents were Love Canal in New York, the 'Valley of the Drums' in Kentucky, and the James River kepone [sic] discharges in Virginia." *Id.* Love Canal had been built as part of an electrical power project and was used by Hooker Chemicals & Plastics Corporation (Hooker) to dispose of hundreds of drums of chemicals. See TOPOL & SNOW, *supra* note 1, at § 1.1 n.10. Hooker later donated the land to the Niagara Falls Board of Education. See *id.* A school building was then constructed on the site and single family homes were built on the land adjacent to the site. See *id.* Both the school building and the homes had to be abandoned after the contamination was discovered. See *id.* It was the condition of this abandoned site that led Congress to recognize that the existing legislation did not adequately address this type of contamination. See *id.* at 3-4.

As originally enacted, CERCLA was intended to "address what many believed to be a limited problem," and provided the Environmental Protection Agency (EPA) with a \$1.6 billion fund, called the "Superfund," to study and clean up the

sage of CERCLA, Congress intended to address the gaps that other statutes had left with respect to the regulation of hazardous waste sites.³ Such legislation was, and still is, necessary because of the astronomical cost to clean up a contaminated site.⁴ At present, there are approximately 1,500 sites on the National Priorities List (NPL),⁵ and estimates show that the average cost to clean up just

designated hazardous waste sites. H.R. REP. NO. 99-253(I), at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2836. "Most believed that cleaning up a site was relatively inexpensive and involved removing containers or scraping a few inches of soil off the ground." *Id.* Within five years after the enactment of CERCLA, however, legislatures understood that a cleanup could go "far beyond simple removal of barrels" and it may often involve "years of pumping contaminated water from aquifers." *Id.* In 1986, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act (SARA), increasing the Superfund to \$8.5 billion. See Lorelei Joy Borland, *Superfund: An Overview*, in INTRODUCTION TO ENVIRONMENTAL LAW 15, 17 (1990) (discussing necessity of amendments). For further discussion of SARA, see *infra* notes 39-45 and accompanying text. For a discussion of how a site becomes designated for cleanup, see *infra* note 5.

3. See Jason E. Panzer, Note, *Apportioning CERCLA Liability: Cost Recovery or Contribution, Where Does a PRP Stand?*, 7 FORDHAM ENVTL. L.J. 437, 439 (1996). CERCLA "substantially changed the legal machinery used to enforce environmental cleanup efforts and was enacted to fill gaps left in . . . the Resource Conservation and Recovery Act of 1976 ('RCRA')." *Id.* (quoting *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989)). The Fifth Circuit in *Amoco Oil* stated that "RCRA left inactive sites largely unmonitored by the EPA unless they posed an imminent hazard. CERCLA addressed this problem 'by establishing a means of controlling and financing both governmental and private responses to hazardous releases at abandoned and inactive waste disposal sites.'" *Amoco Oil*, 889 F.2d at 667 (quoting *Bulk Distrib. Ctr., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1441 (S.D. Fla. 1984)). Congress's concern with the gaps left by the other environmental statutes is evidenced by the following excerpt:

After having previously focused on air and water pollutants, the Congress, in the Resource Conservation and Recovery Act of 1976, provided a prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society. Since enactment of that law, a major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as the "inactive hazardous waste site program." The unfortunate human health and environmental consequence of these practices has received national attention amidst growing public and congressional concern over the magnitude of the problem and the appropriate course of response that should be pursued. Existing law is clearly inadequate to deal with this massive problem.

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

4. See *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1236 (7th Cir. 1997) (stating "astronomical sums needed to restore [hazardous] sites can deter prompt remedial action"). Commentators have argued, however, that CERCLA will not impose an "overwhelmingly large financial burden" on many industries. See KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS 9 (1995). For example, the estimated cost of cleanups in the chemical industry in 1995 was \$394 million. See *id.* The estimated profits for that same year were over \$20 billion. See *id.*

5. See *Superfund: EPA - Claimed Improvements to CERCLA Misleading, Political Consulting Group Says*, Chemical Regulation Daily (BNA) (July 15, 1997); see also LISA

one site is \$29.1 million.⁶ Unfortunately, to date, only 419 sites out of the 1,500 sites on the NPL have been remediated.⁷

CERCLA has been criticized as being an overly complex piece of legislation with “a well deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative his-

WEEKLY COULTER ET AL., *THE SURETY'S ENVIRONMENTAL RISK 2* (Donald G. Gavin & Robert M. Wright eds., 1997). The National Priorities List (NPL) is a roster used to identify the nation's hazardous waste sites. See TOPOL & SNOW, *supra* note 1, at § 2.4. The list originally acted as a priority list, ranking the top four hundred hazardous sites in the United States that required the most attention. See *id.* Congress intended the NPL to serve as a “quick and inexpensive method of identifying sites that warranted further investigation under CERCLA.” *Id.* The manner in which sites are selected to be placed on the NPL has raised constitutional challenges. See *id.* at § 2.1. Once an individual proposes to place a site on the NPL, there is no opportunity for a hearing before it is actually placed on the NPL. See *id.* Many have argued that this is a violation of due process. See *id.*

6. See *Superfund: EPA - Claimed Improvements to CERCLA Misleading, Political Consulting Group Says*, *supra* note 5 (stating “[t]hirty percent of the total number of sites on the National Priorities List — 419 sites — have reached EPA's definition of ‘construction complete’ midway through fiscal 1997”); see also PROBST ET AL., *supra* note 4, at 132. Experts used three components to estimate the cleanup cost for each site, namely, remedial action costs, site assessment costs, and operation and maintenance costs. See *id.* at 129. These experts based the estimated cleanup cost on EPA data gathered in 1993 and a report from the University of Tennessee's Waste Management Research and Education Institute. See *id.*

In 1994, the Congressional Budget Office estimated that the total cost of cleaning up all current and future NPL sites ranged from \$106 billion to \$462.9 billion. See *id.* at 18. Annual spending in the United States through the Superfund is estimated to be \$6 billion, which includes expenditures by all parts of the federal government and all spending by private parties for cleanup and transaction costs. See *id.* at 11. This figure, however, is considerably small in comparison to the amount spent by other federal environmental regulatory programs. See *id.* The \$6 billion spending represents less than five percent of the \$135 billion spent each year in the United States to comply with all environmental regulations. See *id.*

7. See COULTER, *supra* note 5, at 2. Critics claim that CERCLA has not met the expectations that surrounded the legislation when it was enacted. See *id.* In 1980, when CERCLA was enacted, “it was no doubt expected that by 1995 most sites would have been remediated.” *Id.* The rate at which new sites have been added to the NPL, however, has decreased in recent years. See PROBST ET AL., *supra* note 4, at 20. Most analysts believe that the reason that most sites have not been remediated is because EPA cannot handle a rapid increase in the volume of NPL sites. See *id.* These analysts claim the maximum number of sites that will be included on the NPL will be between 2,000 and 3,000 sites, which will be cleaned up in the next twenty to thirty years. See *id.*

When Congress enacted CERCLA, EPA expected to engage in 400 cleanups across the country for a total cost of \$1.6 billion. See COULTER, *supra* note 5, at 2. Estimates, however, show that even though far fewer sites have engaged in cleanup than was originally expected, \$24 billion has been expended. See *id.* Expenses toward litigation pertaining to who will be responsible for these costs has accounted for an estimated 20% to 30% of this total cost. See *id.* at 2-3; see also TOPOL & SNOW, *supra* note 1, at v (indicating amount of money “allocated by the federal government for cleanup projects may constitute the largest public works effort in the history of the world”).

tory.”⁸ CERCLA’s liability system has recently become a major source of controversy.⁹ In particular, courts have been divided on whether to allow a private potentially responsible party (PRP)¹⁰ to bring an action against other PRPs for the recovery of all costs incurred in the cleanup of a hazardous waste site.¹¹

8. *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985); *see also Louisiana-Pacific Corp. v. Asarco, Inc.*, 735 F. Supp. 358, 360 (W.D. Wash. 1990) (“The CERCLA statute is extensive and complicated and the language of the statute has been criticized by many courts.”); *see also* PROBST ET AL., *supra* note 4, at 1 (“Complaints about Superfund come from municipal officials, bankers, and many other individuals, corporations, and other entities that have either generated or transported hazardous substances during the past 100 years or that have owned and operated the disposal sites or other facilities where contamination remains.”); Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83 (1997) (stating that in comparison to CERCLA, “[f]ew statutes have generated more controversy and litigation”); Mark A. Stach, *Only “Innocent” Parties Need Apply: The Death of Private Party Cost Recovery Actions Under Superfund?*, 20 WM. & MARY ENVTL. L. & POL’Y REV. 33, 35-36 (discussing confusion that revolves around CERCLA); Panzer, *supra* note 3, at 437-38 (recognizing CERCLA as “an imprecise tool” used to address hazardous waste sites); *cf.* TOPOL & SNOW, *supra* note 1, at 1 (stating CERCLA has been dubbed “Lawyers Welfare and Relief Act of 1980” and “has created unprecedented professional opportunities for hydrologists, engineers and lawyers”).

Commentators have also criticized CERCLA for the following reasons:

- (a) That the liability system is unfair and has resulted in excessive litigation and other transaction costs;
- (b) That the remedy selection process has delayed clean-up action and increased clean-up costs unnecessarily;
- (c) That the states and local citizens do not have the ability to fully participate in the selection and implementation of appropriate remedies; and
- (d) That the stigma of being a former superfund site creates economic disincentives for the redevelopment and reuse of contaminated properties.

COULTER, *supra* note 5, at 3.

9. *See* Panzer, *supra* note 3, at 440. One critic noted that the “absence of definitive guidance from Congress has resulted in discord among recent court decisions and has propelled the issue apportioning liability to the forefront of CERCLA litigation.” *Id.* at 441. The controversy arises when two or more parties are responsible for the contamination of a single site. *See* David G. Manselbaum, *Toward a Superfund Cost Allocation Principle*, 3 ENVTL. L. 117 (1996). Parties cannot decide among themselves how the costs of a site cleanup should be allocated because each party has its own concept of what is fair. *See id.* This has resulted in a high volume of litigation over the proper allocation of costs. *See id.* The courts, however, have provided little guidance in determining what may be considered an equitable allocation of the costs. *See id.* For a general discussion of the controversy that exists in characterizing claims brought under CERCLA, *see* Hernandez, *supra* note 8, at 83-85.

10. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994). Potentially responsible parties (PRPs) are parties which fall within one of the categories of persons liable under section 107(a) of CERCLA for the cleanup costs of a hazardous site. *See id.* For a discussion of the categories of PRPs, *see infra* note 28.

11. *See* Steven F. Baicker-McKee & James M. Singer, *Narrowing the Roads of Private Cost Recovery: Recent Developments Limiting the Recovery of Private Response Costs*

The United States Court of Appeals for the Seventh Circuit in *Rumpke of Indiana, Inc. v. Cummins Engine Co.*¹² held that Rumpke of Indiana (Rumpke) was entitled to bring an action against another PRP for the recovery of all costs incurred in the cleanup of the Uniontown Landfill.¹³ The Seventh Circuit held that a landowner of a hazardous site who alleged it did not participate in the contamination of the site was entitled to bring such an action.¹⁴ While courts have not yet settled the issue of whether a PRP may bring an action for full recovery, the decision in *Rumpke* is inconsistent with the established decisional trends.¹⁵

This Note addresses the controversy that exists surrounding whether PRPs are entitled to bring actions for full cost recovery against other PRPs. Part II presents the background of CERCLA and how courts have ruled on the controversy.¹⁶ Part III discusses the facts of *Rumpke*.¹⁷ Next, Part IV analyzes the Seventh Circuit's decision to allow a PRP to bring an action for full recovery of cleanup costs, as well as the Seventh Circuit's reasoning in determining the scope of a consent decree.¹⁸ Part V critically analyzes the Seventh Circuit's decision.¹⁹ Finally, Part VI addresses the im-

Under CERCLA § 107, 25 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,593 (1995) (discussing how courts recently "have questioned" whether PRP may bring action to recover all costs). Circuit courts have recently been limiting PRPs to the recovery of only those costs which could be proven attributable to a specific party. *See id.* Some district courts, however, have allowed PRPs to recover all costs from any party found responsible for any portion of the contamination. *See id.* For an analysis of how the courts have addressed claims by PRPs for total cost recovery, see *infra* notes 53-96 and accompanying text. For a general discussion on how the circuit and district courts decided this issue in 1994 and 1995, see Stach, *supra* note 8, at 48-78.

12. 107 F.3d 1235 (7th Cir. 1997).

13. *See generally id.* For a discussion of the Seventh Circuit's reasoning in *Rumpke of Indiana, Inc. v. Cummings Engine Co.*, see *infra* notes 110-28 and accompanying text.

14. *See id.* at 1240-41. For a discussion of the "innocent landowner exception" applied by the Seventh Circuit, see *infra* notes 148-64 and accompanying text.

15. For a discussion of how the decision in *Rumpke* differs from the trends of the other courts, see *infra* notes 129-75 and accompanying text.

16. For a discussion of CERCLA and how the courts have addressed a PRP's action against other PRPs, see *infra* notes 21-96 and accompanying text.

17. For a discussion of the facts of *Rumpke*, see *infra* notes 97-109 and accompanying text.

18. For a discussion of the Seventh Circuit's reasoning in *Rumpke*, see *infra* notes 110-28 and accompanying text.

19. For a critique of the Seventh Circuit's decision in *Rumpke*, see *infra* notes 129-78 and accompanying text.

plications and the potential effects of the Seventh Circuit's ruling in *Rumpke*.²⁰

II. BACKGROUND

A. The Development of CERCLA

Congress had two primary purposes in the enactment of CERCLA, namely, to encourage the prompt and voluntary cleanup of hazardous waste sites, and to impose the costs of cleanup on parties responsible for the contamination.²¹ In order to meet Congress's goals, many courts have determined that CERCLA must be interpreted broadly and liberally.²² Additionally, courts have inter-

20. For a discussion of the implications of the holding in *Rumpke*, see *infra* notes 179-87 and accompanying text.

21. See *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986) (stating Congress's purpose in CERCLA "was to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created"); *Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1236 (M.D. Pa. 1996) (stating purpose of CERCLA was "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal site"); see also *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994) ("CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.") (quoting *FMC Corp. v. Aero Indus., Inc.*, 998 F.2d 842, 847 (10th Cir. 1993)).

Some commentators have suggested that courts have recognized that CERCLA was created for the following objectives: (1) to encourage the use of maximum care and responsibility when handling hazardous substances; and (2) to encourage the prompt reporting of CERCLA violations. See Brian I. Sopinsky, Note, *Kaiser Aluminum and Chemical Corp. v. Catellus Development Corp.: Broad Remedial Powers of CERCLA Take No Prisoners*, 6 VILL. ENVTL. L.J. 181, 185 (1995) (citing *Chemical Waste Management, Inc. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1290 (E.D. Pa. 1987)).

CERCLA provides four tactics to achieve its goals: (1) an information-gathering and reporting system; (2) the federal authority to act on hazardous waste emergencies and to clean up inactive dump sites; (3) the establishment of a fund to finance the cleanup of the inactive sites; and (4) the imposition of strict liability on persons contributing to the release of hazardous substances. See William H. Rodgers, Jr., *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or the Superfund)*, 4 ENVTL. L. § 8.1.

22. See, e.g., *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982). The court in *United States v. Reilly Tar & Chemical Corp.* held that in order for the congressional goals of CERCLA to be met, "CERCLA should be given a broad and liberal construction. The statute should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided." *Id.* CERCLA is a remedial statute, intended to provide protection for the public health and the environment. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). Courts are, therefore, "obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes." *Id.* (citing *United States v. Mottolo*, 605 F. Supp.

preted CERCLA as imposing strict liability on those designated as PRPs.²³

Despite these relatively clear goals, courts have recently disagreed over how to characterize a claim brought by a PRP against another PRP.²⁴ Specifically, two theories of liability have emerged. First, the cost recovery theory provides that parties may recover from a PRP all of the costs incurred from the cleanup of a hazardous site.²⁵ Second, the contribution theory entitles those who have been found liable to bring suit against other PRPs for their respective share of the cleanup costs.²⁶

B. CERCLA's Liability System

1. Cost Recovery Theory

The cost recovery theory is governed by section 107 of CERCLA.²⁷ Section 107(a) specifically describes who may be classified as a PRP and the manner in which liability attaches.²⁸ Courts have

898, 902 (D.N.H. 1985); *United States v. Conservative Chem. Co.*, 619 F. Supp. 162, 192 (W.D. Mo. 1985)).

23. See CERCLA § 101(32), 42 U.S.C. § 9601(32) (1994) (defining liability by same strict liability standard used under section 311 of Clean Water Act); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120-21 (3d Cir. 1997) (stating section 107 imposes strict liability on PRPs for costs incurred in hazardous waste cleanups and site remediation); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995) (stating "it is now well settled that § 107 imposes strict liability on PRPs" for hazardous waste site cleanups, and "imposes . . . liability on PRPs regardless of fault"); see also H.R. REP. NO. 99-253(I), at 74 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2856 (stating "liability under CERCLA is strict, that is, without regard to fault or willfulness").

24. See generally Hernandez, *supra* note 8 (discussing controversy among courts over PRPs' right of recovery and providing alternative solution).

25. For a discussion of the cost recovery theory, see *infra* notes 27-38 and accompanying text.

26. For a discussion of the contribution theory, see *infra* notes 39-45 and accompanying text.

27. See CERCLA § 107, 42 U.S.C. § 9607. For a discussion of constitutional challenges brought against CERCLA's strict liability scheme, see *TOPOL & SNOW, supra* note 1, at §§ 2.1-2.2.

28. See *id.* § 107(a), 42 U.S.C. § 9607(a). Section 107(a) of CERCLA provides that:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or

held that this section also authorizes both the government and private plaintiffs to bring actions for cost recovery.²⁹ Several courts have interpreted CERCLA as requiring a plaintiff to prove the following four elements to establish a prima facie case for cost recovery:³⁰ (1) that a hazardous substance was disposed of at a

incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
 - (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
 - (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
 - (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
 - (D) the costs of any health assessment of health effects study carried out [consistent with] this title.

Id. § 107(a), 42 U.S.C. § 9607(a). Additionally, a “person” as used in section 107 of CERCLA includes any individual, corporation, association or partnership. *See id.* § 101(21), 42 U.S.C. § 9601(21).

29. *See Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989) (“Section 9607(a) . . . permits both government and private plaintiffs to recover from responsible parties the costs incurred in cleaning up and responding to hazardous substances”); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890 (9th Cir. 1986) (holding that section 107 “expressly creates a private right of action for damages”); *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 288 (N.D. Cal. 1984) (“It is difficult for the Court to imagine statutory language that would more clearly grant a private cause of action.”); *Hernandez, supra* note 8, at 89-90 (discussing authorization of “the United States, the states, Indian tribes, and any other person” to bring action for cost recovery).

Under section 107(a) of CERCLA, EPA will seek to recover costs expended from the Superfund and a private party will seek to recover the costs that it has incurred for the cleanup of a hazardous site from the PRPs. *See CERCLA* § 107(a), 42 U.S.C. § 9607(a). Costs that are recoverable include those costs associated with short term “removal actions,” such as responding to discovered leaks or spills, as well as those costs associated with long term “remedial actions,” such as activities aimed at providing permanent cleanup and restoring environmental quality. *See TOPOL & SNOW, supra* note 1, at 11. The remedial or removal actions taken by the federal government, state governments and private parties to clean up sites must be conducted within the guidelines for cleanup established by the National Contingency Plan (NCP). *See CERCLA* § 105, 42 U.S.C. § 9605. In federal and state cost recovery actions, the defendant PRP must overcome a presumption that all of the cleanup costs are consistent with the NCP in order to prevail. *See Hernandez, supra* note 8, at 91. In cost recovery actions brought by private parties, the plaintiff has the burden of proving that its costs are consistent with the NCP. *See id.*

30. *See CERCLA* § 107(a), 42 U.S.C. § 9607(a). For an explanation of how these four requirements are analyzed by the courts, see *In re Reading Co.*, 115 F.3d 1111, 1117-18 (3d Cir. 1997); *Amoco Oil*, 889 F.2d at 668; *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 797 (D.N.J. 1996); *Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 629 (E.D. Mo. 1996).

“facility;”³¹ (2) that there has been an actual “release” or “threatened release” from that facility;³² (3) that the defendant is considered a responsible party under section 107(a);³³ and (4) that the release or threatened release has caused the plaintiff to incur response costs.³⁴ Once a court determines that a party is a PRP, strict liability attaches and the party may avoid liability only by establishing one of the defenses listed in section 107(b).³⁵

31. See CERCLA § 101(a), 42 U.S.C. § 9601(9). CERCLA has defined “facility” as including “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise to be located.” *Id.*

32. See *id.* § 101(22), 42 U.S.C. 9601(22). CERCLA has defined “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . .” *Id.*

33. For a discussion of CERCLA’s definition of a responsible party, see *supra* note 28 and accompanying text.

34. See CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). CERCLA has defined “response costs” as those costs which are consistent with the NCP, as well as reasonable under the circumstances. See *id.* Response costs include the costs of “such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances” *Id.* § 101(23), 42 U.S.C. § 9601(23).

35. See *id.* § 107(b), 42 U.S.C. § 9607(b). This section provides:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were 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, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes that (a) he exercised due care with respect to the hazardous substance concerned . . . in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

Id. Section 101(35)(A) of CERCLA provides the following definition of the term “contractual relationship” used in section 107(b)(3):

The term “contractual relationship,” for the purpose of section 9607(b)(3), includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

- (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substances which is the subject of the release or threatened release was disposed of on, in, or at the facility.
- (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or

Courts have interpreted section 107(a) as imposing joint and several liability on PRPs for all response costs incurred by a party during the cleanup of a hazardous waste site.³⁶ When Congress originally enacted CERCLA, a party's sole remedy for response

through the exercise of eminent domain authority by purchase or condemnation.

- (iii) The defendant acquired the facility by inheritance or bequest. In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.

Id. § 101(35)(A), 42 U.S.C. § 9601(35)(A). The definition of the term "contractual relationship" was intended to "clarify and confirm that under limited circumstances landowners who acquire property without knowing of any contamination . . . may have a defense to liability under section 107 and therefore should not be held liable for cleaning up the site if such persons satisfy the remaining requirements of section 107(b)(3)." H.R. REP. NO. 99-962, at 186 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3299. Sections 107(b) and 101(35)(A) work together to establish the innocent landowner defense. *See Chesapeake & Potomac Telephone Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1266, 1280 (E.D. Va. 1992). Specifically, the defense derives from the general third-party defense set forth in section 107(b)(3) of CERCLA, with the essential term "contractual relationship" being defined in section 101(35)(A). *See id.* Commentators have referred to the innocent landowner defense as providing "a useful counterbalance to the strict liability scheme of CERCLA." Eva M. Fromm et al., *Allocating Environmental Liabilities in Acquisitions*, 22 J. CORP. L. 429, 455 (1997).

36. *See, e.g., Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 629 (E.D. Mo. 1996) (stating that liability under section 107(a) is joint and several unless PRP can prove that harm caused is divisible). When Congress originally enacted CERCLA, it did not expressly mention joint and several liability, and thus, courts were forced to "establish the scope of liability through a case-by-case application of 'traditional and evolving principles of common law' and pre-existing statutory law." H.R. REP. NO. 99-253(I), at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856. The Energy and Commerce Committee reported that the court in *United States v. Chem-Dyne Corp.* "had established a uniform federal rule for using joint and several liability in the appropriate CERCLA cases." *Id.* The court in *Chem-Dyne* was the first court to address the application of joint and several liability under CERCLA. *See United States v. Chem-Dyne*, 572 F. Supp. 802, 810 (S.D. Ohio 1983). The court stated:

A reading of the entire legislative history in context reveals that the scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases. The deletion was not intended as a rejection of joint and several liability. Rather the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex federal scenarios associated with multi-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.

Id. at 808. The *Chem-Dyne* court relied on Restatement (Second) of Torts § 433 (1965) to determine whether to impose joint and several liability or to impose several liability, in which the PRP would only bare its own share of the cost incurred. *See id.* at 810. For the pertinent text of Restatement (Second) of Torts § 433 (1965), *see infra* note 38.

costs was a cost recovery action under section 107(a).³⁷ Courts were forced to use common law principles to create an implied right of contribution among PRPs because CERCLA did not yet contain any cost contribution provision.³⁸

37. See CERCLA § 107(a), 42 U.S.C. § 9607(a). Originally, there was no express mechanism for a party to recover the costs incurred in cleaning up a hazardous site which were not part of its pro rata share. See *In re Reading*, 115 F.3d 1111, 1118 (3d Cir. 1997). The courts, therefore, created a remedy by interpreting section 107(a) as providing a private right of action for contribution from others when a party has incurred more than its pro rata share of the expenses. See *id.*

38. See Richard D. Buckley, Jr., Comment, *Making a Case for Statutory Amendment to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"): Solving the Section 107/Section 113 Cause of Action Controversy*, 31 TULSA L.J. 851, 856 (1996). Courts have generally bifurcated issues of contribution into a liability phase and a subsequent cost allocation phase. See *id.* PRPs were held jointly and severally liable, according to the common law principles of joint tortfeasors, unless the harm was shown to be divisible. See *id.* In the early stages of CERCLA, in order to have a systematic way to allow PRPs to bring actions for contribution, the federal courts relied on the following sections of the Restatement (Second) of Torts:

§ 886A. Contribution Among Tortfeasors:

- (1) Except as stated in Subsections (2), (3) and (4), when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them.
- (2) The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability, and is limited to the amount paid by him in excess of his share. No tortfeasor can be required to make contribution beyond his own equitable share of the liability.
- (3) There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm.
- (4) When one tortfeasor has a right of indemnity against another, neither of them has a right to contribution against the other.

RESTATEMENT (SECOND) OF TORTS § 886A (1979).

§ 433A. Apportionment of Harm to Causes:

- (1) Damages for harm are to be apportioned among two or more causes where
 - (a) there are distinct harms, or
 - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
- (2) Damages for any other harm cannot be apportioned among two or more causes.

Id. § 433A (1965).

§ 881. Distinct or Divisible Harms:

If two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused.

Id. § 881 (1979). For further discussion of how the courts applied these sections of the Restatement (Second) of Torts, see Buckley, *supra*, at 856-57.

2. The Contribution Theory

In 1986, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act (SARA).³⁹ In doing so, Congress added section 113(f), which both codified the federal common law principles of contribution as well as provided an express right to contribution.⁴⁰ This provision permits a PRP that has been held jointly and severally liable under section 107(a) to seek contribution from other PRPs if it incurred a disproportionate share of the cleanup costs.⁴¹ The liability imposed on PRPs in an action for contribution is several only.⁴²

In addition to the express right of contribution, Congress established a "contribution bar" in section 113(f)(2).⁴³ This subsec-

39. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C. §§ 9601-9675 (1994)) [hereinafter SARA].

40. See Panzer, *supra* note 3, at 450. Section 113(f) of CERCLA 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 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 9607 of this title.

CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

41. See *id.*; United Tech. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 100 (1st Cir. 1994) (stating purpose of section 113(f) is to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances"); see also *In re Reading*, 115 F.3d at 1119; *Hemingway Transport, Inc. v. Kahn*, 993 F.2d 915, 922 (1st Cir. 1993) (finding contribution provision enables PRPs "subjected to pending or completed EPA enforcement actions" to bring private actions "for full or partial contribution from nonsettling PRPs by way of impleader or an independent action"); but see *Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1237 (M.D. Pa. 1996) (stating attempt to "clarify and confirm" right to contribution created confusion in interplay of sections 107 and 113). For a further discussion of the purposes of section 113(f), see Panzer, *supra* note 3, at 450-53 (discussing how right of contribution promotes fairness in apportioning liability).

42. See CERCLA § 113(f), 42 U.S.C. § 9613(f). The PRP suing for contribution remains liable for all costs that cannot be fairly allocated to the defendants in the contribution action. See *id.* Moreover, the PRP who has intentionally created the hazardous waste situation will be held liable without the right to contribution. See RESTATEMENT (SECOND) OF TORTS § 886A (3) (1979). For the language used in section 886A(3) of the Restatement (Second) of Torts, see *supra* note 38.

43. See CERCLA § 113(f)(2), 42 U.S.C. § 113(f)(2). Section 113(f)(2) of CERCLA provides:

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for

tion provides that a party who has resolved its liability in a settlement agreement with either the United States or a state will not be liable for further claims for contribution on matters covered in that settlement.⁴⁴ The contribution bar is designed to promote CERCLA's goals of encouraging prompt and voluntary cleanup of a hazardous site and imposing the costs of a cleanup on the parties responsible.⁴⁵

C. The Controversy: A PRP's Right to Recovery

With the enactment of SARA, Congress established two express causes of action for a party that incurs response costs, namely, a cost recovery action under section 107, and a contribution action under section 113.⁴⁶ Cost recovery actions are generally favored by plaintiffs because they entitle the plaintiff to recover all costs incurred in the hazardous site cleanup.⁴⁷ Courts, however, have been reluctant

claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Id. § 113(f)(2), 42 U.S.C. § 9613(f)(2).

44. *See id.*; *see also* Rumpke of Indiana, Inc. v. Cummins Engine Co., 107 F.3d 1235, 1236 (7th Cir. 1997) (stating barring contribution "protects parties who settle claims with the government from liability for contribution in suits relating to 'matters addressed' in administratively or judicially settled consent decrees").

45. *See* H.R. REP. NO. 99-253(1), at 80 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 ("Private parties may be more willing to assume the financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others."). Critics have viewed the contribution bar as giving the United States "obvious and important leverage" for the efficient resolution of waste site cleanup disputes. *In re* Reading, 115 F.3d at 1119. Non-settling PRPs remain liable for the total amount minus the settlement agreement. *See id.* PRPs who choose to settle, therefore, "gain protection from contribution, enjoy potentially favorable settlement terms, and retain the ability to seek contribution from other defendants." *Id.* Conversely, PRPs who do not settle, "are barred from seeking contribution from the settling PRPs and thus face potentially disproportionate liability." *Id.*

46. *See United Tech.*, 33 F.3d at 99 (stating that CERCLA distinguishes between actions for cost recovery and actions for contribution); Kaufman & Broad-South Bay v. Unisys Corp., 868 F. Supp. 1212, 1214 (N.D. Cal. 1994) (stating that CERCLA provides "two different kinds of legal actions" for parties to recover some or all of costs incurred in cleanup).

The First Circuit in *United Technologies* noted that although Congress did not explicitly state when to use each type of action, "we are not wholly without guidance." *United Tech.*, 33 F.3d at 99. The First Circuit emphasized the need to utilize the accepted canons of construction and to construe the meaning of the legal terms contained in the statute in accordance with their customary legal meaning. *See id.*

47. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a). Plaintiffs prefer actions for cost recovery for two additional reasons: (1) there is a longer statute of limitations in which an action may be brought and (2) cost recovery actions may be brought against PRPs who are protected against actions for cost contribution by the contribution bar under section 113(f)(2). *See* Panzer, *supra* note 3, at 456-57. One of the

to allow a PRP to sue other PRPs to recover all cleanup costs incurred.⁴⁸

There has been no Supreme Court decision that has specifically addressed whether a plaintiff PRP may bring an action under section 107(a). The Supreme Court did, however, state in *Key Tronic Corp. v. United States*⁴⁹ that CERCLA “authorizes a cause of action for contribution in section 113 and impliedly authorizes a similar somewhat overlapping remedy in section 107.”⁵⁰ While most courts find this language to be irrelevant, some courts have used it as support for holding that a PRP may bring an action for cost recovery under section 107 of CERCLA.⁵¹ Because the Supreme Court has not expressly addressed this issue, an analysis of the applicable case law will demonstrate the divided views which

major disadvantages of pursuing an action for contribution is that the plaintiff may not be able to recover all of its losses unless that party is able to bring an action for contribution against all of the liable parties. *See id.* at 451.

Claims by PRPs generally arise in one of two ways. *See Hernandez, supra* note 8, at 83. First, EPA, or a similar entity, may clean up a site and then bring a cost recovery action against a PRP. *See id.* at 84. Since, according to the cost recovery provision, that party will be considered jointly and severally liable, it will then want to sue other PRPs to force them to share in the liability. *See id.* Second, a PRP may either voluntarily clean up a site or be compelled to do so by the government. *See id.* The PRP in this situation may also want to sue other PRPs to share the costs of the cleanup. *See id.*

48. *See Baicker-McKee & Singer, supra* note 11 (“Congress did not indicate whether [section 113(f)] was meant to supplement private parties’ efforts to recover response costs from other potentially responsible parties under CERCLA § 107 or was meant to preclude such cost recovery actions.”). For discussion of courts’ reasons for limiting PRPs to actions for contribution, see *infra* notes 153-55 and accompanying text.

49. 511 U.S. 809 (1994).

50. *Id.* at 816. In *Key Tronic*, the Court faced the issue of whether attorneys’ fees could be considered necessary response costs under CERCLA. *See id.* at 811. The petitioner settled the lawsuit brought against it by EPA and then brought an action against other PRPs to recover a share of its cleanup costs. *See id.* at 811-12. Although the Court held that the attorneys’ fees were not recoverable under section 107, however, it noted that:

[This holding] does not signify that all payments that happen to be made by a lawyer are unrecoverable expenses under CERCLA. On the contrary, some lawyers’ work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of § 107(a)(4)(B).

Id. at 819-20. For the pertinent text of section 107(a)(4)(B), see *supra* note 28.

51. *Compare Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1246 (M.D. Pa. 1996) (noting that *Key Tronic* “seems to implicitly endorse the validity of a PRP cost recovery action”) with *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 799 (D.N.J. 1996) (stating *Key Tronic* Court did not intend to address PRPs’ right of action under section 107).

courts have established with respect to whether a PRP may bring an action for cost recovery against other PRPs.⁵²

1. *How the Circuit Courts Have Addressed the Controversy*

The Fifth Circuit in *Amoco Oil v. Borden Inc.*⁵³ was one of the first circuit courts to address the issue of whether a PRP may bring an action under section 107(a) of CERCLA.⁵⁴ In *Amoco Oil*, the Fifth Circuit held that a PRP's remedy is limited to contribution.⁵⁵ The Fifth Circuit noted that it is the court's responsibility to ascertain each responsible party's equitable share of the cleanup costs under CERCLA's contribution provision.⁵⁶

The Sixth Circuit, however, held in *Velsicol Chemical Corp. v. Enenco, Inc.*⁵⁷ that a plaintiff PRP could bring an action under section 107(a).⁵⁸ In *Velsicol Chemical*, the plaintiff brought an action under section 107(a), alleging that the defendant was also responsible for the contamination of a site that the plaintiff had been ordered to clean up.⁵⁹ The Sixth Circuit, finding that the defendant failed to establish one of the defenses to liability enumerated under

52. See generally Stach, *supra* note 8, at 48-78 (providing synopsis of each case decided during 1994 and 1995 that addressed whether PRPs may bring actions for cost recovery against other PRPs).

53. 889 F.2d 664 (5th Cir. 1989).

54. See *id.* In *Amoco Oil*, Amoco Oil Company (Amoco) had purchased property from Borden in 1977. See *id.* at 666. In 1978, the Texas Department of Water Resources informed Amoco for the first time of the radioactive nature of phosphogypsum. See *id.* Amoco was aware this substance was on the site, but was not aware that it was a hazardous waste. See *id.*

55. See *id.* at 672. The Fifth Circuit stated that as the "owner of a facility that continues to release a hazardous substance, Amoco shares joint and several liability for remedial actions with [other PRPs]." *Id.*; see also *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996) (holding plaintiff PRP, as original owner of contaminated site, may only bring claim for contribution).

56. See *Amoco Oil*, 889 F.2d at 668.

57. 9 F.3d 524 (6th Cir. 1993).

58. See *id.* at 530. In *Velsicol Chemical*, EPA performed studies which indicated the presence of hazardous materials in the sediment and table water of the North Hollywood Dump. See *id.* at 526. Velsicol Chemical Corporation (Velsicol) was one of the entities that used this site to dispose of waste. See *id.* EPA, therefore, concluded that Velsicol may be responsible for at least some of the contamination. See *id.* Despite any role that Velsicol may have played in the contamination of the site, the Sixth Circuit held that Velsicol, a PRP, may bring a cost recovery action under section 107(a) against the other PRPs. See *id.* at 530.

59. See *id.* at 527. Velsicol filed a third party complaint against the defendants for cost recovery and, in the alternative, for cost contribution. See *id.* Velsicol alleged that the defendants had disposed of its wastes containing hazardous substances at the dump site, and therefore, was also a PRP for the contamination of the dump site. See *id.*

section 107(b), held that the plaintiff was entitled to bring an action for response cost recovery.⁶⁰

The Seventh Circuit's holding in *Akzo Coatings, Inc., v. Aligner Corp.*⁶¹ initiated a trend of limiting PRPs to actions for contribution.⁶² In *Akzo*, the plaintiff, as well as twenty other companies, received an administrative order to conduct emergency removal activities at a facility.⁶³ The plaintiff, in an effort to recoup the costs it had incurred in the cleanup, argued that it was entitled to bring a cost recovery action under section 107(a).⁶⁴ Although the Seventh

60. *See id.* at 530. The Sixth Circuit found that the district court had erred by holding that the doctrine of laches, the defense asserted by the defendants, barred Velsicol's suit. *See id.* The Sixth Circuit acknowledged that other courts had allowed non-enumerated equitable defenses to be applied in CERCLA litigation. *See id.* The Sixth Circuit explained, however, that "[t]he clear language of section 107(a) and (b) . . . manifests the congressional intent to foreclose any non-enumerated defenses to liability." *Id.* The Sixth Circuit noted that the Eighth Circuit had also recognized that "the plain language of 107(b) . . . set[s] forth the universe of defenses to section 107 liability." *Id.* (citing *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990)). Since the defendant had no valid defense, the Sixth Circuit held that Velsicol was entitled to bring a claim under section 107(a). *See id.* For further discussion of the Sixth Circuit's reasoning in *Velsicol Chemical*, see *infra* notes 151-53 and accompanying text.

61. 30 F.3d 761 (7th Cir. 1994).

62. *See Buckley, supra* note 38, at 865-74. Currently, there is a trend among the courts to prohibit PRPs from bringing an action under section 107(a) of CERCLA. *See id.* at 865-68. Interestingly, some commentators argue that Congress should repeal section 113 in order to restore the original intent of CERCLA. *See id.* at 868-74.

63. *See Akzo*, 30 F.3d at 762. In *Akzo*, more than 200 firms had sent the hazardous wastes generated from their respective sites to the Fisher-Calo site, a collective group of facilities which included the Two-Line Road facility. *See id.* In 1988, EPA found that the wastes stored at the Two-Line Road facility created a "danger of release" into the surrounding environment. *Id.* EPA issued an order requiring Akzo Coatings (Akzo), and over twenty other companies that were considered liable parties under CERCLA, to complete the following tasks: (1) fence off and otherwise secure the facility; (2) secure and remove all drums, tanks and other containers of hazardous waste from the premises, including buried containers; and (3) determine the extent to which the soil was contaminated and remove any soil that was visibly polluted. *See id.* Akzo, acting in full compliance with the orders, incurred costs in excess of \$1.2 million. *See id.* at 762-63.

64. *See id.* at 763-64. In 1990, approximately thirty-five companies that had been labeled PRPs with respect to the Fisher-Calo site, including Akzo, began performing voluntary evaluations. *See id.* at 763. The purpose of these evaluations was "to quantify the nature and extent of the liability of any and all PRPs for clean-up of the site and to evaluate" the type of work that was going to be ordered. *Id.* Less than a year later, Akzo withdrew from these evaluations, claiming that it was not liable for any contamination of the Fisher-Calo site beyond the Two-Line Road facility. *See id.* In 1992, several PRPs, including Aigner Corporation, entered into a consent decree with EPA to complete the decontamination of the site and to compensate EPA for some of the expenses it had incurred to date. *See id.* Soon after, Akzo brought suit against Aigner Corporation for full compensation of the expenses of the initial cleanup work that was required by EPA, as well as the voluntary costs Akzo had incurred due to studying the site for long-term effects. *See id.*

Circuit disagreed, it noted that the plaintiff could have brought a cost recovery action if the plaintiff had not actively contaminated the site, and thereby created what courts in later cases have called the “innocent landowner exception.”⁶⁵ Nevertheless, the Seventh Circuit in *Akzo* found that the “innocent landowner exception” did not apply in this case and held that the plaintiff could only pursue an action for cost contribution under section 113(f) of CERCLA.⁶⁶

In *United Technologies Corp. v. Browning-Ferris Industries*,⁶⁷ the First Circuit followed the Seventh Circuit’s reasoning by limiting a PRP that was liable under a consent decree to an action for contribution.⁶⁸ In *United Technologies*, the plaintiff admitted its liability for the contamination of the site, entered into a consent decree and incurred significant costs in the required cleanup work.⁶⁹ The plaintiff then brought suit against several defendants, alleging that the defendants were “wholly or partially responsible” for the contamination.⁷⁰ The First Circuit, noting the plaintiff’s confessed liability, rejected the possibility of a cost recovery claim and stated that

65. *Id.* at 764. The Seventh Circuit reasoned that “[w]hatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.” *Id.* The Seventh Circuit, thus, concluded that Akzo’s claim was “governed by section 113(f).” *Id.*

66. *See id.* at 764. The Seventh Circuit stated that “Akzo itself is a party liable in some measure for the contamination at the . . . site, and the gist of Akzo’s claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible That is a quintessential claim for contribution.” *Id.* (citation omitted). Nevertheless, the Seventh Circuit created what has been referred to as the “innocent landowner exception” by stating: “Akzo has experienced no injury of the kind that would typically give rise to a direct claim under section 107(a)—it is not, for example, a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands.” *Id.* For a critical analysis of the Seventh Circuit’s application of the “innocent landowner exception,” see *infra* notes 148-64 and accompanying text.

67. 33 F.3d 96 (1st Cir. 1994).

68. *See id.* at 102. In *United Technologies*, EPA placed the site in question on the NPL in 1981. *See id.* at 97. Subsequently, EPA conducted an investigation and discovered that Inmont Corporation, later acquired by the plaintiff, United Technologies Corporation (UTC), had engaged in various activities that led to the contamination of the site. *See id.* In 1986, the United States brought a civil action against several parties, including UTC, for past and current cleanup costs incurred by the federal government as well as future cleanup costs that would continue to be incurred. *See id.*

69. *See id.* According to the decree, UTC agreed to “undertake and complete corrective work” at the site, in addition to reimbursing the state and federal governments for the costs already incurred. *Id.* UTC alleged it had already spent in excess of \$13 million and predicted that the additional work still required would run in excess of \$20 million. *See id.*

70. *Id.* UTC initially sought three separate kinds of relief: (1) recovery of cleanup costs paid directly by them; (2) recovery of the costs paid by them to reimburse EPA; and (3) a declaration of rights with respect to liability for future

“it is 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.”⁷¹

The Tenth Circuit faced a similar situation in *United States v. Colorado & Eastern Railroad Co.*⁷² In *Colorado & Eastern Railroad Co.*, the United States filed suit against all known PRPs, including the defendant, who was the current owner of the site, and the plaintiff, who was a previous owner of the site.⁷³ The plaintiff then brought an action against the defendant for cost recovery under section 107(a).⁷⁴ The Tenth Circuit held that the plaintiff’s claim could proceed as an action for contribution.⁷⁵ The Tenth Circuit rea-

response costs. *See id.* at 97-98. UTC later voluntarily dropped its claim for reimbursement of the costs paid to EPA. *See id.* at 98.

71. *Id.* at 100. In making its decision the First Circuit stated:

By contrast, 42 U.S.C. § 9613(g)(3) allows a “non-innocent” party (*i.e.*, a party who himself is liable) only to seek recoupment of that portion of his expenditures which exceeds his *pro rata* share of the overall liability—in other words to seek contribution rather than complete indemnity. The statutory language thus suggests that cost recovery and contribution actions are distinct and do not overlap.

Id. (citing CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3) (1994)). The First Circuit also found support for its decision by relying on the definition of contribution as a claim “by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.” *Id.* at 99 (quoting *Akzo Coatings, Inc. v. Alinger Corp.*, 30 F.3d 761, 764 (7th Cir. 1994)).

72. 50 F.3d 1530 (10th Cir. 1995).

73. *See id.* at 1533. In 1968, Farmland purchased a controlling interest in Woodbury Chemical Company (Woodbury), which was located on land that had been contaminated since 1965. *See id.* at 1532. Farmland then sold its interest to another party in 1971 and in 1983 the site was added to the NPL. *See id.* In 1984, Colorado & Eastern Railroad Co. (CERC) purchased this site. *See id.* at 1533. In 1989, EPA filed suit in the United States District Court for the District of Colorado under section 107 of CERCLA against the past and present owners of the site. *See id.*

Farmland entered into a consent decree with the United States in 1990, in which it agreed to finance and perform all remediation of the site and to reimburse \$700,000 to EPA for the past response costs. *See id.* The agreed upon cleanup work was completed at a cost in excess of \$15 million, of which Farmland alleged nearly \$1.5 million was incurred due to CERC’s activities on the site. *See id.* CERC entered into its own consent decree with the United States in April, 1992, two months before the remediation of the site was complete, and it agreed to pay \$100,000 of EPA’s past response costs. *See id.*

74. *See id.* In addition to the cost recovery claim, Farmland also pled in the alternative for contribution under section 113(f) of CERCLA. *See id.* Before Farmland could successfully bring either action, the Eleventh Circuit had to assess the scope of the consent decree that CERC had entered. *See id.* at 1539. The Eleventh Circuit held CERC was “protected from any contribution claim Farmland may make in regard to its \$700,000 payment to the government but not from Farmland’s . . . claim for contribution involving remediation costs allegedly caused by [CERC].” *Id.*

75. *See id.* at 1536. The Tenth Circuit explained that the contribution provision describes the discretion the courts have in carrying out a contribution claim.

soned that “[t]here is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution.”⁷⁶

In two recent circuit court cases addressing the issue of a PRP bringing an action for cost recovery, the Third Circuit in *New Castle County v. Halliburton NUS Corp.*⁷⁷ and the Ninth Circuit in *Pinal Creek Group v. Newmont Mining Corp.*⁷⁸ reached very similar holdings. In *New Castle County*, the owner and operator of a contaminated landfill filed suit, claiming the defendant was responsible for all or part of the costs incurred for the cleanup of the site.⁷⁹ In *Pinal Creek Group*, the plaintiff, after admitting its own liability, also commenced an action in an attempt to recover from the other PRPs all, or part, of the expenses incurred in the voluntary cleanup of the site.⁸⁰ Both the Third and Ninth Circuits held that the plaintiffs

See id. “[T]he court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” *Id.* (citing CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1994)). The Tenth Circuit noted that it may use any number of determining factors, depending on the circumstances of the particular case, to establish the amount of contribution due from the liable parties. *See id.* (citing *Environmental Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992)). Additionally, the Tenth Circuit emphasized that “the burden of proof is on the . . . party seeking apportionment to establish that it should be granted.” *Id.* (quoting H.R. REP. NO. 99-253(III), at 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3038, 3042).

76. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 886A (1979)). The Tenth Circuit added that if PRPs were allowed to recover costs incurred in “cleanup and remediation from other PRPs under § 107’s strict liability scheme, § 113(f) would be rendered meaningless.” *Id.*

77. 111 F.3d 1116 (3d Cir. 1997).

78. 118 F.3d 1298 (9th Cir. 1997).

79. *See New Castle County*, 111 F.3d at 1119. After hazardous substances had been discovered at the landfill owned by New Castle County, the United States filed suit against New Castle County and other PRPs, who collectively became known as New Castle. *See id.* EPA then entered into a series of consent decrees with New Castle, requiring it “to finance and implement remedial action at the landfill.” *Id.* EPA contracted with Halliburton NUS Corporation (NUS) to perform a “Remedial Investigation/Feasibility Study” so that the appropriate response actions could be determined. *Id.* New Castle alleged that NUS installed one of the monitoring wells improperly which “opened a ‘window’ between the two groundwater formations.” *Id.* New Castle, therefore, filed a suit for cost recovery claiming that NUS was liable under section 107(a)(4)(B) of CERCLA for all or part of the costs incurred for the cleanup of the site. *See id.*

80. *See Pinal Creek Group*, 118 F.3d at 1300. Three mining companies, collectively known as the Pinal Group, voluntarily undertook the cleanup of the Pinal Creek Drainage Basin, a hazardous waste site. *See id.* The Pinal Group admitted that it was at least partially liable for some of the cleanup costs. *See id.* Despite admitting to partial liability, the Pinal Group asserted a claim for the “totality” of the costs and sought to impose joint and several liability on the defendants. *See id.* The Pinal Group contended that it should be allowed to bring suit under section 107(a) of CERCLA because the defendants would subsequently be entitled to

could not bring actions for cost recovery and noted that sections 107 and 113 work together to “provide” and “regulate” a PRP’s right to contribution.⁸¹

The Seventh Circuit, however, in *AM International, Inc. v. Datacard Corp.*,⁸² broke the trend of limiting PRPs to actions for contribution.⁸³ In *AM International*, despite knowledge that the site was contaminated, the plaintiff purchased an industrial site assuming that it would be able to recover any cleanup expenses from the former owner.⁸⁴ The Seventh Circuit held that because the plaintiff was a PRP “merely due to its status as a landowner,” it was entitled to bring a cost recovery action under section 107(a)(4)(B) of CERCLA.⁸⁵

bring an action for contribution against the Pinal Group to recover costs for which Pinal Group was responsible. *See id.*

81. *See Pinal Creek Group*, 118 F.3d at 1301-02; *New Castle County*, 111 F.3d at 1122. For a discussion of the reasoning used by the Ninth Circuit in *Pinal Creek Group* and the Third Circuit in *New Castle County*, see *infra* note 155.

82. 106 F.3d 1342 (7th Cir. 1997).

83. *See id.* The Seventh Circuit in *AM International* rejected the defendant’s argument that only parties, who did not cause the contamination, could bring an action under section 107(a) and allowed the plaintiff PRP to bring such an action. *See id.* at 1346-47.

84. *See id.* at 1346. AM International (AMI) owned an industrial site from 1959 to 1981, on which a “tank farm” was operated. *See id.* at 1345. AMI had mixed chemicals at the site to form cleaning products and, in doing so, spilled thousands of gallons of these chemicals on the ground. *See id.* In 1981, AMI sold the site to DBS, Inc., but retained ownership of the tanks and leased the tank farm grounds back from DBS, Inc. *See id.* While leasing the tank farm grounds, AMI continued to spill more chemicals onto the ground, until 1985, when AMI finally ended the tank farm operations. *See id.* at 1346. Datacard Corporation, a year later, conducted an environmental audit of the site, and despite the discovery of the contamination, bought the site from DBS, Inc. *See id.* Datacard Corporation then immediately undertook the cleanup of the site and gave AMI, among other parties, notice that it intended to sue for the response costs of the cleanup. *See id.* Upon receiving the notice, AMI sought a judgment claiming that Datacard’s claim had been discharged due to AMI’s status of being bankrupt. *See id.* Datacard Corporation then filed counterclaims against AMI, requesting damages under CERCLA. *See id.*

85. *Id.* at 1347. The Seventh Circuit, relying on its previous holding in *Akzo*, held that, ordinarily, cost recovery disputes between two PRPs are considered claims for contribution. *See id.* The Seventh Circuit noted, however, that the decision in *Akzo* established that “if a landowner faces liability solely because a third party spilled or allowed hazardous waste to migrate onto its property, the landowner may directly sue for its response costs.” *Id.* (citing *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994)). The Seventh Circuit in *AM International* noted that since Datacard Corporation did not participate in the manufacturing of the chemicals that were spilled, it was in the position of a “party forced to clean up contamination on its property due to a third party’s spill.” *Id.* Applying the language used in *Akzo*, the Seventh Circuit held that Datacard Corporation was, therefore, entitled to bring an action for cost recovery under section 107(a)(4)(B). *See id.* The Seventh Circuit in *AM International* did not discuss whether the plaintiff PRP (a “less innocent landowner”) was required to meet the

2. How District Courts Have Addressed the Controversy

In addition to those circuit courts that have addressed the issue, some district courts have also had to decide whether a PRP may bring an action for cost recovery. In *Bethlehem Iron Works, Inc. v. Lewis Industries, Inc.*,⁸⁶ for example, the court held that the plaintiff PRPs were entitled to bring an action for cost recovery under section 107(a) against the other PRPs.⁸⁷ In so holding, the court focused on the case law surrounding the issue, the language of section 107 and policy considerations.⁸⁸

elements of the innocent landowner defense under section 107(b)(3) of CERCLA. See *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 n.7 (3d Cir. 1997) (commenting on how Seventh Circuit in *AM International* included only brief discussion of section 107 and omitted any discussion of innocent landowner defense of section 107(b)(3)).

86. 891 F. Supp. 221 (E.D. Pa. 1995).

87. See *id.* at 223. In *Bethlehem Iron Works*, Bethlehem Fabricators purchased the site in question in 1968 and shortly thereafter constructed and operated a structural steel fabricating plant on the property. See *id.* at 222. Bethlehem Fabricators sold the property in 1983 to Mr. Charles P. Lewis, the sole stockholder of Lewis Industries. See *id.* As the owner of the property, Mr. Lewis also owned and operated the structural steel fabrication facility. See *id.* Beginning in 1985, the plaintiff, Bethlehem Iron Works, took over ownership and continued to operate the facility. See *id.*

As the current owner, Bethlehem Iron Works voluntarily cleaned up the site once the contamination was discovered. See *id.* Bethlehem Iron Works alleged that it incurred almost \$3 million in cleanup costs. See *id.* Bethlehem Iron Works brought suit under section 107(a) of CERCLA to recover these costs from the previous owners of the site. See *id.* None of the parties, as far as the evidence on record indicated, were ever subject to any judgment, consent decree or other agreement with the state or federal government pertaining to the liability for the cleanup of this site. See *id.* The court recognized that as current owners of the hazardous waste site, Bethlehem Iron Works was a liable party. See *id.* at 223. In making its decision, the court rejected any argument that a liable party is not entitled to bring an action for cost recovery under section 107(a) and allowed Bethlehem Iron Works to pursue its section 107(a) claims. See *id.*

88. See *id.* at 223-25. In analyzing the relevant case law, the *Bethlehem Iron Works* court found support in *United Technologies*, where contribution was defined as a claim "by jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make." *Id.* at 224 (quoting *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 (1st Cir. 1994)). The court in *Bethlehem Iron Works* distinguished the plaintiffs' voluntary cleanup of the site in *Bethlehem Iron Works* from those cases where EPA or another government entity forced the party to clean up the site. See *id.* The court additionally emphasized a footnote in the First Circuit's decision in *United Technologies* stating that it may be possible that "a PRP who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution under 42 U.S.C. § 9607(c)." *Id.* (quoting *United Tech.*, 33 F.3d at 99 n.8). The court summarized, therefore, "that if a plaintiff remediates a site with no governmental prodding, it is not prohibited from raising a section 107 claim." *Id.*

The court in *Bethlehem Iron Works* also found support in *Reichhold Chemicals, Inc. v. Textron, Inc.* See *id.* In *Reichhold Chemicals*, the court, in deciding which type of recovery a plaintiff that had signed a consent decree may pursue, held that "the exclusive remedy for a liable PRP seeking contribution from other PRPs is a Sec-

The court's holding in *Bethlehem Iron Works* can be contrasted with the court's holding in *Kaufman & Broad-South Bay v. Unisys Corp.*⁸⁹ In *Kaufman*, the plaintiff was the current owner of a residential development on which buried barrels of toxic waste were found.⁹⁰ The plaintiff filed an action to recover at least part of the cleanup costs it incurred, claiming that private PRPs were entitled to bring suit under section 107(a).⁹¹ The court rejected this argument and held that the only way the plaintiff, a PRP itself, could bring a section 107 action against other PRPs was if it could prove it was "innocent" under section 107(b).⁹²

Similarly, in *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*,⁹³ the court found that the plaintiff, as the current owner of the site, was "at the very least a potentially responsible party under

tion 113(f) contribution claim." *Reichhold Chems., Inc. v. Textron, Inc.*, 888 F. Supp. 1116 (N.D. Fla. 1995). The court in *Bethlehem Iron Works* stated "[t]he use of the term 'liable PRP' [by the court in *Reichhold Chemicals*] instead of just 'PRP' suggests that the fact that the plaintiff had already entered into a consent decree with a state agency influenced the court's decision." *Bethlehem Iron Works*, 891 F. Supp. at 224.

The court in *Bethlehem Iron Works* also used an analysis of the statute of limitations for both the cost recovery action and the contribution action to conclude that PRPs may bring actions under section 107(a). *See id.* at 225. In an action for contribution, the statute of limitations begins to run on the date of judgment, administrative order or entry of a judicially approved settlement concerning costs or damages. *See id.* (citing CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3) (1994)). The court compared this to a claim to recover removal costs, where the statute of limitations begins to run after the completion of removal, and a claim to recover remedial costs, where the statute of limitations begins to run after initiation of physical on-site construction. *See id.* (citing CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2)). Based on this comparison, the court found this to be further support that section 107(a) of CERCLA is available to PRPs, reasoning that "[i]f parties that voluntarily cleanup are permitted to raise claims only pursuant to section 113(f), it seems strange that no statute of limitations applies to these parties." *Id.* For a discussion of the analysis of the language of section 107(a) and the policy arguments, see *infra* note 152 and accompanying text.

89. 868 F. Supp. 1212 (N.D. Cal. 1994).

90. *See id.* at 1214. Kaufman and Broad-South Bay (K & B) purchased the property at issue for residential development in 1989. *See id.* Prior to purchasing the land, K & B had discovered barrels of toxic waste buried on the property. *See id.* Soon after their purchase of the property, the California Regional Water Quality Control Board issued an abatement order to K & B, "requiring investigation and remediation of the property, and protection of water under and around the property." *Id.*

91. *See id.* K & B alleged that it spent in excess of \$26 million to clean up the property. *See id.* K & B brought an action against Unisys Corporation, who was the successor-in-interest to the alleged originator of the waste, Doudell Trucking Company and Diamond Tank and Transportation, who allegedly transported the waste to the site. *See id.*

92. *See id.* at 1216. For a discussion of the court's reasoning, see *infra* notes 168-70 and accompanying text.

93. 947 F. Supp. 790 (D.N.J. 1996).

CERCLA.⁹⁴ The plaintiff argued that it was not responsible for the hazardous wastes found at the site.⁹⁵ The court, nonetheless, held that unless the plaintiff could prove that it was not liable through the use of the defenses provided in section 107(b), it would not be permitted to bring a cost recovery action under section 107(a) due to their current status as owners.⁹⁶

III. FACTS

In 1984, Rumpke purchased the Uniontown Landfill, the site at issue in *Rumpke of Indiana, Inc. v. Cummins Engine Co.*⁹⁷ Without conducting any environmental inspections of its own, Rumpke was informed by the previous owners that there had never been any hazardous wastes accepted at the site.⁹⁸ In 1990, Rumpke discov-

94. *Id.* at 798 n.3. Prior to the plaintiff's, Stearns & Foster's, purchase of the site in question, the site had been used primarily for the manufacturing of fire extinguishers by two separate companies. *See id.* at 795. Stearns & Foster used the site to manufacture bedding from 1979 until 1991. *See id.* In June of 1989, Stearns & Foster entered into an Administrative Consent Order with the New Jersey Department of Environmental Protection. *See id.* at 795-96. The order required Stearns & Foster to investigate and determine the amount and the extent of the soil and groundwater contamination that was currently at the site and to implement remedial procedures. *See id.* at 796.

95. *See id.* at 796. While investigating the contamination, Stearns & Foster learned that some of the soil and extensive groundwater pollution was caused by chlorinated solvents. *See id.* Stearns & Foster argued that these types of solvents were never used in its manufacturing process. *See id.* It was undisputed, however, that the companies manufacturing fire extinguishers did use these chlorinated solvents. *See id.* Additionally, it was undisputed that an employee of one of the fire extinguisher manufacturers emptied drums of the solvents directly onto the ground at the site. *See id.*

96. *See id.* at 801. For a discussion of the court's reasoning, see *infra* notes 172-75 and accompanying text.

97. *See Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1236 (7th Cir. 1997). The Uniontown site was a sanitary landfill that was in operation since 1968. *See Site Inspection Report for Darlarge Landfill (Rumpke of Indiana) at 1-2, Rumpke (No. 96-1650).* The site covers approximately 274 acres of land and it has been estimated that nearly 45 acres "have been actively landfilled." *See id.* After the land was sold to Rumpke in 1984, Rumpke used it for commercial and residential trash disposal. *See id.* No hazardous wastes have been deposited into the site since the time of Rumpke's purchase. *See id.*

98. *See Rumpke*, 107 F.3d at 1236. The previous landowners were George and Ethel Darlarge. *See id.* Rumpke obtained the following warranty as a part of the purchase of the Uniontown Landfill:

I, George A. Darlarge, represent that to the best of my knowledge, no hazardous waste has been deposited in the landfill I am selling to Rumpke of Indiana, Inc. All materials have had proper disposal permits and there are not outstanding EPA citations for hazardous waste violations. This representation runs with the land and shall survive the closing of the sell [sic] of the landfill. Dated this 31st day of October 1984.

Brief for Appellee at 3, *Rumpke of Indiana, Inc. v. Cummings Engine Co.*, 107 F.3d 1235 (7th Cir. 1997) (No. 96-1650).

ered that there had in fact been hazardous wastes deposited at the Uniontown site for many years.⁹⁹ Rumpke also learned that much of this waste had come from the Seymour Recycling Corporation, located about ten miles from the Uniontown site.¹⁰⁰

The Seymour site had been identified as an "environmental disaster area" before the contamination of the Uniontown site was discovered.¹⁰¹ In response to the condition of the Seymour site, the United States filed a complaint, which alleged violations under sections 106 and 107 of CERCLA.¹⁰² A proposed consent decree was also filed, and the settling parties, which included the Cummins group, were resolved of all obligations and responsibilities with respect to the Seymour site.¹⁰³

99. See *Rumpke*, 107 F.3d at 1236. Rumpke claimed to be very surprised by the "cocktail of hazardous wastes" that were discovered at the Uniontown site and the [volatile organic compounds] that were found "migrating to surrounding areas." *Id.*

100. See *id.* Rumpke learned that during the time that the Darlages owned the property "it is possible that wastes were accepted from . . . Seymour Manufacturing. Such substances as paint pigments, slag, and hardened polymers could have been accepted for disposal from Seymour." Site Inspection Report for Darlarge Landfill (Rumpke of Indiana) at 1, *Rumpke* (No. 96-1650). As a part of the recycling business, Seymour distilled for reuse acetones, alcohols, paint thinners, chlorinated solvents and freon materials. See *Rumpke*, 107 F.3d at 1236-37. The distilling process resulted in both reusable solvents and toxic sludge, and Rumpke asserted that some of the drums that Seymour used to dispose of the toxic sludge "made their way" to the Uniontown site. See *id.* at 1237.

101. See *id.* Over 60 thousand drums of toxic waste and 98 bulk storage tanks had been left on the Seymour site in various stages of decay. See *id.* The drums and tanks were "leaking, exploding and sending clouds of toxic chemicals into the air over nearby residential areas." *Id.*

102. See *id.* at 1237. The United States filed its original complaint in May of 1980, alleging violations of RCRA and the Clean Water Act. See *id.* The United States then filed an amended complaint in 1982, after the enactment of CERCLA, to include violations of sections 106 and 107 of the newly enacted statute. See *id.* The amended complaint added 24 new defendants who "allegedly had transported hazardous wastes to the Seymour site for handling, storage, disposal or treatment." *Id.*

103. See *id.* The consent decree provided that the United States, the State and the local governments would not bring any further civil actions against the settling companies for actions "arising out of or related to the storage, treatment, handling, disposal, transportation or presence or actual or threatened release or discharge of any materials at, to, from or near the Seymour site, including any action with respect to surface cleanup and soil or groundwater cleanup at the Seymour site." *Id.* The consent decree provided a "mechanism by which the surface cleanup of the Seymour Recycling Site may promptly occur." *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1336 (S.D. Ind. 1982). According to the consent decree, each of the 24 settling companies were to pay to the Seymour Site Trust Fund their specified share of the cleanup costs within 15 days of the entry of the consent decree. See *id.* The Trustees of the Fund were then obligated to pay Chemical Waste Management, a firm specializing in hazardous waste removal, the money necessary for the cleanup work required at the site. See *id.* The court approved the proposed consent decree on the grounds that it was "in accordance

Rumpke filed suit to recover costs associated with the cleanup of the Uniontown site against several of the Seymour settling parties, including the Cummins group.¹⁰⁴ Rumpke did not act as the subject of any administrative order from any public authority; rather, it cleaned up the Uniontown site on a strictly voluntary basis.¹⁰⁵ The Cummins group filed for summary judgment, arguing that Rumpke was prohibited from bringing a claim for contribution against them because, according to section 113(f)(2), the consent decree blocked any action for contribution of costs brought against a settling party.¹⁰⁶

The United States District Court for the Southern District of Indiana held that the language of the consent decree indicated that the agreement dealt only with the Seymour site, and thus, the court

with the public interest. . . . [and] satisfie[d] the requirements of legality, fairness and reasonableness." *Id.* at 1342. The court, concerned that a delay in the cleanup would "exacerbate the potential for groundwater contamination from the leakage and spillage of chemicals and other substances onto the surface of the site," emphasized the need to begin the cleanup immediately and abate the hazardous conditions. *Id.* at 1340. Experts estimated that the cleanup would take approximately one year to complete. *See id.* at 1336.

104. *See Rumpke*, 107 F.3d at 1237. At the time Rumpke filed suit, Seymour Recycling was no longer in existence, so Rumpke filed an action against the manufacturers that used Seymour Recycling to process their materials. *See id.*

105. *See id.* at 1239. The Seventh Circuit found that it was undisputed that Rumpke had never been a party subject to any action under CERCLA. *See id.* Moreover, the Seventh Circuit assumed that Rumpke did nothing to "contribute to the presence of the hazardous substances." *Id.* Rumpke asserted that it "intends to act, consistent with the National Contingency Plan, to assure that the [volatile organic compounds] it has discovered outside of the waste disposal area of the Uniontown Landfill, but within the property boundaries of the Landfill, do not become a threat to health or the environment." *Id.*

It should be noted, however, that EPA conducted a site inspection of the landfill on February 12, 1986. *See Site Inspection Report for Darlarge Landfill (Rumpke of Indiana) at 1-3, Rumpke (No. 96-1650).* The Indiana Department of Environmental Management had initially identified the Uniontown site "as potentially requiring investigation" because industrial waste had possibly been accepted at the site during the time that the Darlages owned the landfill. *Id.* Three groundwater and three sediment samples were taken. *See id.* The groundwater samples showed no signs of contamination. *See id.* Despite finding several metals in the sediment samples, EPA concluded that they did not need to perform any further investigations of the Uniontown site. *See id.*

106. *See Rumpke*, 107 F.3d at 1237. The Cummins group argued that because Rumpke's suit presented claims for contribution, these claims were barred as matters already addressed in the settlement. *See id.* They argued that, by using the appropriate ellipses, the consent decree covered actions "arising out of . . . the . . . transportation . . . of any materials . . . from . . . the Seymour site." *Id.* at 1237-38. The Cummins group reasoned that Rumpke's claim alleged that materials had been transported from the Seymour site to the Uniontown site. *See id.* at 1238. The Cummins group argued, therefore, that this claim falls "squarely within the language" of the consent decree, thereby barring the claim under section 113(f)(2) of CERCLA. *Id.*

granted a cross-motion for summary judgment made by Rumpke on the issue of the consent decree.¹⁰⁷ On appeal, the Seventh Circuit first concluded that Rumpke's suit may proceed under both sections 107(a) and 113(f)(1) of CERCLA.¹⁰⁸ Next, the Seventh Circuit affirmed the district court's decision and held that the consent decree did not insulate the Cummins group from a contribution action brought by Rumpke pertaining to the Uniontown site.¹⁰⁹

IV. NARRATIVE ANALYSIS

In *Rumpke*, the Seventh Circuit faced the issue of whether the 1982 Seymour settlement protected the Cummins group from the suit brought by Rumpke.¹¹⁰ The Seventh Circuit stated that before this issue could be addressed, it must first determine whether

107. *See id.* at 1238. The district court held that CERCLA and SARA "anticipate site-specific remedial activity." *Id.* Accordingly, the district court held that "the settlement authority of the United States is limited to the individual facility." *Id.* The district court also noted in its decision that, in addition to the express claim for contribution under section 113(f)(1) of CERCLA, Rumpke's case was in part based on a section 107(a) claim. *See id.* Next, the district court recognized that the Seventh Circuit's decision in *Akzo* created the "innocent landowner exception." *See id.* The district court, however, was factually uncertain whether Rumpke was eligible for the exception and accordingly, denied summary judgment on this issue. *See id.* The district court later denied reconsideration of the order and subsequently certified the order for interlocutory appeal to the United States Court of Appeals for the Seventh Circuit. *See id.*

108. *See id.* at 1241. The Seventh Circuit found that the "innocent landowner exception" was applicable if Rumpke was in fact the "innocent party" that it claimed to be. *See id.* at 1241-42. The Seventh Circuit held, therefore, that Rumpke may be entitled to bring an action under section 107(a). *See id.* at 1241. Additionally, the Seventh Circuit held that if the cost recovery action failed because Rumpke was found to have participated in the contamination of the site, Rumpke would be entitled to bring an action under section 113(f)(1) for contribution. *See id.* at 1242.

109. *See id.* at 1242-43. The Seventh Circuit found that the consent decree signed by the Cummins group was inapplicable to the suit brought by Rumpke because it did not address the settling parties' liability in connection with the Uniontown site. *See id.* For a discussion of the Seventh Circuit's reasoning regarding the scope of the consent decree, see *infra* notes 125-28 and accompanying text.

110. *See id.* at 1236. In response to the Seventh Circuit's order to identify the questions to be certified, the district court posed the following question of law: "[W]hether Rumpke's action against Settlers is barred pursuant to the earlier consent decree with the United States." *Id.* at 1238. From that question, the following additional questions arose:

- (1) whether the pertinent environmental statutes limit the settlement authority of the United States to individual facilities;
- (2) whether a settlement dealing with one facility (here, Seymour) may bar liability for waste disposed by or through that facility to another one (here, Uniontown); and
- (3) whether the consent decree itself is ambiguous, thus making a ruling on its effect as a *matter of law* inappropriate.

Id.

Rumpke's suit should proceed under section 107(a), section 113(f)(1) or both.¹¹¹

A. Rumpke's Section 107(a) Claim

The Seventh Circuit started with the assumption that Rumpke did nothing to contribute to the presence of the hazardous substances found and emphasized that Rumpke's status as a PRP was based solely on the fact that it was the current owner of the Uniontown site.¹¹² Using this assumption, the Seventh Circuit then analyzed whether the exception that it had previously established in *Akzo* applied.¹¹³ Accordingly, the Seventh Circuit found it necessary to briefly examine the facts surrounding its decision in *Akzo*.¹¹⁴

The Seventh Circuit in *Rumpke* noted the distinction made in *Akzo* between the party who was responsible in some way for the contamination and a "landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands."¹¹⁵ The Seventh Circuit then

For the pertinent text of the consent decree, see *supra* note 103. For a discussion of the Seventh Circuit's reasoning regarding the scope of the consent decree, see *infra* notes 125-28 and accompanying text.

111. See *Rumpke*, 107 F.3d at 1239. The district court did not decide whether Rumpke's suit could proceed under section 107(a) of CERCLA because it believed there were issues of fact to be resolved prior to deciding that issue. See *id.* The Seventh Circuit noted that the contribution bar of section 113(f)(2) of CERCLA, which prohibits recovery from parties who have resolved their liability in settlement agreements, did not apply to actions for cost recovery. See *id.* at 1242. The Seventh Circuit reasoned that the consent decree would therefore only have to be considered if Rumpke was limited to an action for contribution. See *id.* at 1239. Accordingly, the Seventh Circuit held that the most appropriate way to address Rumpke's suit was to first determine whether Rumpke was entitled to bring a claim for cost recovery, then address whether an action for contribution was permissible and, finally, address the scope of the consent decree. See *id.*

112. See *id.* The Seventh Circuit further assumed that Rumpke acquired the site "without knowledge of the presence of environmental hazards and after all the deposits had been made." *Id.*

113. See *id.* at 1239-40. Specifically, the Seventh Circuit considered: [M]ay a landowner PRP bring a direct liability suit for cost recovery under § 107(a) against other PRPs (in this case "arrangers"), if it contributed nothing to the hazardous conditions at the site, or is the *Akzo* exception available only to a narrower group of parties, such as the landowner who discovers someone surreptitiously dumping wastes on its land?

Id. For a discussion of the "innocent landowner exception," see *supra* note 66 and accompanying text.

114. See *id.* at 1240. The Seventh Circuit emphasized that the plaintiff in *Akzo* and the plaintiff in *Rumpke* were distinguishable. See *id.* *Akzo* itself had sent hazardous materials to the site while Rumpke had not caused the site to become contaminated. See *id.* For a discussion of the facts in *Akzo*, see *supra* notes 61-66 and accompanying text.

115. *Rumpke*, 107 F.3d at 1240 (quoting *Akzo Coatings, Inc. v. Aligner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994)). The Seventh Circuit in *Rumpke* placed particular

used this distinction to conclude that “when two parties who both injured the property have a dispute about who pays how much - a derivative liability, apportionment dispute - the statute directs them to § 113(f) and only to § 113(f).”¹¹⁶ In addition, the Seventh Circuit noted that the distinction made in *Akzo*, as well as the holdings of some other courts, “have acknowledged that a class of cases might remain in which a PRP might sue under § 107(a).”¹¹⁷

Drawing from its analysis in *Akzo*, the Seventh Circuit in *Rumpke* found that there was “nothing in the language of § 107(a) that would make it unavailable to a party suing to recover for direct injury to its own land, under circumstances where it is not trying to apportion costs.”¹¹⁸ Furthermore, the Seventh Circuit held that the language of section 113(f) indicated that *Rumpke*’s section 107(a) claim was consistent with CERCLA as a whole.¹¹⁹ The Seventh Cir-

importance on its conclusion in *Akzo* that the plaintiff was liable in part for the contamination of the site, stating, “the costs it has incurred should be apportioned equitably amongst itself and the others responsible.” *Id.* (quoting *Akzo*, 30 F.3d at 764).

116. *Id.* The Seventh Circuit noted that decisions in this area have been somewhat inconsistent. *See id.* The Seventh Circuit concluded, however, that “[t]he other courts of appeals that have considered the problem have agreed with our conclusion that claims properly characterized as those for contribution may normally be brought only under § 113(f).” *Id.* (citing *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1534-36 (10th Cir. 1995); *United Tech. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 101-03 (1st Cir. 1994); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989)). The Seventh Circuit, emphasizing the “innocence” of *Rumpke*, pointed out that in all of these cases the plaintiff PRPs had themselves contributed to the contamination. *See id.*

117. *Id.* (citing *Akzo*, 30 F.3d at 764; *Redwing Carriers*, 94 F.3d at 1496; *United Tech.*, 33 F.3d at 99 n.8). For a discussion of the language that the Seventh Circuit relied on in *Rumpke* from the *Akzo* decision, see *supra* note 66 and accompanying text.

118. *Rumpke*, 107 F.3d at 1240. The Seventh Circuit explained that only one of two possibilities could result from a landowner’s suit under section 107(a):

[E]ither the facts would establish that the landowner was truly blameless, in which case the other PRPs would be entitled to bring a suit under § 113(f) within three years of the judgment to establish their liability among themselves, or the facts would show that the landowner was also partially responsible, in which case it would not be entitled to recover under its § 107(a) theory and only the § 113(f) claim would go forward.

Id. The Seventh Circuit noted that “[n]either one of those outcomes is inconsistent with the statutory scheme promoting allocation of liability.” *Id.* at 1240-41.

119. *See id.* at 1241. The Seventh Circuit relied on the following opening sentence of section 113(f)(1): “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 . . . or under section 9607(a) of this title.” *Id.* (quoting CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1) (1994)). The Seventh Circuit explained that *Rumpke*’s suit was following neither a section 106 proceeding nor a section 107 proceeding; instead *Rumpke* was bringing its own section 107(a) action. *See id.* Additionally, the Seventh Circuit noted that if

cuit then cautioned that if section 107(a) was read as “implicitly denying standing to sue” to landowners who were not at all responsible for creating the contamination found at the site, “this would come perilously close to reading § 107(a) itself out of the statute.”¹²⁰ The Seventh Circuit concluded that landowners who allege that “they did not pollute the site in any way” may sue under section 107(a) to recover their direct response costs.¹²¹

B. Rumpke’s Section 113(f)(1) Claim

The Seventh Circuit then briefly addressed the status of Rumpke’s claim for contribution under section 113(f)(1).¹²² The Seventh Circuit held that if Rumpke was found to be partially responsible for the contamination of the Uniontown site, then its suit could only proceed under section 113(f) as an action for contribu-

Rumpke was found to be liable for the contamination at the Uniontown site, Rumpke would not qualify for the “innocent landowner exception.” *See id.* The Seventh Circuit further noted that in this situation, Rumpke would still be entitled to bring an action for contribution for its expenses from other PRPs, provided Rumpke met the requirements of section 113(f)(1). *See id.* The Seventh Circuit acknowledged that “this seems to provide a disincentive for parties voluntarily to undertake cleanup operations, because a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available.” *Id.* The Seventh Circuit justified the potentially negative impact of the *Rumpke* decision by describing it as “what the statute requires.” *Id.*

120. *Id.* The Seventh Circuit found that if plaintiffs like Rumpke were denied the opportunity of bringing an action under section 107(a), there would be very few private party plaintiffs entitled to use this provision. *See id.* The Seventh Circuit expanded on this theory, stating “[t]ruly innocent private party plaintiffs would be limited to, for example, a neighbor of a contaminated site who has acted to stem threatened releases for which he is not responsible . . . or a party who can claim one of the complete defenses as set forth in 42 U.S.C. § 9607(b).” *Id.* (quoting *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 801 (D.N.J. 1996)) (citations omitted). For further discussion of *Stearns & Foster Bedding*, see *supra* notes 93-96 and accompanying text and *infra* notes 172-74 and accompanying text.

121. *Rumpke*, 107 F.3d at 1241. In holding that Rumpke, a plaintiff PRP, may bring an action under section 107(a), the Seventh Circuit made two important points. First, the Seventh Circuit noted that its decision was consistent with its previous decision in *Akzo* by finding no distinction “between this situation and a case where a landowner discovers that someone has been surreptitiously dumping hazardous materials on property it already owns, apart from the potentially more difficult question of fact about the landowner’s own responsibility in the latter case.” *Id.* at 1242. Second, the Seventh Circuit noted that the contribution bar of section 113(f)(2), which prohibits recovery from parties who have resolved their liability in settlement agreements, plays no role in an action brought under section 107(a). *See id.* The Seventh Circuit reasoned that “[c]ontribution among the defendants could be of no possible benefit to a party entitled to recover its full direct costs, nor could the settlement carve-out feature of § 113(f)(2) be of any possible benefit to Rumpke as a Uniontown PRP.” *Id.*

122. *See id.* at 1242.

tion.¹²³ At this point in the analysis, the Seventh Circuit emphasized the importance of the contribution bar under section 113(f)(2), which prohibits recovery from parties who have resolved their liability in settlement agreements.¹²⁴

C. Matters Addressed in the Settlement

In determining the scope of the Seymour settlement, the Seventh Circuit began by analyzing the specific language of the consent decree.¹²⁵ The Seventh Circuit concluded that there was nothing to suggest that the “*Seymour* decree addressed the settling parties’ liability for waste from Seymour Recycling dumped at virtually any or every other spot on the globe, including the Uniontown landfill.”¹²⁶ Additionally, the Seventh Circuit noted that, read as a

123. *See id.* Once again, the Seventh Circuit in *Rumpke* relied on its previous decision in *Akzo*. *See id.* at 1242. The Seventh Circuit found that the decision in *Akzo* indicated that if the plaintiff actively participated in the contamination of the site, the plaintiff must be limited to actions for contribution. *See id.* at 1240.

124. *See id.* To determine the scope of the contribution bar, the Seventh Circuit considered whether the Seymour settlement addressed the Cummins group liability for the cleanup of sites other than the Seymour site. *Id.* For a discussion on the scope of the consent decree, see *infra* notes 125-28, 176-78 and accompanying text.

125. *See Rumpke*, 107 F.3d at 1242. The Seventh Circuit relied on its previous holding in *Akzo*, where it held that “the ‘matters addressed’ by a consent decree must be assessed in a manner consistent with both the reasonable expectations of the signatories and the equitable apportionment of costs that Congress has envisioned.” *Id.* (quoting *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 766 (7th Cir. 1994)). In particular, the Seventh Circuit relied on the holding in *Akzo* that the consent decree did not bar the plaintiff’s claim since “‘Akzo’s work [stood] apart in kind, context, and time from the work envisioned in the consent decree’” *Id.* (quoting *Akzo*, 30 F.3d at 767). The Seventh Circuit in *Rumpke* then found that the cleanup done at the Uniontown site was “apart in ‘kind, context, and time’ from the Seymour surface cleanup.” *Id.*

126. *Id.* The Seventh Circuit in *Rumpke*, emphasizing the concern previously expressed in the *Akzo* decision, found that the terms of a consent decree that affect a third party must be explicitly stated. *See id.* (citing *Akzo*, 30 F.3d at 766 n.8, 768). The Seventh Circuit in *Rumpke* cited the following provisions from the consent decree to demonstrate that the decree in the Seymour settlement specifically defined the parties’ obligations and responsibilities for the Seymour Recycling site only:

Exhibit B of the decree defined the decree’s object as “The Removal and Disposal of Drummed Hazardous Chemicals and Waste Materials Located at: Seymour Recycling Center[,] Seymour, Indiana.” Section VIII of the decree gave the United States, the State, and their authorized representatives “access to the Seymour site at all times until such time as the Work is completed.” Section IX allowed the various governmental authorities “access to the site for the sampling of wastes at the site” Section XII itself, on which the Cummins group has pinned its hopes, declared it to be the intention of the parties “[t]o avoid litigation . . . in connection with the Seymour site”

Id.

whole, the consent decree was not ambiguous, and therefore, did not allow extrinsic evidence to be admitted.¹²⁷ The Seventh Circuit held that the consent decree only protected the Cummins group from actions for contribution for matters directly related to the Seymour site, and not actions pertaining to a separate and distinct site, like that of the Uniontown site.¹²⁸

V. CRITICAL ANALYSIS

The Seventh Circuit's holding on Rumpke's section 107(a) claim is inconsistent with that of other courts and creates results that are contrary to CERCLA's purposes.¹²⁹ On the other hand, the Seventh Circuit correctly held that the 1982 Seymour settlement did not protect the Cummins group from an action for contribution brought by Rumpke.¹³⁰

127. *See id.* at 1242-43. The Seventh Circuit, relying on several Supreme Court cases, found that it was not appropriate for extrinsic evidence to be considered when the decree is clear on its face. *See id.* at 1243. The Seventh Circuit refused to admit the affidavits from the settling defendants' lawyer "about what he really meant in approving the language of section XII." *See id.* at 1243.

128. *See id.* at 1243. The Seventh Circuit was unpersuaded by the Cummins group's attempt to use ellipses to demonstrate that the consent decree could have covered the "transportation . . . of any materials . . . from . . . the Seymour site." *Id.* The Seventh Circuit responded:

If we are playing with ellipses, we could also say that the decree covers matters "arising out of the . . . transportation . . . of any materials . . . near the Seymour site," but even Cummins' lawyer agreed that it would be absurd to conclude that the Cummins group was protected even if any of its wastes had ever been "near" Seymour, perhaps passing on their way to Uniontown or other locales.

Id.

The Seventh Circuit concluded its opinion by stating that "nothing in the pertinent environmental statutes *theoretically* limits the power of the United States to enter into a settlement that addresses more than one facility." *Id.* (citing *Akzo*, 30 F.3d at 766 n.8, 768). The intent to include more than one site in a settlement agreement, however, "must appear far more plainly in the language of the agreement than we have here." *Id.*

129. Most notably, the Seventh Circuit's decision in *Rumpke* was partially inconsistent with its holding in *AM International*, decided eight days prior to the *Rumpke* decision. *See generally* *AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342 (7th Cir. 1997). For a discussion of this inconsistency, see *infra* notes 143-44 and accompanying text. For a discussion of the adverse effects the decision in *Rumpke* has on the goals of CERCLA, see *infra* notes 181-87 and accompanying text.

130. *See Rumpke*, 107 F.3d at 1242-43. Even though the scope of the consent decree was the central issue in this case, the majority of the Seventh Circuit's analysis was devoted to whether Rumpke's action should proceed under section 107(a), section 113(f) or both. *See id.* at 1239-42. For an analysis of the Seventh Circuit's interpretation of the consent decree, see *supra* notes 125-28 and accompanying text.

A. Analysis of the Section 107(a) Claim

Other courts' decisions addressing the issue of a PRP bringing an action under section 107(a) have been divided.¹³¹ These decisions can be broadly classified into two categories. Courts in the first category have held that all parties, regardless of PRP status, may bring a claim under section 107(a), while courts in the second category have held that only parties not responsible for causing the contamination may bring claims under section 107(a).¹³² The Seventh Circuit in *Rumpke* held that "normally" PRPs are not permitted to bring a section 107(a) claim; however, in the case where the plaintiff is a PRP solely due to its status as the landowner of a hazardous site, that plaintiff is entitled to bring such an action.¹³³ By not requiring the plaintiff to prove it was not responsible for causing the contamination of the site, the Seventh Circuit created a new standard for a PRP bringing an action under section 107(a).¹³⁴

The Seventh Circuit's decision can be distinguished from the reasoning of other courts that have addressed whether PRPs may

131. See Panzer, *supra* note 3, at 443-44 (discussing that courts are split over whether PRPs are entitled to bring claims under section 107); see generally Baicker-McKee & Singer, *supra* note 11 (stating courts have not yet "reconciled" sections 107(a) and 113(f)). For further discussion of the division among the courts in addressing actions by PRPs for cost recovery, see *infra* notes 150-55 and accompanying text.

132. See Hernandez, *supra* note 8, at 111-13. Some commentators have further distinguished court decisions addressing whether a PRP can bring an action for cost recovery. See *id.* These commentators have noted that some courts have allowed a PRP to bring an action under section 107(a) and then have allocated liability according to section 113(f). See *id.* Such courts are essentially holding that sections 107(a) and 113(f) work together to form a single cause of action. See Baicker-McKee & Singer, *supra* note 11 (discussing interplay of sections 107(a) and 113(f)(1)).

133. See *Rumpke*, 107 F.3d at 1240-41. The Seventh Circuit reasoned that "[o]n the basis of the present record, we must regard [Rumpke] as a landowner on whose property others dumped hazardous materials, before Rumpke even owned the property." *Id.* at 1241-42. The Seventh Circuit, therefore, applied the "innocent landowner exception," established in *Akzo*, and held that Rumpke was entitled to bring an action under section 107(a) of CERCLA. See *id.* at 1241-42. For an analysis of the "innocent landowner exception" and its application by the Seventh Circuit, see *infra* notes 148-64 and accompanying text.

134. See *Waste Liability: Federal Appeals Court Rules Operators Can Sue Other Sites to Recover Costs*, 28 Solid Waste Rep. (Business Publishers, Inc.) No. 15, at 117 (Apr. 10, 1997), available in 1997 WL 10909436. Commentators have interpreted the Seventh Circuit's decision in *Rumpke* as automatically entitling waste facility site owners who receive wastes from other sites to sue the owners of the site from which the waste originated for cost recovery under section 107(a). See *id.* "The 7th Circuit's new standard would appear to be that a party facing CERCLA liability 'merely due to its status as landowner' qualifies for the plaintiff-friendly tools of CERCLA's section 107(a) cost-recovery provision." Richard M. Kuntz, *Court Expands Chances for Recovering Costs*, CHI. DAILY L. BULL., Feb. 27, 1997, at 6.

bring actions for cost recovery on three primary points. First, the Seventh Circuit reasoned that Rumpke's voluntary cleanup of the site and the lack of knowledge of the contamination before purchasing the site minimized the significance of its PRP status.¹³⁵ Second, the Seventh Circuit interpreted the language of section 107(a) as creating an exception for landowners of a hazardous waste site who were not actively involved in the contamination of the site.¹³⁶ Finally, the Seventh Circuit did not require the elements of the innocent landowner defense to be met.¹³⁷

1. Voluntary Cleanup and Knowledge of the Contamination

The Seventh Circuit began its analysis by indicating that Rumpke had begun the cleanup of the Uniontown site strictly voluntarily.¹³⁸ Other courts, however, have generally focused solely on a party's PRP status, regardless of whether the party initiated cleanup voluntarily.¹³⁹ In *Kaufman*, for example, the court held that "any and all responsible parties, even those who have ex-

135. See *Rumpke*, 107 F.3d at 1239. The Seventh Circuit relied on Rumpke's lack of knowledge of the contamination, despite Rumpke's failure to perform an environmental audit of the site before purchasing it. See *id.* at 1236, 1239. For a discussion on how the decision by the Seventh Circuit in *Rumpke* differed from the holdings of other courts on this issue, see *infra* notes 138-47 and accompanying text.

136. For a discussion of how the Seventh Circuit in *Rumpke*, as well as other courts, have interpreted the language of section 107(a) of CERCLA, see *infra* notes 148-64 and accompanying text.

137. For a discussion of how courts have applied the innocent landowner defense, see *infra* notes 165-75 and accompanying text.

138. See *Rumpke*, 107 F.3d at 1239. Rumpke pointed out both in its brief and at oral argument that it had never been the subject of any administrative cleanup order from any federal, state or other public authority. See *id.* In addition, Rumpke noted that no party had ever brought a section 107 action against Rumpke. See *id.* Rumpke stated that it intended to act consistent with the NCP so that the site could be cleaned up properly and all of the danger associated with the contamination could be eliminated. See *id.* The Seventh Circuit indicated that Rumpke's status as a PRP was "based solely on its ownership of the Uniontown site." *Id.* at 1239. Rumpke's voluntary cleanup of the site was a factor that the Seventh Circuit attempted to use to distinguish Rumpke from a liable party. See *id.*

139. See, e.g., *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1498 (11th Cir. 1996). In *Redwing Carriers*, Saraland Apartments constructed an apartment complex on a site that was at one time owned by Redwing Carriers. See *id.* at 1494. During an inspection by the United States Department of Housing and Urban Development, significant contamination of the site was discovered. See *id.* The Eleventh Circuit noted that Redwing Carriers was a responsible party under CERCLA because it had "originally disposed of most, if not all, of the hazardous substances now contaminating the Site." *Id.* at 1496. More importantly, the Eleventh Circuit indicated that Saraland Apartments was also a responsible party because it was the current owner of the contaminated site. See *id.* at 1498. The Eleventh Circuit stated that "[i]t is therefore settled that a person is a responsible party under subsection 107(a)(1) if they are the current owner or operator of a

pending response costs voluntarily, are confined to bringing contribution actions under § 9613(f).¹⁴⁰

facility . . . [Saraland Apartments] thus concedes it is a potentially responsible party under subsection 107(a)(1) as the current owner of the property." *Id.*

Similarly, in *Amoco Oil* the plaintiff purchased a site which was later found to be contaminated. *See Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 666 (5th Cir. 1989). The plaintiff immediately initiated the cleanup of the site, without any federal or state administrative orders to do so. *See id.* While assessing what damages should be awarded for the costs the plaintiff incurred during the cleanup, the Fifth Circuit stated that "[a]s an owner of a facility that continues to release a hazardous substance, Amoco shares joint and several liability for remedial actions with [the other PRPs]." *Id.* at 672. The Fifth Circuit, therefore, considered Amoco a liable party, even though it engaged in voluntary cleanup of the hazardous substances. *See id.*; *see also Hydro-Mfg., Inc. v. Kayser-Roth Corp.*, 903 F. Supp. 273, 276-77 (D.R.I. 1995) (rejecting plaintiff's argument that consent decree indicates no liability and holding that plaintiff's status as PRP determines CERCLA liability).

Commentators have argued that allowing private parties who voluntarily clean up a hazardous site to bring cost recovery actions would "promote[] the important CERCLA policy of encouraging the voluntary cleanup of hazardous waste sites." *Borough of Sayreville v. Union Carbide Corp.*, 923 F. Supp. 671, 679 n.12 (D.N.J. 1996). A private liable party would be more likely to take the initiative and begin cleanup measures if there was an opportunity to gain a "windfall" by recovering all of the costs of the cleanup, including those costs for which that liable party was responsible. *See id.* This "windfall" argument has been held to "unfairly benefit a PRP who has access to cash and is willing to front load cleanup costs for an opportunity to be indemnified in a cost recovery action." *Id.* Furthermore, the "windfall" argument has been rejected as being illusory. *See id.* (citing *Kaufman & Broad-South Bay v. Unisys Corp.*, 868 F. Supp. 1212, 1215 n.2 (N.D. Cal. 1994)). For example, if parties were found liable under section 107(a) for all of the costs of a cleanup, they could then bring an action under section 113(f) for contribution for the pro rata share of the private party that brought the cost recovery action. *See id.*

140. *Kaufman*, 868 F. Supp. at 1215. The First Circuit in *United Technologies* held that "it is 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." *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994). Additionally, the First Circuit stated that section 113(f) "allows a 'non-innocent' party (*i.e.*, a party who himself is liable) only to seek recoupment of that portion of his expenditures which exceeds his *pro rata* share of the overall liability - in other words, to seek contribution rather than complete indemnity." *Id.* In *Kaufman*, while explaining that its holding was consistent with the holding in *United Technologies*, the court stated that "*United Technologies* clearly holds that only innocent parties may bring cost recovery actions and makes no distinction between liable parties who have been forced to incur cleanup costs and those who have done so voluntarily." *Kaufman*, 868 F. Supp. at 1215; *see also New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997) (using rational in *United Technologies* to arrive at same holding); *Ekotek Site PRP Comm. v. Self*, 881 F. Supp. 1516, 1521 (D. Utah 1995) (stating it was "the plaintiff's status as a PRP, and not the degree of voluntariness with which it initiated cleanup activity" which limits plaintiff's claim to contribution); *but see Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221, 224 (E.D. Pa. 1995) (stating that *United Technologies* holding "suggests that if a plaintiff remediates a site with no governmental prodding," it is not prohibited from bringing action under section 107).

Furthermore, the Seventh Circuit relied on its assumption that Rumpke had acquired the land “without knowledge of the presence of environmental hazards and after all the deposits had been made.”¹⁴¹ While the significance of this factor has not been settled by the courts, the analysis made by the Seventh Circuit in *Rumpke* is inconsistent with the reasoning of prior decisions.¹⁴²

The Seventh Circuit itself, in fact, had recently held in *AM International* that knowledge of the contamination is irrelevant in determining whether a party can bring an action for cost recovery.¹⁴³ In *AM International*, the Seventh Circuit permitted a landowner to bring suit under section 107(a) even though the landowner was aware of the contamination of the site prior to purchasing it, and in fact, purchased the site for a reduced price because of it.¹⁴⁴ Moreover, the reasoning in *Rumpke* is also inconsistent with the decision

141. *Rumpke*, 107 F.3d at 1239.

142. *See id.* The Seventh Circuit reasoned that Rumpke's lack of knowledge of the contamination indicated that Rumpke did not actively participate in the contamination of the Uniontown site. *See id.* The Seventh Circuit found that this was an important factor distinguishing Rumpke from a party that was liable for the contamination. *See id.* Based on the fact that Rumpke had not caused the site to become contaminated, the Seventh Circuit considered whether the “innocent landowner exception” could be applied. *See id.* at 1239-40. In concluding that the exception did apply, the Seventh Circuit reasoned that a landowner who did nothing to contribute to the hazardous conditions of the site was comparable to the landowner that discovers someone dumping hazardous materials on property it already owns. *See id.* at 1241-42. For the pertinent text in the *Akzo* decision creating the innocent landowner exception, see *supra* note 66.

143. *AM Int'l Inc. v. Datacard Corp.*, 106 F.3d 1342, 1346 (7th Cir. 1997). The Seventh Circuit in *Rumpke* did not mention its earlier decision in *AM International*, but focused primarily on its decision in *Akzo* as a basis for its holding. *See* Kuntz, *supra* note 134. Commentators have drawn several conclusions about the holdings in *AM International* and *Rumpke* despite the Seventh Circuit's failure to address the implications that these cases have when analyzed together. *See generally id.* The holdings suggest that the Seventh Circuit will allow purchasers who have knowledge of the contamination and who would clearly not meet the test of the innocent landowner defense to bring actions against other PRPs under section 107(a). *See generally id.* For a discussion of the elements of the innocent landowner defense, see *supra* note 35 and accompanying text.

144. *See AM Int'l*, 106 F.3d at 1347. Aside from the significance placed on the knowledge of the contamination, the reasoning in *Rumpke* and *AM International* was very similar. The Seventh Circuit in *AM International* found that the case fell into the “innocent landowner exception” it had created previously in *Akzo* by stating that “if a landowner faces liability solely because a third party spilled or allowed hazardous waste to migrate onto its property, the landowner may directly sue for its response costs.” *Id.* (citing *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994)). The Seventh Circuit in *AM International* assumed that Datacard Corporation purchased the site for a reduced cost “because it knew it was buying into an expensive cleanup.” *Id.* The Seventh Circuit reasoned that this may have made Datacard Corporation “a little less ‘innocent’ than the landowner described in *Akzo*” and therefore, concluded that “Datacard qualifies under *Akzo*'s exception and can directly pursue its response costs under § 107(a)(4)(B).” *Id.*

in *Amoco Oil*, where the Fifth Circuit addressed the situation of a landowner that was unaware of the contamination of a site before purchasing it.¹⁴⁵ The Fifth Circuit in *Amoco Oil* held that the current landowner of a contaminated site shares joint and several liability.¹⁴⁶ The Fifth Circuit then held that the plaintiff landowner was limited to an action for contribution regardless of whether the owner knew the site was contaminated before it was purchased.¹⁴⁷

2. "Innocent Landowner Exception"

The Seventh Circuit in *Rumpke* concluded that there is nothing in the language of the cost recovery provision that would make an action for cost recovery "unavailable to a party suing to recover for direct injury to its own land, under circumstances where it is not trying to apportion costs."¹⁴⁸ While acknowledging that technically *Rumpke* was a PRP, the Seventh Circuit, nevertheless held that as a landowner claiming innocence of any contamination on the site, *Rumpke* was entitled to bring an action for cost recovery under section 107(a).¹⁴⁹

145. See *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1990). In *Amoco Oil*, the owner of the hazardous site purchased the land knowing that "a pile" of phosphogypsum existed on the site, but did not know of the radioactive nature of this substance. See *id.* at 666. For a discussion of the facts of *Amoco Oil*, see *supra* notes 53-56 and accompanying text.

146. See *id.* at 672.

147. See *id.*; see also *Bethlehem Iron Works, Inc. v. Lewis Indus. Inc.*, No. CIV.A.94-0752, 1996 WL 557592, at *47 (E.D. Pa. Oct. 1, 1996) ("Under § 9607(a)(1) of CERCLA, the present owners and operators of a site are liable for response costs without regard to whether hazardous substances were disposed of at the site during the tenure of the owner or operator.").

148. *Id.* at 1240. The Seventh Circuit held that "landowners who allege that they did not pollute the site in any way may sue for their direct response costs under § 107(a)." *Id.* at 1241. For a discussion of the Seventh Circuit's reasoning, see *supra* notes 118-21 and accompanying text.

149. See *id.* at 1239-41. The Seventh Circuit concluded that allowing a PRP, by virtue of its landowner status, to bring an action under section 107(a) would not be "inconsistent with the statutory scheme promoting allocation of liability." *Id.* at 1240-41.

Section 107(a)(1) of CERCLA lists as "covered" the "owner or operator of the facility." CERCLA § 107(a), 42 U.S.C. § 9607(a)(1). Other courts have held that, according to this provision, landowners should not be treated any differently than the other categories of PRPs. See, e.g., *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1498 (11th Cir. 1996) (stating that "a person is a responsible party under subsection 107(a)(1) if they are the current owner" of hazardous site); *Amoco Oil*, 889 F.2d at 672 (holding plaintiff owner of facility where hazardous waste had been found "shares joint and several liability for remedial actions"); *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 798 n.3 (D.N.J. 1996) (stating "[a]s the current owner of the Site, Stearns & Foster is, at the very least, a potentially responsible party under CERCLA"); *Plaskon Elec. Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, 652 (N.D. Ohio 1995) ("[I]t is quite clear that [the plaintiff] is liable under § 107(a) because it is the owner of

Courts holding that all parties, including PRPs, are entitled to bring actions for cost recovery have not distinguished landowners, who did not cause the contamination, from the other classes of PRPs.¹⁵⁰ The Sixth Circuit in *Velsicol Chemical* held that under the language of section 107(a), the only way an action for cost recovery brought by a PRP could be barred was if the defendants were able to prove they were innocent under section 107(b).¹⁵¹ Similarly, in *Bethlehem Iron Works*, the court stated that “[a]n examination of the text of sections 107 and 113 gives no indication that PRPs are prohibited from bringing claims pursuant to section 107.”¹⁵²

the Site.”); *Kaufman & Broad-South Bay v. Unisys Corp.*, 868 F. Supp. 1212, 1216 (N.D. Cal. 1994) (stating plaintiff, “as a current owner of a site, is a potentially responsible party under CERCLA”); *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1280 (D. Del. 1987), *aff’d*, 851 F.2d 643 (3d Cir. 1988) (holding CERCLA “applies to all current owners and operators regardless of whether they owned or operated the facility at the time of hazardous waste disposal”).

150. *See Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579 (D. Conn. 1994). In *Axil*, the court held that the language “any other person” in section 107 “implies that Congress intended the liability provision to sweep broadly.” *Id.* (citing *United States v. New Castle County*, 642 F. Supp. 1258, 1264 (D. Del. 1986)). Despite Congress’s silence on whether the language “any other person” includes other PRPs, many courts have held that allowing all PRPs to proceed with section 107 actions is consistent with Congress’s intentions for a broad scope of liability. *See id.*; *see also United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 261 (3d Cir. 1992) (indicating “[w]e should not rewrite the [CERCLA] statute simply because the definition of one of its terms is broad in scope”); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269 (E.D. Va. 1992) (finding nothing in statute that precluded any PRP from bringing claim under section 107(a)); *but see Borough of Sayreville v. Union Carbide Corp.*, 923 F. Supp. 671, 680 (D.N.J. 1996) (holding that action brought by PRP against another PRP is attempt to apportion liability and that such action is governed by section 113(f)).

151. *See Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir. 1993). The Sixth Circuit held that it would not “deviate from the plain statutory language of section 107[(a)].” *Id.* The Sixth Circuit held that the doctrine of laches, the defense asserted by the defendants, was not a defense to CERCLA liability under section 107(b). *See id.* Since the defendant could not establish a defense to liability, the Sixth Circuit held that the plaintiff PRP was entitled to bring an action under section 107(a). *See id.* In doing so, the Sixth Circuit relied on the following quotation:

While it may be logical to permit equitable defenses in an inherently equitable proceeding, and sections 106 . . . and 113 . . . both permit equitable considerations, the clear answer for section 107 is that Congress explicitly limited the defenses available to only those three provided in section 107(b). It is within the powers of Congress to so limit the district courts’ discretion, and Congress did so in section 107.

Id. (quoting *United States v. Kramer*, 757 F. Supp. 397, 427 (D.N.J. 1991)).

152. *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221, 225 (E.D. Pa. 1995). The court stated that “section 107 imposes liability on PRPs for necessary response costs incurred by ‘any other person’ . . . [T]he text provides no indication that this implied right is limited to ‘innocent’ private parties.” *Id.* Furthermore, the court reasoned that since the provision is broadly worded and there is no mention of the plaintiff’s PRP status in the defenses provided in section

The majority of recent circuit courts, however, have held that PRPs are not permitted to bring claims under section 107(a) of CERCLA.¹⁵³ These courts have generally relied on *United Technologies*, where the First Circuit defined contribution as “a claim ‘by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.’”¹⁵⁴ Courts have found additional support in *Pinal Creek*, where the Ninth Circuit held that the “duality” of roles implied by the language of section 107(a) is best “implemented” by limiting PRPs to actions for contribution.¹⁵⁵

107(b), Congress must have intended that section 107(a) liability “sweep broadly.” *Id.* The court found further support in the language of section 113. *See id.* For example, the court reasoned that while section 113 does provide “a right of action for private plaintiffs who voluntarily cleanup, it does not provide that section 113(f) is the exclusive remedy for potentially liable parties.” *Id.*

153. *See* Buckley, *supra* note 38, at 865-68. Recent case law indicates a trend towards denying PRPs the statutory right to bring actions under section 107(a). *See id.* at 865. Courts following this trend explain that the plaintiff’s standing as a PRP is the sole factor in limiting the party to actions for contribution. *See id.* In coming to this conclusion, courts have relied on three basic points: (1) PRPs are jointly and severally liable parties, thereby making any claim to reapportion cleanup costs among PRPs the “quintessential claim for contribution;” (2) permitting PRPs to recover from other PRPs the costs incurred for cleanup under section 107(a) would render part of section 113 meaningless; and (3) PRP cost recovery claims may jeopardize the protection offered by the contribution bar of section 113(f)(2). *See* Panzer, *supra* note 3, at 453-54.

154. *United Tech. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 (1st Cir. 1994) (citations omitted). In *United Technologies*, the First Circuit concluded that contribution was a “standard legal term that enjoys a stable well-known denotation.” *Id.* The First Circuit held that this definition should be accepted in the CERCLA provisions “absent evidence that Congress had a different, more exotic definition in mind.” *Id.* This has, in fact, become the widely accepted definition of contribution for courts addressing CERCLA contribution issues. *See, e.g., In re Reading*, 115 F.3d 1111, 1120-21 (3d Cir. 1997) (adopting First Circuit’s definition of contribution); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3d Cir. 1997) (finding “contribution” is “standard legal term”).

155. *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-02 (9th Cir. 1997). The Ninth Circuit found that “[u]nder the literal language of § 107,” PRPs are partly responsible for their own cleanup costs. *Id.* at 1301. In addition, the Ninth Circuit noted the language indicates that a PRP may also hold other PRPs liable for a portion of those same costs. *See id.* The Ninth Circuit held that this duality would best be served by restricting PRPs to actions for contribution. *See id.* By interpreting section 107 in this manner, the Ninth Circuit reasoned that a PRP would be held responsible only “for that portion of the liability which it equitably should bear anyway, while being entitled to hold other PRPs severally liable for each of their, respective, equitable shares of the total costs.” *Id.* at 1301. The Ninth Circuit concluded that section 107 “implicitly incorporates a claim for contribution.” *Id.* The Ninth Circuit also stated that “while section 107 created the right of contribution, the ‘machinery’ of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107.” *Id.* at 1302; *see also New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3d Cir. 1997) (asserting “section 113 does not in itself create any new liabilities; rather, it confirms the right of a potentially responsible

The Seventh Circuit in *Rumpke* agreed with this line of holdings, finding that a dispute for the apportionment of costs is controlled by section 113(f)(1).¹⁵⁶ The Seventh Circuit, however, considered Rumpke's situation to be analogous to the innocent landowner who was forced to clean up hazardous wastes in *Akzo*.¹⁵⁷ In *Rumpke*, the Seventh Circuit found that its holding in *Akzo* indicated that there is an exception to the rule that PRPs are only entitled to bring actions for contribution.¹⁵⁸ Other courts have not adopted the "innocent landowner exception" used by the Seventh Circuit in *Rumpke*.¹⁵⁹

person under section 107 to obtain contribution from other potentially responsible persons."); *Transtech Indus. v. A & Z Septic Clean*, 798 F. Supp. 1079 (D.N.J. 1992) (finding sections 107 and 113 work together, "one governing liability and the other governing contribution from those found liable").

In holding that PRPs could only bring actions for contribution against other PRPs, the Ninth Circuit in *Pinal Creek* indicated that its holding was "consistent with the statements by the Supreme Court, and by five other circuits." 118 F.3d at 1303 (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 n.11 (1994); *New Castle County*, 111 F.3d at 1120; *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United Tech.*, 33 F.3d at 99 n.8 & 100; *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672-73 (5th Cir. 1989)).

156. See *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997). The Seventh Circuit in *Rumpke* analyzed its previous holding in *Akzo*, focusing on the distinction drawn between the party liable for the contamination and the landowner who was forced to clean up hazardous wastes found on its property due to the actions of a third party. See *id.* Using the reasoning in *Akzo*, the Seventh Circuit in *Rumpke* held that where two parties have both caused some injury to the site and there is a dispute over the apportionment of the costs, the dispute is governed solely by section 113(f). See *id.* For a discussion of the Seventh Circuit's reasoning, see *supra* notes 115-16 and accompanying text.

157. See *id.* at 1241-42. The Seventh Circuit emphasized that Rumpke acquired the land without knowledge of any contamination and after all of the hazardous deposits were made. See *id.* at 1239. The Seventh Circuit reasoned that the landowner who fails to discover a site's contamination until after it is purchased is equivalent to the landowner who discovers that "someone has been surreptitiously dumping hazardous materials on property it already owns." *Id.* at 1242. The Seventh Circuit in *Rumpke* noted that according to the Seventh Circuit's decision in *Akzo*, landowners in these situations are entitled to use the cost recovery provision. See *id.* at 1240-42. For a discussion of the language in *Akzo* creating the "innocent landowner exception," see *supra* note 66.

158. See *id.* at 1240. It is at this point that the decision in *Rumpke* becomes inconsistent with the holdings of other circuit courts. In essence, the Seventh Circuit relied on the "innocent landowner exception" whereas other courts rely on the "innocent landowner defense." See *id.* at 1240-41. The Seventh Circuit in *Rumpke* acknowledged that section 113(f) "exists for the express purpose of allocating fault among PRPs." *Id.* at 1240. According to the Seventh Circuit, this section did not apply in *Rumpke* because Rumpke was not trying to apportion the costs of the cleanup. See *id.* As the Seventh Circuit noted, Rumpke was seeking to recover all of its costs incurred on a direct liability theory. See *id.*

159. See, e.g., *Kaufman & Broad-South Bay v. Unisys Corp.*, 868 F. Supp. 1212, 1216 (N.D. Cal. 1994). In *Kaufman*, the court distinguished between the "landowner" referred to in the "innocent landowner exception" and the "owner or oper-

The Seventh Circuit in *Rumpke* concluded that the holding in *Akzo* creating the “innocent landowner exception” was an acknowledgment that “a class of cases might remain in which a PRP might sue under § 107(a).”¹⁶⁰ The Seventh Circuit attempted to distinguish the PRP in *Rumpke*’s position, a landowner who did not contribute to the contamination, from a PRP, that had actively participated in contaminating a site.¹⁶¹ Unfortunately, the Seventh

ator” of a site which is referred to in section 107. *See id.* The court, explaining why Kaufman, a PRP, was not entitled to bring a section 107 action, but the “landowner” was entitled to bring such an action, stated that “the landowner [in the example used in *Akzo*] is not liable under CERCLA because he is neither a current nor a past owner or operator of a hazardous waste site.” *Id.* The court in *Kaufman* implied that the “innocent landowner exception” created in *Akzo* was based on the “threatened release and migration of hazardous materials” occurring during the landowner’s ownership of the property. *Id.* According to this reasoning, *Rumpke* would not qualify for the “innocent landowner exception” because the contamination occurred before *Rumpke* purchased the site. *See Rumpke*, 107 F.3d at 1236-37.

The *Kaufman* court indicated that another example of when a landowner may bring a cost recovery action occurs when that party, after having been named a PRP, “can successfully assert one of the affirmative defenses enumerated in § 9607(b).” *Kaufman*, 868 F. Supp. at 1216. The following example given by the *Kaufman* court is more applicable to *Rumpke*’s situation and demonstrates how a PRP can escape CERCLA liability by asserting the third party affirmative defense listed under section 107(b)(3):

[I]f the EPA sues to compel an owner of a hazardous waste site to remediate the contamination and the owner incurs response costs but ultimately establishes that a third party was solely responsible for the contamination, then the owner would not be a liable party under CERCLA and would be entitled to seek full recovery of his cleanup costs under § 9607(a).

Id. For further discussion on the use of the affirmative defenses by the courts, see *infra* notes 165-75 and accompanying text.

160. *Rumpke*, 107 F.3d at 1240. Other courts have not reached this conclusion. *See, e.g., Kaufman*, 868 F. Supp. at 1216. In *Kaufman*, the court explained that while the *Akzo* decision may have allowed innocent parties to bring suit under section 107(a) of CERCLA, “the reality is that the vast majority of private parties will be limited to suing for contribution under § 9613(f).” *Id.* The court reasoned that “CERCLA imposes liability on virtually every private party who would have a reason to recoup cleanup costs.” *Id.* A private plaintiff suing under CERCLA, therefore, will very rarely be “innocent,” thus, virtually eliminating the possibility of a private PRP bringing an action for cost recovery under section 107(a). *See id.*

161. *See Rumpke*, 107 F.3d at 1240. The Seventh Circuit agreed with other circuit courts’ decisions to limit an action brought by one PRP against another PRP to an action for contribution. *See id.* The Seventh Circuit held, however, that it had already been established that the general rule of limiting PRPs to actions for contributions does not apply where the plaintiff did not actively participate in the contamination. *See id.* at 1241 (citing *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1534-36 (10th Cir. 1995); *United Tech. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 101-03 (1st Cir. 1994); *Akzo Coatings, Inc. v. Aligner Corp.*, 30 F.3d 761 (7th Cir. 1994); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989)).

Other courts have not relied on whether the landowner actively participated in the contamination. *See, e.g., Bethlehem Iron Works, Inc. v. Lewis Indus., No. CIV.A.94-0752*, 1996 WL 557592, at *47 (E.D. Pa. Oct. 1, 1996). The court in *Beth-*

Circuit neglected the general understanding that liability under CERCLA is strict and is intended to be without regard to fault or willingness.¹⁶² As the current owner of a hazardous waste site, Rumpke is a liable party.¹⁶³ Rumpke's lack of actual participation in the contamination is irrelevant, as liability under CERCLA is not affected by culpability or responsibility.¹⁶⁴

3. *Innocent Landowner Defense*

Despite CERCLA's imposition of strict liability, courts holding that PRPs are limited to actions for contribution have consistently implied that parties which prove they are "innocent" may bring actions for cost recovery.¹⁶⁵ To become an "innocent party," the PRP must successfully assert one of the established affirmative defenses

lehem Iron Works implied that the current owner's involvement in the contamination was irrelevant. *See id.* The court held that "the present owners and operators of a site are liable for the response costs without regard to whether hazardous substances were disposed of at the site during the tenure of that owner or operator." *Id.*

162. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259 (3d Cir. 1992) (stating "CERCLA imposes strict liability on responsible parties"); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (holding section 9607(a)(1) "unequivocally imposes strict liability on the current owner of a facility," and that liability is imposed without proof of causation); *American Nat'l Bank & Trust Co. v. Harcos Chem., Inc.*, No. 95-C3750, 1997 WL 281295, at *9 (N.D. Ill. May 20, 1997) (stating CERCLA "is not concerned with fault"); *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 797 (D.N.J. 1996) (holding when elements of liability under section 107(a) of CERCLA are met, PRPs "may be held liable for the response costs under § 9607(a) regardless of intent").

163. *See Rumpke*, 107 F.3d at 1239-40; *see also Hydro-Mfg., Inc. v. Kayser-Roth Corp.*, 903 F. Supp. 273, 276 (D.R.I. 1995). In *Hydro-Manufacturing*, the plaintiff purchased the site after it had been contaminated. *See id.* at 274. EPA performed a study after the plaintiff had acquired the land and found that adjacent residential wells were contaminated by hazardous chemicals. *See id.* The plaintiff argued it was an innocent party since it had never actively participated in the site's contamination. *See id.* at 276. Accordingly, the plaintiff sought to bring an action for cost recovery under section 107(a). *See id.*

The court was not persuaded by this argument, however, stating that "[t]his proposition ignores the plain language and the purpose of CERCLA. The legislation is designed to impose strict liability on a variety of actors, including past and present owners, *irrespective of their culpability*, because the aim of CERCLA is to facilitate, repair and clean up." *Id.* (emphasis added). The court concluded that, according to CERCLA, the plaintiff's involvement in the original contamination was irrelevant. *See id.* "[S]imply as owner of the site, [the plaintiff] bears partial responsibility for aiding clean up." *Id.*

164. *See Harcos Chem.*, 1997 WL 281295, at *6 (stating liability is "not triggered by culpability or responsibility for the contamination"); *Adhesives Research Inc. v. American Inks & Coating Corp.*, 931 F. Supp. 1231, 1246 (M.D. Pa. 1996) (holding party's culpability status was irrelevant in deciding whether party could pursue section 107(a) claim).

165. *See United Tech.*, 33 F.3d at 100 (stating "Congress intended only innocent parties" be entitled to cost recovery actions); *Stearns & Foster*, 947 F. Supp. at 801 (concluding that plaintiffs may not proceed with section 107 action unless they

enumerated in section 107(b).¹⁶⁶ The Seventh Circuit in *Rumpke*, however, did not require that Rumpke first prove that it was innocent according to section 107(b).¹⁶⁷

demonstrate innocence); *Kaufman*, 868 F. Supp. at 1216 (holding once innocence is established, plaintiff will be entitled to seek full recovery under section 107).

Courts holding that all parties, including PRPs, may bring actions under section 107(a) have found section 107(b) to be inapplicable. See, e.g., *AM Int'l, Inc. v. Dacard Corp.*, 106 F.3d 1342, 1347 (7th Cir. 1997) (holding even if purchaser has knowledge of contamination before purchase, purchaser is still entitled to bring section 107(a) action against other PRPs); *Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 630 (E.D. Mo. 1996) (stating "there is no indication that the private right of action is limited to 'innocent' private parties"); *Pneumo Abex Corp. v. Bessemer & Lake Erie R.R. Co.*, 921 F. Supp. 336, 347 (E.D. Va. 1996) (holding that nothing in statute precludes PRP from bringing section 107(a) claim).

166. See CERCLA § 107(b), 42 U.S.C. § 9607(b) (1994). In *Mathews v. Dow Chem. Co.*, the court found that a party with a valid affirmative defense to PRP liability may bring a claim under section 107 of CERCLA. 947 F. Supp. 1517, 1520 (D. Col. 1996). The court relied on the First Circuit's language in *United Technologies*, which indicated that only "innocent" parties were permitted full recovery of costs under section 107(a). See *id.* In an effort to determine whether the plaintiff was "innocent," the court analyzed whether the plaintiffs met each of the three elements required to establish a valid defense to CERCLA liability under section 107(b)(3), the third party defense. See *id.* at 1520-21. After finding that all of the elements had been met, the court allowed the plaintiffs' section 107 claims to proceed. See *id.* at 1521.

In *Velsicol Chemical*, the Sixth Circuit stated that "section 107 liability is only barred by a limited number of enumerated causation-based affirmative defenses. The clear language of § 107(a) and (b), 42 U.S.C. § 9607(a) (b), manifests the congressional intent to foreclose any non-enumerated defenses to liability." *Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir. 1993).

While no circuit court has applied the innocent landowner defense, many decisions by circuit courts have implied that PRPs must first establish their innocence before they will be permitted to bring actions under section 107(a). See, e.g., *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 n.2 (3d Cir. 1997) (stating "person who can successfully establish a defense under section 107(b)" is not responsible, and is therefore entitled to bring cost recovery action); *Redwing Carriers*, 94 F.3d at 1496, 1513-14 (holding parties not qualifying as "innocent" are barred from bringing actions under section 107(a)); *Akzo*, 30 F.3d at 764 (stating where plaintiff is "in some measure" liable for contamination, claim is for contribution).

167. See *Rumpke*, 107 F.3d at 1241. The Seventh Circuit held that a landowner who merely alleges that it did not contribute to the contamination is entitled to sue under section 107(a). See *id.*; see also *Wolf, Inc. v. L. & W. Serv. Ctr., Inc.*, No. 4:CV96-3099, 1997 WL 141685, at *8 (D. Neb. Mar. 27, 1997). The court in *Wolf* found the facts of its case very similar to the facts in *Rumpke*. See *Wolf*, 1997 WL 141685, at *7. For example, the plaintiffs in *Wolf* were PRPs due to their status as landowners of the site, they alleged that they did not contribute to the contamination and they were not the subject of any administrative order by the state or federal government. See *id.* at *8. Since the Eighth Circuit had not yet addressed a case of this nature, the court reasoned that the Seventh Circuit's holding in *Rumpke* would guide the decision. See *id.* Accordingly, the court held that the plaintiffs could bring an action for cost recovery without first proving their innocence. See *id.*; cf. *New Castle County*, 111 F.3d at 1116.

In *New Castle County*, the Third Circuit stated that it would not decide whether it endorsed "any of the exceptions for 'innocent' landowners" suggested by other

The court's decision in *Kaufman* supports the use of the affirmative defenses enumerated in section 107(b).¹⁶⁸ Because the release of hazardous waste in *Kaufman* was neither the result of an act of God nor of war, the court held that the plaintiff landowner would then have to establish that the contamination was the act of a third party by proving the elements of section 101(35)(B) of CERCLA.¹⁶⁹ This device "allows a party who acquired property after it

courts, including the *Rumpke* decision. *New Castle County*, 111 F.3d at 1124. Instead, the Third Circuit held that a PRP "under section 107(a), who is not entitled to any of the defenses enumerated under section 107(b), may not bring a section 107 action against another potentially responsible person." *Id.* at 1124.

168. *See Kaufman*, 868 F. Supp. at 1216. The *Kaufman* court held that the plaintiff was limited to bringing an action for contribution because it was a PRP, unless it could establish its innocence under section 107(b). *See id.* For further discussion of the facts of *Kaufman*, see *supra* notes 90-92 and accompanying text.

169. *See id.* at 1216. In order to assert the third party defense, the purchaser must prove by a preponderance of the evidence that it "did not know and had no reason to know" that any hazardous substances existed on the site at the time of the purchase. CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A). To establish this, the purchaser "must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." *Id.* § 101(35)(B), 42 U.S.C. § 9601(35)(B). The court in *Kaufman* acknowledged that complying with section 101(35)(B) was necessary for a party to assert its innocence under section 107(b). *See Kaufman*, 868 F. Supp. at 1216.

To determine whether the purchaser of a site conducts an appropriate inquiry, EPA assesses whether the purchaser conducted a reasonable inspection. *See Fromm et al.*, *supra* note 35, at 456. The following is an example of a Phase I Environmental Site Assessment, which is considered an adequate inquiry of the site to be purchased:

- (1) Conducting a site visit and a walk-through of the property to identify areas of visual contamination and other issues of concern;
- (2) Obtaining information concerning topography, depth to groundwater (if available), proximity to surface water, potential wetlands areas, and surrounding land uses;
- (3) Obtaining information concerning any industrial processes on the property and of the presence of USTs, transformers, wells, and waste disposal activities;
- (4) Obtaining information concerning housekeeping problems, spill areas, the condition of storage of chemicals and wastes, discolored soils or waters, and unusual odors or vegetative conditions;
- (5) Interviewing site personnel to develop information on (a) historical activities conducted at the site, including spills and disposal activities, and (b) current discharges of materials or wastes to the soil, air, and water;
- (6) Identifying possible asbestos-containing materials;
- (7) Identifying any equipment that may contain polychlorinated biphenyls;
- (8) Reviewing prior land uses through a title search, interviews of relevant persons, and a review of aerial photographs;
- (9) Reviewing aerial photographs for indications of problem areas, such as prior disposal areas or oil and gas usage;
- (10) Reviewing agency records for information about the subject site, including permitting status, spill notifications, enforcement actions,

has been contaminated and who did not know or have reason to know of the contamination to avoid liability on the basis of the [section 107(b)] third party defense.”¹⁷⁰

The Seventh Circuit in *Rumpke* partially relied on the court’s decision in *Stearns & Foster Bedding* to support its conclusion that if section 107(a) were read to prohibit “landowners like Rumpke who did not create the hazardous conditions” from bringing an action for cost recovery, section 107(a) would face possible elimination.¹⁷¹ In *Stearns & Foster Bedding*, the court acknowledged that by applying this limitation, “[s]ection 107(a) private party plaintiffs will be few

and notifications of waste activities, and discussions with agency representatives when warranted;

- (11) Reviewing agency files for sites that may affect the subject property, with files including the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database (identifying sites at which certain hazardous substances have been disposed of); the National Priorities List (NPL) database (identifying federal Superfund sites); the Leaking Petroleum Storage Tank (LPST) database; state Superfund databases; and the Resource Conservation and Recovery Act (RCRA) notifier list (identifying companies that generate, store, treat, or dispose of hazardous wastes);
- (12) Searching agency files for well drilling and plugging reports for properties suspected of being used for oil and gas exploration or production; and
- (13) Obtaining photographs of process equipment and areas of concern, such as visibly discolored soils.

Id. at 456-57.

170. *Kaufman*, 868 F. Supp. at 1216 (citing CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B)). The court held that the plaintiff would be entitled to bring a section 107(a) claim if it could assert that it was an innocent landowner by proving the following three elements:

- (1) it acquired the facility after the initial deposit of the hazardous substances;
- (2) at the time of its acquisition, it did not know and had no reason to know that any hazardous substance was deposited at the facility; and
- (3) once the presence of the hazardous substance became known, it exercised due care under the circumstances.

Id. (citing CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A); *Hemingway Trans. Inc. v. Kahn*, 993 F.2d 915, 932 (1st Cir. 1993)). The court held that if the plaintiff could not establish its innocence, it would be limited to bringing an action for contribution under section 113(f). *Id.*

Similarly, in *Boyce v. Bumb*, the court acknowledged that because the plaintiffs were the current owners of a hazardous site, they were PRPs. *See* 944 F. Supp. 807, 812 (N.D. Cal. 1996). The court asserted that other courts of appeals have recognized that “innocent” parties are entitled to bring actions under section 107(a). *See id.* The court, therefore, held that the plaintiffs would be free to bring an action for cost recovery under section 107(a) of CERCLA if they could “prove themselves to be non-responsible ‘innocent landowners’ within the meaning of § 9601(35) and § 9607(b).” *Id.*

171. *Rumpke*, 107 F.3d at 1241.

and far between.”¹⁷² The *Stearns & Foster Bedding* court found this result acceptable, however, and held that a PRP is limited to an action for contribution, unless it can demonstrate that it is “innocent.”¹⁷³ The Seventh Circuit in *Rumpke* disagreed, finding that the *Stearns & Foster Bedding* court’s analysis was not only a narrow reading of section 107(a), but also a narrow interpretation of the *Akzo* holding.¹⁷⁴ The requirement that a plaintiff PRP must prove itself innocent under section 107(b) of CERCLA, therefore, was rejected by the Seventh Circuit, when it held that landowners must simply allege their innocence.¹⁷⁵

172. *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 801 (D.N.J. 1996). The court continued as follows:

Truly innocent private party plaintiffs would be limited to, for example, a neighbor of a contaminated site who has acted to stem threatened releases for which he is not responsible, . . . or a party who can claim one of the complete defenses set forth in 42 U.S.C. § 9607(b). Few others would escape CERCLA’s strict liability scheme.

Id. (citations omitted).

173. *See id.* at 801. The court accepted restrictions limiting the capability of PRPs to bring actions for cost recovery because district courts were granted the power in section 113 to “apportion liability according to equitable principles [which] more than adequately protects a PRP who undertakes a clean-up of another party’s toxic legacy.” *Id.* The court noted that it would be “unfair to allow one PRP to burden all the other PRPs,” who would then be held jointly and severally liable for the entire harm, unless those PRPs could establish that the harm was divisible. *Id.* The court acknowledged that the plaintiff PRP could proceed with its section 107(a) action only if it could demonstrate that it was an “innocent” party. *See id.*

174. *See Rumpke*, 107 F.3d at 1241. The Seventh Circuit in *Rumpke* did not explain why the decision in *Stearns & Foster* was a narrow interpretation of both section 107(a) and the decision in *Akzo*. *See id.* The Seventh Circuit merely disagreed with the more narrow approach, unpersuaded that it was consistent with the “broader purpose and structure of CERCLA.” *Id.*

175. *See id.* The Seventh Circuit regarded *Rumpke* “as a landowner on whose property others dumped hazardous materials, before *Rumpke* even owned the property.” *Id.* at 1241-42. This satisfied one of the elements required to assert the innocent landowner defense. *See* CERCLA § 101(35)(A)(1), 42 U.S.C. § 9601(35)(A)(1). Perhaps *Rumpke* also satisfied the second element of the innocent landowner defense because once *Rumpke* was aware of the hazardous substances, “it exercised due care under the circumstances” by immediately acting to eliminate the contamination of the site. *See id.* § 101(35)(A)(3), 42 U.S.C. § 9601(35)(A)(3). *Rumpke*, however, was not required to prove that it had “no reason to know” of the contamination of the site before purchasing it, and thus, did not satisfy the third element of the innocent landowner defense. *See id.* § 101(35)(A)(2), 42 U.S.C. § 9601(35)(A)(2). This third requirement is fulfilled by performing an “appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice.” *Id.* § 101(35)(B), 42 U.S.C. § 9601(35)(B). For a discussion of what constitutes appropriate environmental inspection, see *supra* note 169.

B. The Consent Decree

The Seventh Circuit in *Rumpke* correctly considered the scope of the consent decree by determining the “matters addressed” by the decree.¹⁷⁶ Finding no ambiguities in the consent decree, the Seventh Circuit also correctly applied its previously established principle that courts should “look to the plain language of the written agreement as the best expression of the parties’ intent.”¹⁷⁷ Accordingly, the Seventh Circuit appropriately found that the consent decree offered the Cummins group no protection with respect to the Uniontown site through its reasoning that the “matters addressed” in the decree were clearly distinct from the work Rumpke was performing at the Uniontown site.¹⁷⁸

176. *Rumpke*, 107 F.3d at 1242. The Seventh Circuit once again relied on its *Akzo* decision in its analysis of the consent decree. *See id.* In *Akzo*, the Seventh Circuit found that the consent decree provided for long-term, remedial work and embodied a negotiated settlement, whereas *Akzo* was required to perform emergency, short-term, removal work. *See Akzo Coatings, Inc. v. Aligner Corp.*, 30 F.3d 761, 767 (7th Cir. 1994). Additionally, by the time the settling parties had entered into the consent decree, *Akzo* had already completed its required work. *See id.* The Seventh Circuit reasoned that cleanup activities already completed and paid for by a private party are unlikely to be addressed in subsequent settlement negotiations. *See id.* The Seventh Circuit, therefore, held that *Akzo*’s work was clearly “distinct” from the matters addressed in the consent decree with respect to “kind, context and time.” *Id.* As a result, the Seventh Circuit found that the contribution bar under section 113(f)(2) did not apply and *Akzo* was entitled to seek contribution from the settling parties of the consent decree. *See id.* The Seventh Circuit in *Akzo* added that the “matters addressed” by a consent decree must be assessed “in a manner consistent with both the reasonable expectations of the signatories and the equitable apportionment of costs that Congress has envisioned.” *Id.* at 766.

The Seventh Circuit in *Rumpke* applied the analysis used in *Akzo* and found that Rumpke’s work on the Uniontown site was distinct in “kind, context and time” from the work done at the Seymour site. *See Rumpke*, 107 F.3d at 1242. The Seventh Circuit analyzed the language of the consent decree and found that it referred specifically to the Seymour site numerous times. *See id.* The Seventh Circuit concluded that there was nothing in the consent decree that addressed liability for wastes “dumped at virtually any or every other spot on the globe, including the Uniontown landfill.” *Id.* For further discussion of the Seventh Circuit’s reasoning, see *supra* notes 125-28 and accompanying text.

177. *United States v. City of Northlake*, 942 F.2d 1164, 1167 (7th Cir. 1991). The Seventh Circuit in *Northlake* acknowledged that if “the plain language of the writing is unclear, then parol or other extrinsic evidence must be considered in order to reconstruct the intent of the parties at the time they entered into the agreement.” *Id.* at 1167. The Seventh Circuit in *Rumpke* applied its holding in *Northlake* and did not permit extrinsic evidence to be admitted. *See Rumpke*, 107 F.3d at 1242-43; *see also United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (stating “the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it”).

178. *See Rumpke*, 107 F.3d at 1242-43. The Seventh Circuit noted that although it is possible that a consent decree may address more than one facility, the intent to do so must “appear far more plainly in the language of the agreement than we have here.” *Id.* This is consistent with the Seventh Circuit’s holding in

VI. IMPACT

The decision in *Rumpke* adds a new standard to an issue in CERCLA liability that has already received inconsistent treatment by the courts.¹⁷⁹ Consequently, the holding does not resolve the controversy of whether a PRP may bring an action for cost recovery, and instead creates results which conflict with the established purposes of CERCLA.¹⁸⁰

Courts permitting all parties, including PRPs, to bring actions for cost recovery argue that a holding like that of *Rumpke*, limiting who may bring such an action, will reduce a party's incentive to cooperate in the cleanup procedures.¹⁸¹ These courts have rea-

Akzo. See *Akzo*, 30 F.3d at 770. In *Akzo*, the Seventh Circuit held that the legislative intent behind section 113(f)(2) "does not create a blanket prohibition against all suits for contribution; the bar extends only so far as the 'matters addressed' by the settlement." *Id.* The Seventh Circuit in *Akzo* indicated that the parties to a consent decree may include provisions protecting the settling parties from actions for contribution for work that would otherwise be outside the scope of the agreement. See *id.* at 766 n.8. The Seventh Circuit stated that if the parties do include such provisions, "then those terms will be highly relevant to, and perhaps even dispositive of, the scope of contribution protection." *Id.* When the parties do not, however, include such explicit provisions, the majority in *Akzo* held that the consent decree should be construed narrowly by keeping an "eye to the practicalities of the situation underlying the settlement and the reasonable expectations of the settling parties." *Id.* at 770.

179. See Kuntz, *supra* note 134. Troubled by all of the existing controversy surrounding whether a PRP may bring an action for cost recovery, several legal scholars have proposed rules in an attempt to create a consistent CERCLA liability scheme. See generally Hernandez, *supra* note 8.

180. For a discussion of the goals of CERCLA, see *supra* note 21 and accompanying text.

181. See, e.g., *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1118 (N.D. Ill. 1988). The court in *Allied* stated the following:

CERCLA seeks the expeditious and safe clean up of hazardous waste sites. A blanket prohibition against joint and several liability in claims between responsible parties would discourage a willing PRP from cleaning up on its own. This is especially true where one or more of the parties are insolvent and, thus, incapable of sharing the costs of cleanup A prohibition against joint and several liability would leave the willing PRP holding the bag for the insolvent companies. On the other hand, a willing PRP would be encouraged to clean up where the law leaves open the possibility that the PRP could recover all costs as against nonwilling, solvent PRPs under a theory of joint and several liability.

Id. In *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, the court found that allowing PRPs to bring claims for cost recovery creates "an incentive for private parties to clean up hazardous waste sites, to risk their own capital initially, knowing that by then prevailing in a section 107 action, they will be reimbursed perhaps in excess of what might be shown in a section 113 action to have been their equitable share." 814 F. Supp. 1269, 1278 (E.D. Va. 1992) (quoting *United States v. Kramer*, 757 F. Supp. 397, 416-17 (D.N.J. 1991)).

Some commentators have reasoned that allowing PRPs to pursue cost recovery actions will act as an incentive for parties to enter into settlements. See Panzer, *supra* note 3, at 478. "If PRPs can recover on a joint and several basis against other

soned that "permitting [PRPs] to raise their section 107(a) claims comports with CERCLA's goal of encouraging parties to initiate cleanup operations promptly and voluntarily."¹⁸² Additionally, these courts have found that by not allowing all parties the opportunity to recover all of their losses incurred in a cleanup, the incentive to challenge EPA will be increased.¹⁸³

Moreover, holding that only landowner PRPs, who did not cause the contamination, may bring section 107(a) claims without requiring them to meet the elements of the innocent landowner defense, also adversely affects CERCLA's goals.¹⁸⁴ Rumpke purchased the Uniontown site after it had already been contaminated and did not discover the contamination until approximately five years after becoming the owner.¹⁸⁵ Such a lapse of time in the recognition of the contamination would have precluded Rumpke from establishing the innocent landowner defense.¹⁸⁶

PRPs, those who the EPA target will more readily settle with the government and begin the cleanup process." *Id.*

182. *Bethlehem Iron Works, Inc. v. Lewis Indus.*, 891 F. Supp. 221, 225 (E.D. Pa. 1995). Any unfairness in imposing the joint and several liability of the cost recovery action can be "remedied" through an action for contribution. *See id.*; *see also Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1246 (M.D. Pa. 1996). In *Adhesives Research*, the court held that by allowing PRPs to utilize section 107, the broad remedial goals of CERCLA would be effectuated "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." *Adhesives Research*, 931 F. Supp. at 1246. The court reasoned that PRPs permitted to pursue cost recovery actions would have greater motivation to initiate the cleanup process voluntarily than if PRPs were only allowed to pursue actions for contribution. *See id.*; *see also Pneumo Abex Corp. v. Bessemer & Lake Erie R.R. Co.*, 921 F. Supp. 336, 347 (E.D. Va. 1996) (stating PRPs pursuing section 107 actions will preserve "the statute's incentives for PRPs to settle and settle early"); *Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579 (D. Conn. 1994) (finding that limitations on PRPs in contribution actions may discourage PRPs from engaging in site cleanup where they might otherwise have initiated cleanup).

183. *See Panzer, supra* note 3, at 478. Parties will assess their chances of recovering the costs that will be incurred in a hazardous site cleanup before they begin the work. *See id.* If they perceive a high risk of having to cover all of the costs, they are likely to challenge EPA's order to clean up the site. *See id.*

184. For a discussion of the courts requiring a plaintiff PRP to establish a defense to liability before bringing an action under section 107(a), *see supra* notes 165-75 and accompanying text.

185. *See Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1236 (7th Cir. 1997). Prior to purchasing the site, Rumpke did not perform an environmental inspection of its own. *See id.* at 1236. Instead, Rumpke relied on the previous owners' promises that no hazardous wastes had been accepted at the site. *See id.*

186. *See CERCLA* § 107(b), 42 U.S.C. § 9607(b) (1994). In order to assert the third party defense under section 107(b)(3), a PRP must prove by a preponderance of the evidence that it did not, and should not have known about the contamination of the site prior to its purchase. *See id.* § 101(35)(A), 42 U.S.C.

By allowing the landowner to escape the strict liability that is imposed on PRPs, the Seventh Circuit has minimized the effect of section 107(a)(1) liability.¹⁸⁷ The Seventh Circuit's decision in *Rumpke*, therefore, does not resolve the controversy of a PRP bringing an action for cost recovery under section 107(a). In fact, the decision creates results which negatively impact the goals of CERCLA and can be interpreted as undermining the strict liability imposed by CERCLA.

Christine D. McGuire

§ 9601(35)(A). To satisfy this requirement, the PRP must have performed an "appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." *Id.* § 101(35)(B), 42 U.S.C. § 9601(35)(B). The contamination of the Uniontown site, therefore, would have been discovered approximately five years earlier if Rumpke had performed such an inquiry. Delaying the cleanup of a contaminated site is not consistent with CERCLA's goals. See Judith S. Kavanaugh & William L. Earl, *CERCLA Investor Liability: "Don't Ask, Don't Tell" Won't Work*, 71 FLA. B.J. 56, 57 (1997) (discussing CERCLA's goals are to encourage site purchasers to be informed and responsible, and to make purchasing with "passive ignorance a liability"). For a discussion of the "appropriate inquiry" that should be performed by a purchaser, see *supra* note 169.

187. Rumpke is a PRP by virtue of being the current owner of the hazardous site. See *Rumpke*, 107 F.3d at 1240-41. CERCLA imposes strict liability on four categories of PRPs, including current owners of a site. See CERCLA § 107(a), 42 U.S.C. § 9607(a). For a discussion of how the strict liability component has been treated by other courts, see *supra* notes 161-64.

