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## Misery Loves Company: Spreading the Costs of CERCLA Cleanup

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## I. INTRODUCTION

The typical case arising under the Comprehensive Environmental Response, Compensation, and Liability Act<sup>1</sup> (CERCLA) involves haz-

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1. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986)) [hereinafter CERCLA].

ardous waste generation<sup>2</sup> and disposal spanning several decades<sup>3</sup> by companies no longer in existence. Subsequent attempts at cleanup by federal and state governments and private parties, as well as legal battles over the ultimate responsibility, are also at issue in the typical CERCLA case.<sup>4</sup> A single party is rarely responsible for the toxic waste pollution of a site. Usually, a toxic waste site, such as a landfill, will have numerous potentially responsible parties (PRPs):<sup>5</sup> generators; transporters; current owners and their lessees; former owners and operators and their successor corporations; individual corporate officers; and even governmental agencies. Ideally, the liability of each PRP would equal its proportionate share of the cleanup costs.<sup>6</sup>

CERCLA, however, is a remedial rather than a fault based statute. A person may be held fully liable for cleanup costs based solely on its status as a PRP under section 107 of CERCLA, even if the person neither caused nor contributed to the release of hazardous substances at the site.<sup>7</sup> CERCLA's liability is retroactive,<sup>8</sup> strict,<sup>9</sup> joint and sev-

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2. "Forty-three million metric tons of such waste were produced in 1981 alone . . . Most of this waste is not destroyed but stored—sealed by commercial waste facilities in 55-gallon drums and deposited in clay-lined dumps, injected deep underground . . . , or abandoned in vacant lots, lagoons, or landfills." *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1462 (1986) (footnotes omitted); see also *United States v. Conservation Chem. Co.*, 661 F. Supp. 1416, 1424 n.10 (W.D. Mo. 1987) (noting that the Conservation Chemical site discharged 22,000 pounds of hazardous wastes into the groundwater annually, a release of 80,000 to 100,000 gallons of contaminated water per day).

3. From 1956 until 1972, approximately 33,900,000 gallons of hazardous substances were dumped into the Stringfellow Acid pits. See, e.g., *Dubuc & Evans, Recent Developments Under CERCLA: Toward a More Equitable Distribution of Liability*, 17 ENVTL. L. REP. (ENVTL. L. INST.) 10,197 (June 1987); see also *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986). From 1959 to 1979, more than 17,000 drums containing chemical waste and 1,000,000 gallons of hazardous bulk liquid were deposited at the Lone Pine Landfill, which ranked fifteenth on the national priorities list in 1985. *Id.* at 883.

4. See *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100 (N.D. Ill. 1988).

5. See, e.g., *United States v. Seymour Recycling Corp.*, 686 F. Supp. 696, 697 (S.D. Ind. 1988) (noting that there were more than 350 PRPs connected with the Seymour site).

6. One of the goals of CERCLA is to ensure "that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)).

7. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985). CERCLA defines "person" to include "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." CERCLA, *supra* note 1, § 101(21), 42 U.S.C. § 9601(21) (1982).

8. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988) (reasoning that CERCLA's retroactivity does not violate due process because its liability scheme is rationally related to a valid legislative purpose), cert. denied, 109 S. Ct. 3156 (1989); *United States v. Motolo*, 695 F. Supp. 615, 622 (D.N.H. 1988) (noting that CERCLA liability encompasses cleanup costs resulting from acts that occurred prior to the enactment of CERCLA in December 1980).

eral,<sup>10</sup> and subject to review only if the administrative record meets the deferential arbitrary or capricious standard.<sup>11</sup> If the government fears that increasing the number of defendants will delay the trial or settlement, it will file suit against only a handful of solvent PRPs.<sup>12</sup> Therefore, a single contributor of a minor amount of hazardous waste or a contributor of only mildly toxic waste can be held liable for the entire costs of site cleanup merely because of its deep pocket.<sup>13</sup> With the average site cleanup cost ranging from twenty-one to thirty million dollars,<sup>14</sup> this is a grossly inequitable result.

In late 1986 Congress passed overwhelmingly the Superfund Amendments and Reauthorization Act of 1986 (SARA)<sup>15</sup> and revitalized Superfund with an additional 8.5 billion dollars.<sup>16</sup> The 1986 amendments to CERCLA and the recent cases arising from the amendments

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9. See, e.g., *Shore Realty*, 759 F.2d at 1042; see also *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986), cert. denied, 108 S. Ct. 146 (1987).

10. See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). Congress deleted an express requirement of joint and several liability from the final CERCLA bill. The deletion was not intended to reject joint and several liability, but rather to determine the scope of liability under common-law principles. *Id.* at 808.

11. 42 U.S.C. § 9613(j)(2) (Supp. IV 1986). This standard of review was added to CERCLA by § 113(c) of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (amending scattered sections of 42 U.S.C. §§ 9601-9675 (Supp. IV 1986)) [hereinafter SARA]. Courts disagree on whether the arbitrary and capricious standard applies retroactively. Compare *Conservation Chem. Co.*, 661 F. Supp. at 1424-29 (W.D. Mo. 1987) (using equity power authorized by CERCLA § 106(c) to avoid applying § 113(j) retroactively) with *United States v. Rohm & Haas, Inc.*, 669 F. Supp. 672, 676-77 (D.N.J. 1987) (applying § 113(j) retroactively to cases pending at the time SARA became effective). But see *United States v. Ottati & Goss*, 694 F. Supp. 977, 1001 (D.N.H. 1988) (refusing to decide the damage phase of a bifurcated trial solely on the administrative record three months after SARA became effective).

12. See, e.g., *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 680 (S.D.N.Y. 1988) (documenting the court's severing and staying of third-party actions brought against more than 300 impleaded parties in hope of advancing settlement negotiations between some or all of the 13 original defendants); *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 914 (N.D. Okla. 1987) (noting that the EPA denied the defendant site owner's request to join the PRP generators because of the lengthy time required to identify and join the generators); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391 (W.D. Mo. 1985) (documenting the Department of Justice's first use of joint and several liability by suing initially only four PRPs out of a total PRP pool of more than 50 large contributors and 150 small contributors of toxic waste); see also Hall, *Third-Party Practice Under CERCLA*, 1 A.L.I.-A.B.A. ENVIRONMENTAL LITIGATION 1205, 1211 (Seminar in Boulder, Colorado, June 20-24, 1988).

13. See, e.g., *Belthoff, Private Cost Recovery Actions Under Section 107 of CERCLA*, 11 COLUM. J. ENVTL. L. 141 (1986).

14. SURVEYS AND INVESTIGATIONS STAFF OF HOUSE COMM. ON APPROPRIATIONS, REPORT ON THE STATUS OF THE ENVIRONMENTAL PROTECTION AGENCY'S SUPERFUND PROGRAM, 101st Cong., 2d Sess. (1988), reprinted in *Practical Approaches to Reduce Environmental Cleanup Costs*, 317 P.L.I. REAL EST. L. & PRAC. 405, 424 (1988) [hereinafter SUPERFUND REPORT].

15. See *supra* note 11.

16. SARA, *supra* note 11, § 517, 26 U.S.C. § 9607 (Supp. V 1987), established the Hazardous Substances Superfund, which is a continuation of the Hazardous Substance Response Trust Fund established by CERCLA, *supra* note 1, § 221, 42 U.S.C. § 9631 (repealed 1986).

provide a more equitable distribution of cleanup responsibility by providing PRPs with a right of contribution,<sup>17</sup> creating an innocent landowner defense to liability,<sup>18</sup> improving settlement options for relatively minor contributors of waste,<sup>19</sup> granting covenants not to sue as positive incentives to settle,<sup>20</sup> encouraging PRPs to perform the cleanup actions themselves,<sup>21</sup> and allowing recoupment against state and local governments if the governments contributed to the environmental hazard.<sup>22</sup> This Note focuses on the 1987 and 1988 CERCLA decisions. These cases build an analytical framework for future CERCLA actions in the same way that many of the early CERCLA decisions established key principles beyond CERCLA's statutory wording,<sup>23</sup> and laid the foundation for SARA.<sup>24</sup>

Once the Environmental Protection Agency (EPA) targets a toxic waste site listed on the national priorities list (NPL) for cleanup, it has several options of response and recovery under CERCLA.<sup>25</sup> The EPA may undertake settlement negotiations with the PRPs for an upfront payment of cleanup costs or it may agree to allow the PRPs to execute the cleanup. If settlement negotiations fail, section 104 authorizes the EPA to respond directly and clean up the site.<sup>26</sup> Financing for the

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17. SARA, *supra* note 11, § 113(b), 42 U.S.C. § 9613(f)(1) (Supp. IV 1986); *see infra* notes 146-52 and accompanying text.

18. SARA, *supra* note 11, § 101(f), 42 U.S.C. §§ 9601(35)(A) (Supp. IV 1986); *see CERCLA, supra* note 1, § 107(b), 42 U.S.C. § 9607(b) (1982); *see also infra* notes 58-63 and accompanying text.

19. SARA, *supra* note 11, § 122(g)(2), 42 U.S.C. § 9622(g)(2) (Supp. IV 1986); *see infra* notes 121-25 and accompanying text.

20. SARA, *supra* note 11, § 122(f), 42 U.S.C. § 9622(f) (Supp. IV 1986); *see infra* notes 114-20 and accompanying text.

21. SARA, *supra* note 11, § 122(b)(1), 42 U.S.C. § 9622(b)(1) (Supp. IV 1986); *see infra* notes 112-13 and accompanying text.

22. SARA, *supra* note 11, § 101(20)(D), 42 U.S.C. § 9601(20)(D) (Supp. IV 1986); *see infra* notes 92-95 and accompanying text.

23. *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (finding that CERCLA imposes strict liability even absent an express provision in the final statute); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 849 (W.D. Mo. 1984) (finding corporate officers liable for the hazardous waste disposal practices of the corporate entity), *aff'd*, 810 F.2d 726, 747 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) (first court holding that parties sued by the government under CERCLA § 107 are jointly and severally liable).

24. *See, e.g., Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985) (recognizing a right to contribution among joint tortfeasors).

25. *See SUPERFUND REPORT, supra* note 14, at 415, 428-29. The NPL is the EPA's ranking of disposal sites that substantially endanger public health and welfare. As of January 1988, the NPL targeted 951 sites for remedial cleanup actions. *Id.* at 415.

26. *See CERCLA, supra* note 1, § 104, 42 U.S.C. § 9604 (1982) (authorizing the EPA to take direct cleanup measures whenever there is a release or threatened release of toxic substances into the environment). The National Contingency Plan (NCP), 40 C.F.R. §§ 300.1-.86 (1988), provides the guidelines for response actions. Response includes short-term removal and long-term remedial

cleanup comes through Superfund.<sup>27</sup> The EPA may seek reimbursement from PRPs pursuant to section 107. Alternately, section 106 authorizes the EPA to compel PRPs to clean up the site<sup>28</sup> or the EPA may refer the case to the Department of Justice, which may file suit in federal court for the same purpose. PRPs may resume settlement negotiations with the EPA or litigate the liability issue. This Note refers to these interactions between the government and the PRPs as the first tier of CERCLA actions.

Settling parties and parties held liable under section 106 or 107 may then pursue cost recovery actions by bringing contribution or indemnity suits against nonparticipating PRPs in federal court pursuant to section 107.<sup>29</sup> The pool of defendants includes generators and transporters of hazardous wastes, and both the current and former owners and operators of hazardous waste facilities. PRPs may initiate voluntary cleanup actions prior to EPA action and sue other PRPs pursuant to section 107, thereby avoiding first tier interaction.<sup>30</sup> Actions initiated by PRPs against other PRPs liable expressly under section 107 will be referred to as second tier CERCLA suits.

If second tier CERCLA actions do not reduce liability to an approximation of fairness because of the unrecoverable shares of bankrupt, defunct, or judgment-proof parties, settling PRPs and PRPs held liable under section 106 or 107 may attempt to spread their CERCLA liability among parties that are beyond the express scope of section 107. Other potential parties for sharing CERCLA liabilities include contract indemnifiers, officers and individual shareholders of corporations, par-

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cleanup actions and any related enforcement activities. 42 U.S.C. § 9601(25) (Supp. IV 1986). CERCLA defines and lists examples of removal and response actions. *See* CERCLA, *supra* note 1, § 101(23), 42 U.S.C. § 9601(23) (1982); *id.* § 101(24), 42 U.S.C. § 9601(24). Only sites listed on the NPL are eligible for Superfund financed remedial cleanup by the EPA. Prior to initiating a remedial action, the EPA makes a Remedial Investigation/Feasibility Study (RI/FS) to determine the optimum cleanup strategy and evaluate the relative effectiveness and costs of alternative approaches. 40 C.F.R. § 300.68(i). Following the completion of the RI/FS, the EPA sets forth its selected remedy in a Record of Decision (ROD). The EPA estimates that the average ROD represents the culmination of five years of study and investigation. *See* SUPERFUND REPORT, *supra* note 14, at 415.

In contrast, removal actions such as installing security fencing or removing drums of hazardous waste to an approved safe disposal site may be undertaken at any site, even those not included on the NPL. They are limited to one year in length and \$2 million in costs. *Id.*; *see also* *Shore Realty*, 759 F.2d at 1046-47.

27. *See* CERCLA, *supra* note 1, § 111, 42 U.S.C. § 9611 (1982) (authorizing reimbursement of response costs by Superfund).

28. *See id.* § 106, 42 U.S.C. § 9606. The government is authorized to recover from PRPs "all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan." *Id.* § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).

29. *See id.* § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

30. *Id.*

ent or successor corporations, and manufacturers of hazardous substances. This Note labels PRP initiated suits against defendants that are outside the express scope of section 107 of CERCLA as third tier CERCLA actions.

This Note analyzes the various options and strategies that a PRP may use to limit its CERCLA liability to its proportionate fair share of cleanup costs. In order to achieve an approximation of liability based on fault, the PRP must spread the liability among the greatest number of possible contributors to the hazardous waste problem. Part II examines a PRP's settlement and litigation options in first tier interactions and addresses the liability of a PRP to the government for cleanup costs. Part III addresses the second tier of CERCLA interactions, contribution suits against other section 107 PRPs. Part IV focuses on third tier actions and suggests possible strategies when a PRP is faced with insolvent or defunct PRPs. Finally, Part V summarizes the strategies available to achieve the fairest possible allocation of costs and describes techniques for locating a maximum number of PRPs.

## II. FIRST TIER LIABILITY—INTERACTION WITH THE GOVERNMENT

Section 107 of CERCLA imposes strict liability for the cleanup of hazardous waste sites on four categories of PRPs: The current owner and operator of a hazardous waste facility; the owner or operator at the time the waste was deposited at the site; generators of waste sent to the site; and transporters of waste sent to the site.<sup>31</sup> The United States has a prima facie case against a section 107 PRP when it incurs response<sup>32</sup> costs resulting from a "release"<sup>33</sup> or threatened release of a "hazardous substance"<sup>34</sup> from a "facility."<sup>35</sup> The PRP is strictly liable unless it can

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31. *See id.* § 107(a), 42 U.S.C. § 9607(a).

32. *See supra* note 26.

33. *See CERCLA, supra* note 1, § 101(22), 42 U.S.C. § 9601(22) (1982) (defining release). SARA expanded the definition of release to include barrels of hazardous substances or pollutants that are not leaking. *See H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 184, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3277.*

34. *See CERCLA, supra* note 1, § 101(14), 42 U.S.C. § 9601(14) (1982) (defining hazardous substance by incorporating the substances listed as hazardous or toxic under the Solid Waste Disposal Act, 42 U.S.C. §§ 6903, 6921 (1982 & Supp. IV 1986), the Clean Air Act, 42 U.S.C. § 7412(a) (1982), the Clean Water Act, 33 U.S.C. §§ 1317(a), 1321(b)(2)(A) (1982), and the Toxic Substances Control Act, 15 U.S.C. § 2606 (1982)). CERCLA authorizes the EPA to designate additional substances that "may present substantial danger to the public health or welfare or the environment." CERCLA, *supra* note 1, § 102(a), 42 U.S.C. § 9602(a) (1982). CERCLA excludes pesticide applications approved by the Federal Insecticide, Fungicide, and Rodenticide Act, *see id.* § 103(e), 42 U.S.C. § 9603(e), oil spills, *see id.* § 101(14), 42 U.S.C. § 9601(14), and radioactive releases from licensed facilities in nuclear accidents or in the course of uranium mining, *see id.* § 101(10)(K), 42 U.S.C. § 9601(10)(K).

35. CERCLA, *supra* note 1, § 101(9), 42 U.S.C. § 9601(9) (1982). CERCLA's broad definition of facility encompasses more than landfills and dump sites. *See, e.g., United States v. Bliss*, 667 F.

assert a valid defense.<sup>36</sup>

Any person<sup>37</sup> linked by even a tenuous thread to a site where hazardous wastes have been released<sup>38</sup> should assess its liability promptly. If the person qualifies as a PRP under section 107, it should assume that it may be held jointly and severally liable for cleanup costs. It may choose to avoid first tier interaction with the government by voluntary cleanup prior to government involvement. The PRP can then proceed to second tier interaction by pursuing private cost recovery actions against other PRPs.<sup>39</sup> If the PRP's claim for response costs is not satisfied within sixty days,<sup>40</sup> the PRP may assert recovery under Superfund for the costs necessary and consistent with the National Contingency Plan (NCP).<sup>41</sup>

Alternatively, the person may choose to wait until the government targets it as a PRP, and then address the issue of whether it should settle or litigate. The strength of a PRP's possible defense to CERCLA will influence the PRP's decision to settle with the government or litigate. If there is no settlement, the government may sue a PRP to force cleanup under section 106 or to recover cleanup costs under section 107. Because liability is joint and several, the government need not join all PRPs. The PRP defendant may implead<sup>42</sup> other PRPs as third-party defendants by merely asserting that the third-party defendant "may be liable for all or part of the plaintiff's claim."<sup>43</sup>

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Supp. 1298, 1305 (E.D. Mo. 1987) (holding that a facility includes "any place where hazardous substances come to be located" such as the containers and trucks from which the substances were released). A building containing any hazardous substance may be a facility. See CERCLA, *supra* note 1, § 101(14), 42 U.S.C. § 9601(14) (1982); see also 40 C.F.R. §§ 261.1-.33 (1988) (containing lists and descriptions of many hazardous substances).

36. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (rejecting a causation requirement and recognizing that CERCLA imposes strict liability).

37. See *supra* note 7 and accompanying text.

38. See CERCLA, *supra* note 1, § 101(22), 42 U.S.C. § 9601(22) (1982). Section 101(22) defines release to include "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." *Id.*

39. *Id.* § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

40. *Id.* § 112(a), 42 U.S.C. § 9612(a); see also *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1574 (E.D. Pa. 1988).

41. CERCLA, *supra* note 1, § 111(a)(2), 42 U.S.C. § 9611(a)(2) (1982); see also *supra* note 26; *infra* note 134.

42. FED. R. CIV. P. 14(a). The plaintiff or third-party defendants may defeat this strategy, however, with successful motions to strike the third-party claims or to sever the trial.

43. See CERCLA, *supra* note 1, § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1982).

### A. Defenses to CERCLA

The majority of courts do not recognize equitable defenses to CERCLA liability.<sup>44</sup> Traditional common-law defenses such as retroactivity and lack of causation or negligence are not defenses to CERCLA liability.<sup>45</sup> CERCLA limits valid defenses to federally permitted releases,<sup>46</sup> and acts solely caused by God,<sup>47</sup> war,<sup>48</sup> or an unrelated third party.<sup>49</sup> In order to assert a successful third-party defense, the PRP must prove four elements by a preponderance of the evidence: A third party solely caused the release; the third party was not contractually related to the defendant; the defendant exercised due care with respect to the hazardous substances; and the defendant took precautions against the third party's foreseeable acts or omissions and their foreseeable consequences.<sup>50</sup>

The "caused solely by" requirement may be a formidable limitation to the successful assertion of a section 107(b) defense. The 1988 decision of *United States v. Hooker Chemicals & Plastics*<sup>51</sup> found a predecessor owner liable under section 107(a)(2). The predecessor owner

44. See, e.g., *United States v. Stringfellow*, 661 F. Supp. 1053, 1061-62 (C.D. Cal. 1987). For an example of the minority position, see *United States v. Mottolo*, 695 F. Supp. 615, 626-29 (D.N.H. 1988) (recognizing the equitable defense of waiver and release against the government).

45. See, e.g., *Stringfellow*, 661 F. Supp. at 1062 (finding the following non-107(b) affirmative defenses relevant to the issue of damages but not liability: comparative fault, contributory negligence, § 104 related defenses, due care, failure to comply with the NCP, failure to comply with claims procedures pursuant to § 112, and set-off); see also *United States v. Mottolo*, 605 F. Supp. 898 (D.N.H. 1985) (limiting the three year statute of limitations of CERCLA § 112(d) to actions for natural resource damages only, not to § 107 actions brought by federal or state governments). In *Dedham Water Co. v. Cumberland Farms, Inc.* the court noted that in a one-site case where pollution occurs at the location of the release, the causal connection may be presumed absent proof of no actual disposal at the site or total removal of wastes at the site. 689 F. Supp. 1223, 1225-26 (D. Mass. 1988). In a two-site case where the hazardous substances migrate to cause pollution at a site different from the release location, the *Dedham* court found strict liability inappropriate unless the defendant's releases caused any effect upon the plaintiff's site. *Id.*

46. CERCLA, *supra* note 1, § 107(j), 42 U.S.C. § 9607(j) (1982). Federally permitted release is defined by *id.* § 101(10), 42 U.S.C. § 9601(10).

47. *Id.* § 107(b)(1), 42 U.S.C. § 9607(b)(1). Act of God is defined by *id.* § 101(1), 42 U.S.C. § 9601(1). See *Stringfellow*, 661 F. Supp. at 1061. The State of California released intentionally 1,500,000 gallons of liquid waste into a navigable body of water fearing that heavy rains would collapse the *Stringfellow* waste facility. The *Stringfellow* court rejected heavy rainfall as an Act of God because rain is foreseeable and better designed drain channels could have prevented the damage. *Id.* See generally *Dubuc & Evans, supra* note 3.

48. CERCLA, *supra* note 1, § 107(b)(2), 42 U.S.C. § 9607(b)(2) (1982).

49. *Id.* § 107(b)(3), 42 U.S.C. § 9607(b)(3); see, e.g., *Stringfellow*, 661 F. Supp. at 1062 (noting that the third party cannot be a state).

50. CERCLA, *supra* note 1, § 107(b), 42 U.S.C. § 9607(b) (1982); see *Jersey City Redev. Auth. v. PPG Indus.*, 655 F. Supp. 1257, 1261 (D.N.J. 1987); see also *O'Neill v. Piccillo*, 682 F. Supp. 706, 728 (D.R.I. 1988) (invoking the third-party defense shifts the burden of proof of causation to the defendant), *aff'd*, No. 88-1551 (1st Cir. Aug. 21, 1989) (WESTLAW, Allfeds database, 1989 WL 94,520).

51. 680 F. Supp. 546 (W.D.N.Y. 1988).

admitted releasing hazardous wastes at Love Canal from 1942 to 1953 but produced expert testimony to support its claims of proper and nonharmful disposal during its period of ownership. The expert testified that the contamination resulted from the improper disposal practices of the subsequent owners.<sup>52</sup> The *Hooker* court denied the defense. It concluded that because the predecessor owner's disposal practices contributed to the subsequent horizontal migration of the hazardous wastes, a third party did not solely cause the Love Canal contamination.<sup>53</sup>

Courts interpret liberally the contractual relationship bar. One federal district court indicated that generators may be liable for cleanup costs at the site although their contracts with the transporter stated expressly that the generator's wastes would be disposed of at another facility.<sup>54</sup> In a similar fact situation, defendant generators claimed a third-party defense based on their proper turnover of wastes to licensed transporters lacking contractual ties to the dump where the defendants' waste was discovered later in identifiable containers.<sup>55</sup> Although the transporters' subcontractors disposed of the waste at sites other than those listed on the transportation contract, the court found that an indirect contractual relationship existed between the defendants and the licensed transporters and their subcontractors. This relationship barred the third-party defense.<sup>56</sup> Courts also imposed liability on innocent purchasers of hazardous waste sites merely on the basis of the purchase and sale agreement.<sup>57</sup>

In contrast, SARA's definition of "contractual relationship" excludes purchasers who acquired property after hazardous substances were placed on it, with no knowledge or reason to know of their existence.<sup>58</sup> In addition, SARA imposes a positive duty on purchasers to investigate the previous ownership and usage of the property "consistent with good commercial or customary practice in an effort to minimize liability."<sup>59</sup> In the 1988 decision of *United States v. Serafini*<sup>60</sup> the

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52. *Id.* at 555.

53. *Id.* at 558-59.

54. See *Missouri v. Independent Petrochem. Corp.*, 610 F. Supp. 4, 5 (E.D. Mo. 1985).

55. *O'Neill*, 682 F. Supp. at 727-28.

56. *Id.*

57. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1048 n.23 (2d Cir. 1985).

58. SARA, *supra* note 11, § 101(35)(A), 42 U.S.C. § 9601(35)(A) (Supp. IV 1986).

59. *Id.* § 101(35)(B), 42 U.S.C. § 9601(35)(B). Some states enacted statutory disclosure obligations requiring owners of real property to inform purchasers of any known contamination. In California, if the owner knows or has reasonable cause to believe hazardous wastes were released on or beneath the property and fails to give written notice to the buyer prior to the sale, the owner is liable for actual damages. See CAL. HEALTH & SAFETY CODE § 25,359.7 (West Supp. 1989). Other states require notice of contamination to be recorded in real property records. See, e.g., N.J. STAT. ANN. §§ 13:1K-6 to -35 (West Supp. 1988).

Government argued that the presence of hundreds of abandoned waste drums on the site at the time of purchase precluded the defendants from attaining innocent purchaser status.<sup>61</sup> The defendants neither performed an on-site inspection prior to purchase nor inquired into the past uses of the site.<sup>62</sup> The district court denied the Government's motion for summary judgment on the issue of CERCLA liability because of a lack of evidence that the defendants' failure to inspect was contrary to accepted commercial or customary practice.<sup>63</sup> Thus, a truly innocent purchaser may assert a successful third-party defense if a reasonable inspection and inquiry is made in accordance with standard commercial or customary practice.

## B. Litigation Against the Government

### 1. Allocation of Costs

If a court rejects a PRP's defense to CERCLA and liability is established, the court assesses response costs. A split of authority exists regarding the allocation of response costs among liable parties. The majority of courts follow *United States v. Chem-Dyne Corp.*<sup>64</sup> in adopting the *Restatement (Second) of Torts* approach.<sup>65</sup> The court first determines whether the harm is divisible.<sup>66</sup> If the harm is divisible, the burden of proof of apportionment is upon the PRP.<sup>67</sup> The most popular

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60. 706 F. Supp. 346 (M.D. Pa. 1988).

61. *Id.* at 1163. In 1983 the EPA found the Taylor waste site littered with 55-gallon drums containing hazardous substances lying "open, crushed, completely or partially buried, and in various stages of decay." *Id.*

62. *Id.* at 1167.

63. The *Serafini* court suggested that affidavits from real estate developers in the area stating that it is the customary practice to inspect similar property prior to purchase would be relevant to assessing the duty to inspect. *Id.* at 1168.

64. 572 F. Supp. 802 (S.D. Ohio 1983). In 1986 Congress adopted the *Chem-Dyne/Restatement* approach tempered by "case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites." H.R. REP. NO. 253, 99th Cong., 1st Sess. 74, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2856 (quoting *Chem-Dyne*, 572 F. Supp. at 808).

65. A tortfeasor's liability varies depending on whether the harm is divisible or indivisible. See RESTATEMENT (SECOND) OF TORTS §§ 433(A), 433(B), 875, 881 (1965) [hereinafter RESTATEMENT OF TORTS].

66. See *id.* § 433(A). The *Restatement* states:

(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.*; see also *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987) (agreeing with the RESTATEMENT OF TORTS, *supra* note 65, § 434 comment d statement that whether the harm is divisible is a question of law and should be considered on a motion for summary judgment).

67. See RESTATEMENT OF TORTS, *supra* note 65, § 433(B)(2). The *Restatement* notes:

Where the tortious conduct of two or more actors has combined to bring about harm to

theory of apportionment is the volumetric approach, which calculates the liability of each generator in proportion to the number of its drums containing hazardous waste found at the site.<sup>68</sup> In addition to volume, a 1988 Fourth Circuit decision found the amount of commingling of hazardous substances relevant to apportionment.<sup>69</sup> Other courts consider comparative fault when allocating costs.<sup>70</sup> If the EPA performs site cleanup in phases, it may allocate the costs of phase specific remedial actions among the contributors of those specific waste types and volumes.<sup>71</sup> For example, only the polychlorinated biphenyl (PCB) contributors might bear the costs of incinerating PCB contaminated soil.<sup>72</sup>

The volumetric approach is appealing in situations in which divisible harm allows apportionable cleanup costs. Proportional division of liability is fairer than placing the entire burden of cleanup on a few PRPs. The volumetric approach also encourages generators to mark and label clearly their wastes and to take adequate precautions in disposing of wastes.<sup>73</sup> Apportionment is appropriate only when the wastes

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the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

*Id.*; see also *O'Neill v. Piccillo*, 682 F. Supp. 706, 724 (D.R.I. 1988), *aff'd*, No. 88-1551 (1st Cir. Aug. 21, 1989) (WESTLAW, allfeds database, 1989 WL 94,520).

68. See RESTATEMENT OF TORTS, *supra* note 65, § 433(A); see also *O'Neill*, 682 F. Supp. at 724-25 (noting that the volumetric method is an appropriate way of apportioning liability among generators if all the drums contained identical wastes); cf. *Chem-Dyne*, 572 F. Supp. at 811 (cautioning that volume alone "is not an accurate predictor of the risk associated with the waste because the toxicity or migratory potential of a particular hazardous substance generally varies independently with the volume of the waste").

69. *United States v. Monsanto Co.*, 858 F.2d 160, 172 n.26 (4th Cir. 1988) (listing factors, other than volume, relevant to establishing divisibility of harm such as "evidence disclosing the relative toxicity, migratory potential, and synergistic capacity of the hazardous substances at the site"), *cert. denied*, 109 S. Ct. 3156 (1989).

70. See *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 402 (W.D. Mo. 1985) (stating that it will not "tolerate a 'windfall' or 'wipeout' which results in an apportionment of liability which arbitrarily or unreasonably ignores the comparative fault of the parties, where there is a reasonable basis for allowing that comparison to be made").

71. See EPA Memorandum: Interim Guidelines for Preparing Nonbinding Preliminary Allocations of Responsibility (May 16, 1987), 52 Fed. Reg. 19,919-20 (1986) [hereinafter NBAR Memorandum], *reprinted in* 17 [Administrative Materials] *Envtl. L. Rep.* (Envtl. L. Inst.) 35,065 (Oct. 1987) [hereinafter *Envtl. L. Rep.*]. For example, the EPA initially may clean up soil contamination and remove waste barrels before beginning the more time-consuming task of remediating groundwater. See SUPERFUND REPORT, *supra* note 14, at 415.

72. See NBAR Memorandum, *supra* note 71, at 19,920, *reprinted in* *Envtl. L. Rep.*, *supra* note 71, at 35,066; cf. *O'Neill*, 682 F. Supp. at 724-25 (disregarding defendant's argument that because none of its waste drums were found in the first two years of cleanup, defendant should not be liable for cleanup costs incurred during those years).

73. See generally *O'Neill*, 682 F. Supp. at 720, 722. Adequate disposal precautions would include separating the wastes by category, packing compatible wastes in metal drums cushioned with vermiculite and other absorbent materials, clearly labeling the drums as to content and generator, and arranging for their disposal through a licensed transporter.

are equivalent in toxicity as well as volume, the waste drums are sealed, and no leaking or commingling of wastes has occurred. There is, however, no clearcut way of apportioning costs among parties other than generators.

In most cleanup actions, the wastes are commingled and indivisible,<sup>74</sup> and the government uses the *Chem-Dyne* theory to impose joint and several liability to obtain a full recovery of cleanup costs from any one or more solvent PRPs.<sup>75</sup> Prior to SARA, one federal district court decision adopted a more moderate approach, rejecting joint and several liability for indivisible harm in favor of a fairer apportionment of liability.<sup>76</sup> In apportioning the costs between the PRPs, the court considered the following equitable factors, which originated in the Gore Amendment to the original House CERCLA bill:<sup>77</sup> The ability to identify and separate the wastes contributed by each party; the amount and toxicity of the hazardous wastes; the PRP's degree of involvement in the generation, transportation, treatment, storage, or disposal of the hazardous waste; the degree of care that the PRP exercised; and the PRP's cooperation with the government. In addition to promoting fairness by not imposing joint and several liability on minor contributors, these equitable factors are suitable for enforcement actions involving PRPs other than generators.<sup>78</sup>

Although the legislative history of SARA fully supports the *Chem-Dyne* rule of joint and several liability in the litigation of indivisible harm cases brought by the Government as plaintiff, SARA does recognize a court's discretion in considering equitable factors, such as the Gore criteria, when allocating costs in suits between private parties.<sup>79</sup>

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74. The legislative history of CERCLA states that hazardous wastes will be considered an indivisible harm if "many parties have contributed to the contamination or other endangerment and there are no reliable records indicating who disposed of the hazardous wastes (or in what quantities)." 126 CONG. REC. 31,966 (1980) (letter from Alan A. Parker, Assistant Att'y Gen., Office of Legislative Affairs); see also *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987) (labeling the damage at the Stringfellow site as indivisible between the PRPs due to the "synergistic effects of the commingling of different wastes").

75. *Chem-Dyne*, 572 F. Supp. at 810. The *Chem-Dyne* court relied upon the *Restatement*, which states that "[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." RESTATEMENT OF TORTS, *supra* note 65, § 875.

76. *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1256-57 (S.D. Ill. 1984).

77. 126 CONG. REC. 26,781 (1980). Prior to the enactment of CERCLA, the House passed the Gore Amendment to modify the *Restatement* approach to joint and several liability. *Id.* at 26,782-85, 26,799. The Senate, however, did not adopt the Gore Amendment. See *id.* at 31,965.

78. *A & F Materials*, 578 F. Supp. at 1256-57 (discussing Congress's approach to joint and several liability).

79. SARA added a modified Gore approach for settlement. Section 122(e) authorizes the EPA to provide a nonbinding preliminary allocation of responsibility (NBAR) among PRPs during settlement procedures. SARA, *supra* note 11, § 122(e)(3), 42 U.S.C. § 9622(e)(3) (Supp. IV 1986);

Therefore, the PRP, held jointly and severally liable to the government, may limit the amount of damages it ultimately will have to pay by bringing contribution suits against other PRPs. In these second tier CERCLA actions, the majority of courts will consider equitable factors in apportioning the damages among the PRPs.

## 2. Counterclaims and Third-Party Practice Against the Government

CERCLA waives the sovereign immunity of the federal government.<sup>80</sup> If the federal government's activities fall within the scope of section 107, it qualifies as a PRP and the defendant PRP may assert a counterclaim in recoupment.<sup>81</sup> Although the PRP will not be able to obtain an affirmative recovery from the federal government, a successful claim reduces its cleanup cost liability.<sup>82</sup> Prior to the 1986 amendments, it was unclear whether CERCLA waived the sovereign immunity of state and local governments. Commentators argued that state and local governments waived sovereign immunity if they generated or disposed of hazardous waste or encouraged similar activities as a means of furthering economic development and expanding the tax base,<sup>83</sup> but not if they acted in a regulatory capacity.<sup>84</sup> One court permitted a counterclaim asserted defensively in recoupment against a state on an implied waiver theory if the counterclaim related to the primary claim brought by the state,<sup>85</sup> but the court refused to recognize affirmative counter-

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*see infra* note 100 and accompanying text; *see also* *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1118 n.12 (N.D. Ill. 1988) (arguing that the 1986 Congress did not reject the moderate Gore-type approach in contribution actions between PRPs); *Stringfellow*, 661 F. Supp. at 1060 (noting that the court's "discretion in apportioning damages among the defendants during the contribution phase does not effect the defendants' liability").

80. SARA amended and recodified the original CERCLA § 107(g) waiver to read as follows:

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

SARA, *supra* note 11, § 120(a)(1), 42 U.S.C. § 9620(a)(1) (Supp. IV 1986).

81. *See, e.g.*, *EEOC v. First Nat'l Bank*, 614 F.2d 1004, 1008 (5th Cir. 1980) (requiring a defendant's recoupment counterclaim to state a claim against the government arising out of the same transaction), *cert. denied*, 450 U.S. 917 (1981).

82. *Id.*

83. Many state and local governments encouraged local industry to transport and dispose of their waste at local hazardous waste dump sites and landfills. *See* *Dubuc & Evans, supra* note 3, at 10,202.

84. *See* *Hall, supra* note 12, at 1205, 1211 (noting the difficulty in showing the government's regulatory act involving the disposal of hazardous waste breached a duty of reasonable care owed to the counterclaimant).

85. *See* *United States v. Mottolo*, 605 F. Supp. 898 (D.N.H. 1985). *Mottolo* requested that the State of New Hampshire be denied reimbursement because its failure to conduct and supervise adequately the cleanup operations added to the cleanup costs. *Id.* at 910. The court noted that when New Hampshire filed suit as a plaintiff in a federal court, it waived any sovereign immunity

claims for indemnification and contribution against a state.<sup>86</sup>

Recently, the United States Supreme Court remanded *United States v. Union Gas Co.* to the Third Circuit to address the issue of whether, under the 1986 amendments, states can be held liable in federal court for the costs of cleaning up hazardous waste sites.<sup>87</sup> In 1980 state excavation pursuant to a flood control project caused a coal tar spill at the site of an abandoned plant owned by the predecessors of the defendant.<sup>88</sup> When the federal government sued the defendant for half of the cleanup costs, the defendant filed a third-party complaint against the state and local governments claiming their excavation work negligently caused, or contributed to, the discharge.<sup>89</sup> On remand, the Third Circuit allowed the counterclaim based on SARA's explicit inclusion of state and local governments within its definition of "owner or operator."<sup>90</sup> Therefore, under SARA, state and local governments are clearly PRPs if they acted as "owners or operators."<sup>91</sup>

In the 1988 case of *United States v. Dart Industries* the Fourth Circuit held that a state could be a PRP under SARA but limited the state's liability to those actions outside the scope of governmental regulation.<sup>92</sup> The defendant filed a third-party complaint against the South

or eleventh amendment immunity claims. *Id.*

86. *Id.* at 911.

87. *United States v. Union Gas Co.* (Union Gas I), 792 F. 2d 372 (3d Cir.), *vacated & remanded* 479 U.S. 1025 (1986).

88. *See United States v. Union Gas Co.* (Union Gas II), 832 F. 2d 1343, 1345 (3d Cir. 1987), *aff'd*, 109 S. Ct. 2273 (1989).

89. Union Gas settled with the federal government but appealed the dismissal of its third-party claim against the state and local governments. *United States v. Union Gas Co.* (Union Gas I), 575 F. Supp. 949 (E.D. Pa. 1983), *aff'd*, 792 F.2d 372 (3d Cir.), *vacated & remanded*, 479 U.S. 1025 (1986).

90. *Union Gas II*, 832 F.2d at 1347-48. SARA added a new clause to the definition of "owner or operator" reading:

The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

SARA, *supra* note 11, § 101(20)(D), 42 U.S.C. § 9601(20)(D) (Supp. IV 1986) (emphasis added).

91. The Third Circuit expanded its holding to include pending suits initiated before SARA, in addition to post-SARA actions. *See Union Gas II*, 832 F.2d at 1357 n.11. The court reasoned that states would not be immune from suit in pending cases, as well as those initiated after SARA, because Congress intended that SARA merely clarify the already existing law. *Id.*; *see H.R. CONF. REP. NO. 962, supra* note 33, at 185-86, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 3278-79.

92. 847 F.2d 144 (4th Cir. 1988).

Carolina Department of Health and Environment. The complaint alleged that the state qualified as an "owner or operator" because of the state's following actions: Granting permits to store wastes at the Fort Lawn site; inspecting the site; regulating the transportation of wastes shipped to the site; and failing to install monitoring wells on the site or to facilitate cleanup as promised.<sup>93</sup> The Fourth Circuit held that to qualify as an "owner or operator," a state either must directly manage employees and finances at the toxic waste site, or contribute to the release of hazardous wastes through its own "hands on" activities.<sup>94</sup> Mere regulatory actions do not bring a state within the scope of section 107 liability.<sup>95</sup>

### C. Settlement with the Government

CERCLA lacked an explicit settlement provision until the 1986 amendments. Section 122 of SARA expressly authorizes the EPA to enter into settlement agreements permitting eligible PRPs to clean up the site if it is within the public interest.<sup>96</sup> Since 1986 the EPA successfully obtained settlements for many sites, some of which involved large numbers of PRPs and high cleanup costs.<sup>97</sup> The EPA's goal is the recovery of one hundred percent of cleanup costs in settlement, thereby expediting remedial cleanup action and minimizing transaction and litigation costs.<sup>98</sup> The settlement decision is at the absolute discretion of the EPA and not subject to judicial review.<sup>99</sup> SARA encourages PRPs to settle with the EPA in several ways: By allocating response costs among the PRPs, which avoids joint and several liability; making partial settlements available in some circumstances; releasing settling parties by giv-

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93. *Id.* at 146.

94. *Id.*

95. *Id.*

96. SARA, *supra* note 11, § 122, 42 U.S.C. § 9622 (Supp. IV 1986).

97. *See, e.g.,* *United States v. Cannons Eng'g Corp.*, CA 88-1786-WF (D. Mass. Aug. 3, 1988). Under a 1988 consent decree, 48 parties agreed to pay \$33.1 million towards the cleanup of four hazardous waste sites located in New Hampshire and Massachusetts. Settling parties included 21 owners and 27 of the largest generators and transporters of hazardous waste to the sites. According to EPA Regional Administrator Michael Deland, the \$17 million cash payment to reimburse state and federal agencies for past cleanup costs is the largest obtained in a CERCLA cost recovery suit. The parties also agreed to clean up three of the four sites at an estimated cost of \$16.1 million. More than 300 small volume generators had agreed previously to pay \$14.6 million and perform \$1.5 million in cleanup work. The \$49.2 million total recovery meets 84% of the total estimated cost of cleanup of the four sites. The federal government then filed suit against 25 nonsettling PRPs. Deland acknowledged the government's intent to prosecute the nonsettling PRPs to the fullest extent of the law. *See \$33.1 Million Settlement Reached in Cleanup of Cannons Superfund Sites* 19 [Current Developments] *Env't Rep.* (BNA) No. 15, at 613 (Aug. 1988).

98. *See* SARA, *supra* note 11, § 122(a), 42 U.S.C. § 9622(a) (Supp. IV 1986); *see also* NBAR Memorandum, *supra* note 71, at 19,919, *reprinted in* *Env'tl. L. Rep.*, *supra* note 71, at 35,065-66.

99. *See* SARA, *supra* note 11, § 122(a), 42 U.S.C. § 9622(a) (Supp. IV 1986).

ing covenants not to sue; and giving de minimis contributors favorable treatment.

To expedite settlements, SARA gives the EPA the discretion to allocate one hundred percent of the response costs among the PRPs before cleanup by preparing nonbinding allocations of responsibility (NBAR).<sup>100</sup> The EPA normally prepares the NBAR during the remedial investigation and feasibility study (RI/FS). A NBAR may proportion liability for all sites, even those with commingled indivisible waste.<sup>101</sup> Unlike the cost allocation made in litigation, the NBAR provides guidance on the division of costs among different classes of PRPs. First, the NBAR allocates one hundred percent of liability among generators based on volume.<sup>102</sup> Second, the EPA adjusts the percentages of liability based on equitable settlement criteria similar to the Gore factors.<sup>103</sup> Third, the EPA may require owner, operator, and transporter PRPs to share in the costs.<sup>104</sup> The volume of waste transported and the method of disposal at the site are relevant to the allocation of liability between transporters.<sup>105</sup> The EPA divides liability between successive owners or operators based on each party's commercial knowledge, relative length of time of ownership or operation, and degree of active involvement in the hazardous waste disposal.<sup>106</sup> Last, the EPA reallocates the shares of defunct or insolvent parties among the solvent PRPs.<sup>107</sup> PRPs may be credited for any previous removal actions or contributions to the RI/FS at the site.<sup>108</sup> After receiving the NBAR, the PRPs may make the EPA a settlement offer.<sup>109</sup>

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100. SARA, *supra* note 11, § 122(e)(3), 42 U.S.C. § 9622(e)(3) (Supp. IV 1986); see NBAR Memorandum, *supra* note 71, at 19,919, reprinted in *Envtl. L. Rep.*, *supra* note 71, at 35,065-66. The EPA may prepare a NBAR if it has sufficient data to enable it to allocate costs and it reasonably believes the NBAR may promote settlement. Situations in which a NBAR might accelerate settlement include: A request from a majority of the PRPs; the existence of a state or local government that is a PRP; and the existence of a large number of de minimis generators. All pre-RI/FS notice letters inform PRPs of the NBAR option, conditioned on a significant percentage of PRPs requesting it within 30 days of receipt of notice. The agreements are "non-binding" as the PRPs may adjust the percentages allocated by EPA among themselves. *Id.*

101. See *id.* at 19,919-20, reprinted in *Envtl. L. Rep.*, *supra* note 71, at 35,066.

102. See *id.* The EPA rejected a method of apportionment based on toxicity of wastes because of difficulty in application, disagreement on the degrees of toxicity, and the lack of a clear relationship between toxicity and cleanup expenses. *Id.* at 19,920, reprinted in *Envtl. L. Rep.*, *supra* note 71, at 35,065.

103. See *id.* at 19,920, reprinted in *Envtl. L. Rep.*, *supra* note 71, at 35,066; see also *supra* notes 77, 78, and accompanying text.

104. See NBAR Memorandum, *supra* note 71, at 19,920, reprinted in *Envtl. L. Rep.*, *supra* note 71, at 35,066.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* SARA, *supra* note 11, § 122(e)(1), 42 U.S.C. § 9622(e)(1) (Supp. IV 1986), requires

SARA authorizes three types of "mixed" funding settlements in which both the PRPs and Superfund share the expenses of cleanup.<sup>110</sup> In a "cash-out" settlement, the PRPs pay the EPA at the outset, and the EPA performs the cleanup.<sup>111</sup> In a "mixed work" agreement, the PRPs and the EPA each agree to perform and pay for discrete portions of a cleanup.<sup>112</sup> A third type of mixed funding is the preauthorization

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the EPA to give the PRPs special notice prior to cleanup. If the EPA receives a substantial good faith offer within 60 days of the special notice, a 60-day negotiation period begins. A substantial good faith offer must meet four criteria. It must be written, equal or exceed the combined allotted shares of the PRPs making the offer, meet the majority of the cleanup costs, and must be acceptable to the EPA in all other respects. If the EPA and the PRPs reach an agreement within the 60-day negotiation period, a consent decree is entered. If no agreement results or the EPA receives no offer at all, the EPA may compel the parties to clean up pursuant to CERCLA § 104. If the EPA decides not to settle, it must notify the PRP of its reasons in writing. SARA requires that the settling PRPs pay the expenses of preparing the NBAR if the EPA accepts their offer. *See id.* § 122(e)(3)(D), 42 U.S.C. § 9622(e)(3)(D). If no settlement results, the NBAR's cost is added to the total response cost. *Id.*

110. *See id.* § 122(b)(1), 42 U.S.C. § 9622(b)(1); EPA Memorandum: Evaluating Mixed Funding Settlements under CERCLA (Oct. 20, 1987), reprinted in 18 [Administrative Materials] *Envtl. L. Rep. (Envtl. L. Inst.)* 35,117 (Jan. 1988) [hereinafter Mixed Funding Memorandum]. The EPA approval of mixed funding is a two-part process. First the EPA determines whether a mixed funding is appropriate using its 10 stated criteria:

1. Volume of wastes contributed to the site by each PRP
2. Nature of wastes contributed
3. Strength of evidence tracing the wastes at the site to the settling parties
4. Ability of the settling parties to pay
5. Litigation risks in proceeding to trial
6. Public interest considerations
7. Precedential value
8. Value of obtaining a present sum certain
9. Inequities and aggravating factors
10. Nature of the case that remains after settlement

EPA Memorandum: Interim CERCLA Settlement Policy, 50 Fed. Reg. 5034, 5037-38 (1985) [hereinafter Interim Settlement Memorandum]. If a mixed funding settlement meets the above criteria, the EPA considers which particular funding approach is optimal for the site in question. *Id.* at 5037.

111. *See Mixed Funding Memorandum, supra* note 110, at 35,119. In evaluating a cash-out settlement, the EPA considers if the settlors will pay a substantial percentage of total costs, and assesses the reliability of liability and cleanup estimates at the time of settlement. It also may consider equitable factors related to both settling and nonsettling PRPs. The EPA generally will not entertain cash-out settlements once a Superfund financed cleanup is underway. A recent example of a cash-out approach is the settlement granted to de minimis generators at the Cannons Engineering sites. *See United States v. Cannons Eng'g Corp.*, CA 88-1786-WF (D. Mass. Aug. 3, 1988); *see also supra* note 97. The de minimis settling PRPs paid their volumetric percentages of the EPA's past and future response costs, a settlement premium calculated by multiplying .60 times each PRP's volumetric share, and a base settlement charge designed to reimburse the EPA for its negotiation transaction costs. *See 53 Fed. Reg. 4070, 4071-72 (1988); 53 Fed. Reg. 20,165 (1988).*

112. *See Mixed Funding Memorandum, supra* note 110, at 35,120. A mixed funding arrangement is useful particularly when the cleanup will be undertaken in discrete phases. *Id.*; *see also supra* notes 71, 72 and accompanying text. The EPA, however, will not approve mixed funding if it could delay cleanup or if the planned actions are technically complex, such as mixed construction.

partial settlement in which PRPs agree to clean up the site in exchange for the right to make claims against Superfund for response costs, such as orphan shares, that the EPA agrees to finance.<sup>113</sup> Thus, preauthorized mixed funding offers the advantage of settlement for less than one hundred percent of the total cleanup cost.

A third incentive for settlement is the release from present and future liability to the government.<sup>114</sup> SARA issues such releases in the form of covenants not to sue.<sup>115</sup> The EPA may grant a covenant not to sue if it will expedite cleanup and is within the "public interest."<sup>116</sup> Also, the settlor must fully comply with a consent decree issued pursuant to section 106, and the EPA must approve the cleanup.<sup>117</sup> To be

*See* Mixed Funding Memorandum, *supra* note 110, at 35,120. Any releases or covenants not to sue would be limited to the cleanup phases explicitly covered by the settlement agreement. *Id.*

113. *See* Mixed Funding Memorandum, *supra* note 110, at 35,118-19. Before granting a preauthorized mixed funding settlement, the EPA considers the PRP's ability to clean up in a timely manner, the PRP's percentage of cleanup, and the severity of the contamination. The EPA limits preauthorization to remedial design and remedial action (RD/RA) proposals; it rarely grants preauthorization for a removal or RI/FS action.

114. SARA provides that a covenant not to sue for future liability becomes effective only upon the EPA's certification that the remedial action meets successfully the requirements specified in the consent decree, and is therefore complete. *See* SARA, *supra* note 11, § 122(f)(3), 42 U.S.C. § 9622(f)(3) (Supp. IV 1986).

115. *See* EPA Memorandum: Covenants Not to Sue Under SARA (July 10, 1987), 52 Fed. Reg. 28,038 (1987), reprinted in 17 [Administrative Materials] *Env'tl. L. Rep.* (Env'tl. L. Inst.) 35,060 (Sept. 1987).

116. *See* SARA, *supra* note 11, § 122(f)(4), 42 U.S.C. § 9622(f)(4) (Supp. IV 1986). An assessment of public interest requires consideration of the following seven factors:

- A. The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.
- B. The nature of the risks remaining at the facility.
- C. The extent to which performance standards are included in the order or decree.
- D. The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.
- E. The extent to which the technology used in the response action is demonstrated to be effective.
- F. Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.
- G. Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

*Id.* A federal court found that a settlement agreement, containing covenants not to sue, was in the public interest because it resolved the cleanup of a PCB contaminated site that threatened contamination of the Biscayne Aquifer, the primary source of drinking water for southeast Florida. *See* *United States v. Pepper's Steel & Alloys, Inc.*, 658 F. Supp. 1160 (S.D. Fla. 1987). In contrast, a covenant not to sue for criminal claims is never in the public interest.

117. SARA, *supra* note 11, § 122(f)(4), 42 U.S.C. § 9622(f)(4) (Supp. IV 1986). Other sections of SARA that allow releases at the EPA's discretion include: § 122(f) (PRPs that fully comply with § 106 orders), § 122(g)(2) (de minimis settlers), and § 122(j)(2) (parties who agree to restore federal resources). *See* 42 U.S.C. § 9622(f), (g)(2), (j)(2) (Supp. IV. 1986). In addition to the discretionary releases, SARA requires the EPA to grant a covenant not to sue if the wastes are destroyed permanently or if the EPA disposes the wastes off-site rather than undertaking an on-site remedy. SARA, *supra* note 11, § 122(f)(2)(A), 42 U.S.C. § 9622(f)(2)(A) (Supp. IV 1986).

effective, the covenant not to sue must bind federal, state, and county governments.<sup>118</sup> The one significant drawback of the release is the required reopener provision, a potential escape from the release for the government. Only in "extraordinary circumstances" may the EPA waive a reopener for future liability contingent upon conditions unknown at the time of settlement<sup>119</sup> and for inadequate remedial actions that endanger the public health and environment.<sup>120</sup>

Section 122(g) of SARA also gives the small volume generator a chance to settle. It requires the government, whenever practicable, to settle with de minimis waste contributors when the settlement represents only a small fraction of the total cleanup costs estimated for the site.<sup>121</sup> To qualify as a de minimis contributor, the PRP either must be a small volume generator/transporter, whose volume and toxicity of waste are minimal in comparison to the total amount and toxicity of hazardous wastes at the site,<sup>122</sup> or a landowner, who neither allowed nor contributed to the hazardous waste generation or disposal by action or inaction, nor purchased the property with actual or constructive notice of the existence of toxic wastes.<sup>123</sup> In addition to protection from joint and several liability in excess of their apportioned share, de minimis settlers avoid potential transaction costs greater than their actual liability.<sup>124</sup> Like other settling parties, de minimis settlers have immunity

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118. See, e.g., *Pepper's Steel & Alloys*, 658 F. Supp. at 1160; cf. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) (federal government suing parties who had obtained releases from the state environmental agency).

119. SARA, *supra* note 11, § 122(f)(6)(A), 42 U.S.C. § 9622(f)(6)(A) (Supp. IV 1986).

120. See, e.g., *Pepper's Steel & Alloys*, 658 F. Supp. at 1168. The covenant not to sue stated:

Notwithstanding any other provisions of this Decree, the United States reserves the right to institute a new action, or to seek modification of this Consent Decree if necessary to do so, in order to compel FPL [Florida Power & Light Co.] either to take additional response measures at the site or to reimburse Plaintiff for additional cleanup costs if:

(1) there is a release or a substantial threat of a release of hazardous substances at or from the Site which may present an imminent and substantial endangerment to the public health or welfare or the environment and which arises from previously unknown or undetected conditions, and/or

(2) Plaintiff receives new information, concerning the nature of the substances at the Site or appropriateness of past response actions which indicates that site conditions may present an imminent and substantial endangerment to the public health or welfare or the environment because of the release or threat of release of hazardous substances from the Site.

*Id.*

121. See SARA, *supra* note 11, § 122(g), 42 U.S.C. § 9622(g) (Supp. IV 1986); see also EPA Memorandum: Interim Guidance on Settlements with *De Minimis* Waste Contributors Under SARA § 122(g) (June 19, 1987), 52 Fed. Reg. 24,333 (1987) [hereinafter *De Minimis* Waste Contributors Memorandum], reprinted in 17 [Administrative Materials] *Envtl. L. Rep.* (Envtl. L. Inst.) 35,067 (Sept. 1987).

122. SARA, *supra* note 11, § 122(g), 42 U.S.C. § 9622(g) (Supp. IV 1986).

123. *Id.*

124. See *De Minimis* Waste, Contributors Memorandum, *supra* note 121, at 24,334, reprinted in *Envtl. L. Rep.*, *supra* note 122, at 35,067.

from contribution suits brought by other PRPs.<sup>125</sup>

De minimis settlement, however, has several limitations. Instead of determining fixed threshold levels and settlement terms, the EPA applies de minimis criteria on a site specific basis.<sup>126</sup> A de minimis volume of waste at one site may not be de minimis at another site.<sup>127</sup> The EPA will not enter into settlement negotiations until after the investigatory phase of site remediation because settlement requires sufficient information concerning the identity and contribution activities of each de minimis PRP.<sup>128</sup> De minimis settlers also must assume a pro rata liability for the orphan shares of defunct or insolvent parties.<sup>129</sup> Finally, the settlement agreement is not a binding release of liability; the EPA may set it aside in the case of unanticipated cost overruns.<sup>130</sup>

Even if some PRPs settle, the nonsettlers do not escape liability. First, settling PRPs may bring contribution actions against nonsettling PRPs.<sup>131</sup> Second, if the settling PRPs paid less than their ultimate proportionate share of liability, the EPA may assess the shortfall against the nonsettlers.<sup>132</sup>

### III. SECOND TIER RECOVERY—SPREADING THE LIABILITY AMONG OTHER SECTION 107 POTENTIALLY RESPONSIBLE PARTIES

A PRP that bears more than its equitable share of cleanup costs may bring private recovery actions against other PRPs liable under sec-

125. See EPA Memorandum: Interim Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree and Administrative Order on Consent, 52 Fed. Reg. 43,393, 43,394 (1987). Section 13 of this model consent decree states that the EPA agrees that the de minimis settlor has "resolved its liability to the United States for Covered Matters pursuant to . . . 42 U.S.C. 9622(g)(5), and shall not be liable for claims for contribution for Covered Matters." *Id.* at 43,398.

126. See Ruhl, *De Minimis Settlement Policy Leaves Small Volume Contributors Guessing*, 3 NAT. RESOURCES & ENV'T, Winter 1988, at 35.

127. *Id.* at 36. For instance, a 1% contributor is excluded from de minimis status if its waste differs from the toxicity of the general waste composition or if a significant number of generators also contribute only 1% of the waste. Early settlement with large numbers of de minimis contributors may disadvantage major contributors at the site. At the Cannons Engineering toxic waste sites, more than 250 parties qualified as de minimis under the EPA's 1% ceiling. The ineligible contributors argued that the ceiling was too high, allowing too small a settlement too early. *See id.*; see also *supra* notes 97, 115.

128. See *De Minimis* Waste Contributors Memorandum, *supra* note 121, at 24,336, reprinted in *Env'tl. L. Rep.*, *supra* note 121, at 35,068-69.

129. *Id.* at 24,338, reprinted in *Env'tl. L. Rep.*, *supra* note 121, at 35,070.

130. *Id.* at 24,337, reprinted in *Env'tl. L. Rep.*, *supra* note 121, at 35,069. The EPA must include a reservation of rights clause unless it concludes that the site records account for the vast majority of the waste and expects no significant new information about the site to surface. *Id.*

131. SARA, *supra* note 11, § 113(f)(2), 42 U.S.C. § 9613(f)(2) (Supp. IV. 1986); see *infra* note 147 and accompanying text; see also *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 681 n.5 (S.D.N.Y. 1988).

132. SARA, *supra* note 11, § 113(f)(2), 42 U.S.C. § 9613(f)(2) (Supp. IV 1986).

tion 107.<sup>133</sup> PRPs may recover costs “necessary” and “consistent” with the NCP.<sup>134</sup> If the PRP voluntarily cleaned up the site prior to governmental action, it may recover under section 107(a)(4)(B). Before SARA, courts disagreed whether private party complaints must allege and prove EPA approval of the response action.<sup>135</sup> After SARA, the Ninth Circuit ruled that neither prior federal, state, or local government action concerning a site,<sup>136</sup> nor cleanup pursuant to a governmentally authorized cleanup program,<sup>137</sup> are prerequisites to a private party’s action for response costs under section 107 because Congress intended to promote private enforcement actions.

#### A. Contribution Suits Against Nongovernmental PRPs

Prior to the SARA amendments, the majority of courts recognized an implicit right to contribution but did not define the standards for dividing costs.<sup>138</sup> In *United States v. New Castle Co.*<sup>139</sup> the court listed the criteria for a third-party complaint for contribution under CERCLA: The third-party defendant disposed of waste at the site; the waste contained “hazardous substances;”<sup>140</sup> and those particular chemicals were identified at the site.<sup>141</sup> Moreover, the third-party plaintiff was not

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133. See H.R. REP. NO. 253, *supra* note 64, pt. 3, at 19, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 3042.

134. See *supra* note 26 and accompanying text. The burden of proving consistency with the NCP lies with the plaintiff PRP. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 850-51 (W.D. Mo. 1984), *aff’d*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987). Consistency is measured solely against the NCP in effect at the time the actual response costs were incurred, not when the cleanup action began or ended. See *id.* at 851.

Private plaintiffs must prepare the most cost-effective practicable response plan, must provide an opportunity for public comment, must use EPA-approved contractors, and must comply with any governmental agency’s requirements. 40 C.F.R. § 300.71 (1988). A cost-effective alternative must meet a minimum level of environmental protection. See 40 C.F.R. pt. 300 (1988).

135. Compare *Artesian Water Co. v. Government of Newcastle County*, 605 F. Supp. 1348 (D. Del. 1985) (requiring prior government approval), *aff’d on other grounds*, 851 F.2d 643 (3d Cir. 1988) with *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 290 (N.D. Cal. 1984) (not requiring federal preauthorization of private recovery action).

136. See *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988).

137. See *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986) (stating that it is “‘absolutely clear that no Federal approval of any kind is a prerequisite to a cost recovery under section 107’” (quoting National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.71 (1988))).

138. See Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 *Ecology L.Q.* 365 (1987). Most courts found a right to contribution implicit in CERCLA or alternatively within the courts’ power to create federal common law. *Id.*

139. 642 F. Supp. 1270 (D. Del. 1986).

140. See CERCLA, *supra* note 1, § 101(14), 42 U.S.C. § 9601(14) (1982); see also *New Castle*, 642 F. Supp. at 1274 n.5 (noting that the presence of more than a regulatory threshold concentration of a pollutant, not the mere presence of a pollutant, triggers CERCLA liability).

141. *New Castle*, 642 F. Supp. at 1275 (not requiring complainant to allege any threshold amount of waste because the purpose of discovery is to allow the parties to substantiate their

restricted to contribution from only persons responsible for the specific chemical species listed as hazardous substances in the government's complaint.<sup>142</sup> The courts agreed that nonculpable PRPs could sue other PRPs to recover costs, but the question of whether culpable parties also had standing to sue was uncertain.<sup>143</sup> CERCLA created no statute of limitations for cost recovery actions<sup>144</sup> and the majority of courts have reasoned that because CERCLA was equitable in nature, the doctrine of laches applied, rather than a statute of limitations.<sup>145</sup>

SARA provides expressly that if the government holds the PRP liable under section 106 or 107, the PRP may seek contribution from other PRPs pursuant to section 113(f). In addition, PRPs that settle with the government may seek contribution from nonsettlor PRPs.<sup>146</sup> Under SARA, the right to seek contribution is retroactive<sup>147</sup> and without qualification. Even culpable parties, therefore, may recover costs from other PRPs.<sup>148</sup> SARA states that "any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) . . ."<sup>149</sup> This amendment codifies the federal common-law principle that contribution may be obtained only from parties independently liable under CERCLA.<sup>150</sup> Therefore, the threshold issue in any

claims).

142. *Id.*

143. *See* Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1057-58 (D. Ariz. 1984) (allowing former owner/operator's equitable defense of unclean hands to bar the present owner/operator's recovery), *aff'd on other grounds*, 804 F.2d 1454 (9th Cir. 1986).

144. *See, e.g.*, T & E Indus. v. Safety Light Corp., 680 F. Supp. 696, 704 (D.N.J. 1988).

145. *E.g.*, United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985).

146. SARA, *supra* note 11, § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (Supp. IV 1986), states: "A person who has resolved its liability to the United States . . . for some or all of the costs of such [response] action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement."

147. SARA's contribution provision is retroactive because Congress merely codified the contribution right that already existed. *See* H.R. REP. No. 253, *supra* note 64, pt. 1, at 79, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2861.

148. *See, e.g.*, Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1003 (D.N.J. 1988); Allied Corp. v. Acme Solvents Reclaiming, 691 F. Supp. 1100, 1119 (N.D. Ill. 1988).

149. SARA, *supra* note 11, § 113(b), 42 U.S.C. § 9613(f)(1) (Supp. IV 1986). This section states:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims . . . shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

*Id.*

150. *E.g.*, Edward Hines Lumber Co. v. Vulcan Materials Corp., 685 F. Supp. 651 (N.D. Ill.) (disallowing contribution suit against chemical manufacturers because they were not liable parties under § 107 as they neither generated or transported wastes nor owned or operated a waste site),

contribution action is whether the contribution defendant is a responsible party under CERCLA section 107.

The PRP will remain liable for all costs less the defendant's allocated share. The burden of apportionment will be on the PRP, but unlike liability actions against the government, courts are free to consider equitable factors when allocating the amount of contribution between liable parties.<sup>151</sup> The legislative history of CERCLA states that a court may consider "the degree of involvement by parties in the generation, transportation, treatment, storage or disposal of hazardous substances."<sup>152</sup> A 1988 federal district court decision indicated that equitable factors between a former owner and the current owner of the manufacturing facility would include the amount by which the sale price was discounted, and the damage caused by the current owner after the closing date.<sup>153</sup> Similarly, a Minnesota court relied on equitable factors when it apportioned cleanup costs between generators and owners and operators.<sup>154</sup> The court assessed the majority of the cleanup costs to the owners and operators because they exercised control over the treatment and storage of the hazardous substances, took no action to reduce their toxicity, substantially caused their release, and failed to cooperate with the government's cleanup.<sup>155</sup> In addition to their awareness of the hazardous character of the wastes, the owners and operators were expert toxic waste handlers.<sup>156</sup> In contrast, the generators cooperated fully with the government and relied on the owners' and operators' representations that the waste would be disposed of properly.<sup>157</sup>

The range of defenses to contribution suits is not limited to those listed in section 107(b) defenses.<sup>158</sup> Other permissible defenses include previous settlement with the government,<sup>159</sup> and an enforceable indem-

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*aff'd*, 861 F.2d 155 (7th Cir. 1988); *accord* C. Greene Equip. Corp. v. Electron Corp., 697 F. Supp. 983 (N.D. Ill. 1988) (stating that a seller of totally enclosed, nonleaking PCB transformer is not a responsible party under CERCLA).

151. See *supra* notes 77, 78, and accompanying text; see also *Allied Corp.*, 691 F. Supp. at 1118 n.12 (applying the *Gore* factors in allocating costs in second tier contribution suits but not in first tier suits involving the Government as plaintiff).

152. H.R. REP. No. 253, *supra* note 64, pt. 3, at 19, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 3042.

153. *Southland Corp.*, 696 F. Supp. at 1003.

154. See *Advance Circuits, Inc. v. Carriere Properties*, Nos. 84-3316, 84-4591 (D. Minn. Feb. 18, 1987); see also *Dubuc & Evans*, *supra* note 3, at 10,201.

155. *Advance Circuits*, Nos. 84-3316, 84-4591.

156. *Id.*

157. *Id.*

158. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988), cert. denied, 109 S. Ct. 837 (1989).

159. See *SARA*, *supra* note 11, § 113(f)(2), 42 U.S.C. § 9613(f)(2) (Supp. IV 1986) (stating that a party that has settled with the government is not liable for contribution).

nification agreement between the indemnifier plaintiff and defendant.<sup>160</sup> Caveat emptor, however, is no defense to contribution and may not be used to transfer CERCLA liability to a purchaser.<sup>161</sup> SARA created a three year statute of limitations for contribution suits,<sup>162</sup> which begins to run on the date of judgment, date of administrative order,<sup>163</sup> or date of entry of a judicially approved settlement. One 1988 district court decision reasoned that because SARA created a statute of limitations for contribution suits where none previously existed, the period began to run for existing claims on the effective date of SARA, October 17, 1986.<sup>164</sup> Therefore, a rush of contribution suits resulting from pre-SARA judgments or settlements is now before the courts in anticipation of the October 1989 deadline.

### B. Suits Against the Government for Contribution and Indemnity

In *United States v. Moore*<sup>165</sup> the court addressed the issue of whether a PRP could seek indemnity and contribution from a federal agency. The Department of Defense (DOD) sold Moore certain cylinders that allegedly caused environmental damage.<sup>166</sup> After settling with the EPA, Moore filed a contribution suit against the DOD. The court allowed Moore's claim for contribution on a recoupment theory.<sup>167</sup> The court also allowed the indemnity claim, noting that Congress envisioned indemnification as a means of shifting the financial burden of cleanups to responsible parties, which may include government agencies.<sup>168</sup> Likewise, in 1988 the Ninth Circuit indicated that the federal government, a previous owner of the hazardous waste site, could be liable as a defendant in a cost recovery action brought by a private plaintiff under section 107.<sup>169</sup> During its period of ownership, the government built a rubber plant on the site, leased it to a third party to operate, and approved the third party's disposal of hazardous byproducts at the site.<sup>170</sup>

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160. See *id.* § 107(e), 42 U.S.C. § 9607(e).

161. See *Celotex Corp.*, 851 F.2d at 89-90.

162. SARA, *supra* note 11, § 113(g)(3), 42 U.S.C. § 9613(g)(3) (Supp. IV 1986).

163. SARA provides for "administrative order[s] under section 9622(g) . . . (relating to de minimis settlements) or 9622(h) . . . (relating to cost recovery settlements)." *Id.* § 113(g)(3)(B), 42 U.S.C. § 9613(g)(3)(B).

164. See *T & E Indus. v. Safety Light Corp.*, 680 F. Supp. 696, 704 (D.N.J. 1988).

165. *United States v. Moore*, No. 87-101-NN, 28 Env't Rep. (BNA) 1153 (E.D. Va. July 27, 1988) (denying various motions by the United States and the defendants); *United States v. Moore*, No. 87-101-NN, 28 Env't Rep. (BNA) 1151 (E.D. Va. May 27, 1988).

166. *Moore*, 28 Env't Rep. at 1153.

167. *Id.*

168. *Id.*

169. *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 840 F.2d 691, 695-96 (9th Cir. 1988) (remanding damages claim against the federal government for further consideration).

170. *Id.* at 693.

Unless the EPA's settlement agreement contains reciprocal covenants not to sue, the settling PRP may be able to sue other governmental entities or even one of the governmental parties in the consent decree. In *United States v. Seymour Recycling Corp.*<sup>171</sup> more than 200 PRPs paid a pro rata sum to settle with the United States based on each PRP's proportionate share<sup>172</sup> of waste sent to the Seymour site. In return, the PRPs received covenants not to sue signed by the United States, the State, the City, and the local aviation board. The Seymour Recycling Consent Decree and the Pro Rata Covenants not to sue contained reciprocal covenants protecting only the federal and state governments from suit. The court allowed the settling PRPs to file contribution claims against the City and its aviation board, the owners of the site.<sup>173</sup>

#### IV. THIRD TIER RECOVERY—SPREADING LIABILITY TO POTENTIALLY LIABLE PARTIES BEYOND SECTION 107

If the PRP anticipates shouldering a disproportionate share of the cleanup costs due to the missing shares of defunct, insolvent, or judgment-proof PRPs, it must look beyond the scope of section 107 PRPs. Other potential defendants include indemnifiers, successor corporations, parent corporations, individual shareholders, and corporate officers.

##### A. Contractual Transfers of Liability

All responsible persons are fully liable to the government for cleanup costs under CERCLA regardless of any contractual agreements to which they are a party.<sup>174</sup> CERCLA allows contractual transfers of response costs; section 107(e)(1) recognizes expressly contracts to ensure, hold harmless, or indemnify between private parties.<sup>175</sup> Although these agreements do not alter or excuse the underlying liability, they provide a right to reimbursement or compensation to the party held liable under section 107(a).<sup>176</sup> Therefore, the PRP should consider carefully any agreements to which it is a party, whether express or implied, that transfer contractually its liability to a third party. The same contract that precludes a PRP from asserting an affirmative section 107(b)

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171. 686 F. Supp. 696 (S.D. Ind. 1988).

172. See *supra* note 68.

173. See *Seymour Recycling*, 686 F. Supp. at 699. The court found that the settlement neither contractually nor statutorily barred Seymour Recycling's claim against the City and the aviation board. *Id.*

174. CERCLA, *supra* note 1, § 107(e)(1), 42 U.S.C. § 9607(e)(1) (1982).

175. *Id.*

176. See, e.g., *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986).

defense to liability against the government may provide the PRP with a valid cause of action against the third party with whom it contracted for recovery of the response costs the PRP paid the government.

A successful contractual transfer of liability action offers several advantages over a contribution action. Instead of pursuing costly PRP searches or bringing multiple suits against numerous contribution defendants, the plaintiff PRP may obtain a full recovery from a single indemnifier defendant. A successful indemnity action can shift the entire cost of cleanup from the plaintiff PRP to another party rather than merely reducing the plaintiff PRP's cost burden by a percentage equal to the defendant's liability. The indemnifier defendant need not qualify as a PRP under section 107.<sup>177</sup> Therefore, the same party that successfully avoids liability with the government by asserting a valid innocent landowner defense may bear the entire cost of CERCLA cleanup if it contractually assumed the responsibility for environmental hazards within the purchase agreement. Last, previous settlement with the government offers no protection from indemnification suits. A PRP may bring indemnification actions against both settling and nonsettling parties.

Parties to an agreement containing an indemnity or warranty provision typically have conflicting goals. A current owner (buyer) of a hazardous waste site may bring suit against the predecessor owner (seller) on the basis of an indemnity or warranty clause contained within the purchase and sale contract. At the time of closing, the seller wishes to disclaim all warranties and release all environmental risks to the buyer, whereas the buyer desires protection from all future liabilities. Similarly, a hazardous waste generator wishes to transfer the risk of environmental liability to the transporter and owner/operator of a disposal site. In contrast, the transporter and owner/operator request indemnification or a release from the generator. Therefore, the issue of whether CERCLA liability is transferred becomes one of contract interpretation.<sup>178</sup> Courts look to the language of the contract to discern the parties' mutual objective intent at the time they entered into the agreement.<sup>179</sup> The majority of decisions agree that state law governs contract interpretation and the validity of causes of action for contrac-

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177. See *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988). The *Hines Lumber* court stated that CERCLA does not impose liability on "slipshod architects, clumsy engineers, poor construction contractors, . . . negligent suppliers of on-the-job training," or even a party who is "all four rolled into one" absent a contractual agreement to indemnify. *Id.* at 157.

178. See, e.g., *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1000-01 (D.N.J. 1988).

179. *Id.*

tual cost recovery.<sup>180</sup>

Courts disagree on whether a valid contractual transfer of CERCLA liability must be express. One federal district court declined to recognize an implied warranty in a typical waste disposal contract between a generator and owner/operator.<sup>181</sup> Other courts have upheld implied contractual transfers of liability if not contrary to the intent of the parties.<sup>182</sup> For example, one federal district court interpreted a 1967 release from "all claims, demands, and causes of action which plaintiff has, had, or may have . . ." to include any future CERCLA claims, even without an express reference to CERCLA.<sup>183</sup> Likewise, in upholding language discharging general claims "based upon, arising out of or in any way relating to the Purchase Agreement" as a valid release of the seller from a CERCLA claim, the Ninth Circuit noted that the parties had constructive notice of CERCLA, their negotiations encompassed environmental liabilities, and the seller paid separate consideration for "other claims asserted under the Purchase Agreement."<sup>184</sup>

A valid release may bar or reduce the PRP plaintiff's recovery. For example, the Ninth Circuit upheld a postclosing release of CERCLA liability.<sup>185</sup> The buyer argued that because the parties were unaware of the impending cleanup and future closure of the waste disposal site at the time of agreement, the release should be avoided.<sup>186</sup> The applicable

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180. See *Mardan Corp.*, 804 F.2d at 1460; *Lyncott Corp. v. Chemical Waste Management, Inc.*, 690 F. Supp. 1409, 1417 (E.D. Pa. 1988); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1291 (D. Minn. 1987). But see *Mardan Corp.*, 804 F.2d at 1463 (Reinhardt, J., dissenting) (arguing against state law presumption because CERCLA is federal law). Because state law governs contractual transfers of liability, it is necessary to look to the relevant state indemnity and warranty law. For instance, some states bar indemnity claims among joint tortfeasors. See *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1053 n.5 (D. Ariz. 1984), *aff'd on other grounds*, 804 F.2d 1454 (9th Cir. 1986).

181. See *Chemical Waste Management, Inc. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1295 (E.D. Pa. 1987) (rationalizing its nonrecognition of implied warranties by stating that "[i]f owner/operators and generators wish to redistribute the risks distributed by Congress, they must do so clearly and unequivocally").

182. See, e.g., *Lyncott Corp.*, 690 F. Supp. at 1416 (recognizing implied indemnity under CERCLA if it would not defeat the intention of the parties to the agreement).

183. See *FMC Corp.*, 668 F. Supp. at 1292.

184. *Mardan Corp.*, 804 F.2d at 1456; *cf. id.* at 1463 (Reinhardt, J., dissenting) (disagreeing that a general release includes CERCLA claims and recommending adoption of a uniform federal rule requiring a release of a CERCLA claim to be express).

185. *Id.* at 1456. The buyer, *Mardan Corp.*, acquired a manufacturing plant from the seller in 1980. *Id.* The next year, the parties entered into an agreement pursuant to which the seller paid *Mardan* \$781,055 as settlement for "other claims asserted under the Purchase Agreement." *Id.* (quoting the parties' settlement agreement). In return, *Mardan* agreed to release the seller from "all actions, causes of action, suits, . . . based upon, arising out of or in any way relating to the Purchase Agreement." *Id.* (quoting the parties' settlement agreement). In 1983 the EPA brought an action against *Mardan*. *Mardan* then sued the seller under CERCLA § 107 to recover cleanup costs estimated at between \$500,000 and \$1,550,000. *Id.*

186. *Id.* at 1462.

state law would avoid the release if the parties believed mistakenly that no injury existed, but not if the parties knew of the injury but not the extent of its consequences.<sup>187</sup> The Ninth Circuit rejected this argument because both parties knew that the environmental problems and hazardous wastes located at the site would require future corrective actions and that the buyer had constructive knowledge of CERCLA.<sup>188</sup> In contrast, a warranty disclaimer is a defense limited to causes of action based on breach of warranty; it is not an express assumption of liability.<sup>189</sup> A typical purchase and sale agreement will contain a warranty disclaimer similar to the following:

THE ASSETS ARE SOLD ON AN "AS IS, WHERE IS" BASIS WITHOUT WARRANTY OR GUARANTEE AS TO QUALITY, CHARACTER, PERFORMANCE, OR CONDITION, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OR GUARANTEE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.<sup>190</sup>

This typical warranty will not transfer all environmental liabilities to the buyer.

By interpreting narrowly other techniques used by the indemnifying party to limit its liability exposure, such as excepting various situations or imposing conditions on indemnification, courts favor PRP plaintiff recovery from the indemnifier.<sup>191</sup> One example is the typical change of law provision included in most contracts to transfer all risks of change of law from the indemnifier. Arguably, this provision provides a defense in contracts entered into before 1980;<sup>192</sup> courts will impose constructive notice of CERCLA on contracts entered into after the enactment of CERCLA.<sup>193</sup>

Another exposure limitation technique that sellers use excepts liability for postclosing incidents caused in whole or in part by the buyer. In a recent example, a buyer purchased the assets of the seller's gear making business in 1974 and continued production. In the purchase agreement, the seller promised to indemnify the buyer with respect to "[a]ny and all liabilities of Seller of any nature, whether absolute, accrued, contingent or otherwise, existing at the Closing Date or arising out of any transaction of the Seller . . . prior to the Closing Date. . . ."<sup>194</sup> After the state environmental agency ordered the buyer

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187. *Id.* (applying New York law).

188. *Id.* at 1463.

189. *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1001 (D.N.J. 1988).

190. *Id.*

191. See generally Zimmerman, *Environmental Issues in Sales Transactions: The Seller's Perspective*, 3 NAT. RESOURCES & ENV'T, Fall 1988, at 7.

192. See *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987).

193. See *Mardan Corp.*, 804 F.2d at 1461-63 (barring a release entered into in 1981).

194. *Marmon Group, Inc. v. Rexnord, Inc.*, 822 F. 2d 31, 33 n.1 (7th Cir. 1987).

to undertake remedial cleanup actions in 1985, the seller argued that its contractual promise of twelve years earlier did not include an assumption of liability for future unanticipated events. The Seventh Circuit held that although the contract language appeared unambiguous, boilerplate indemnity conditions did not bar the plaintiff's recovery against the indemnifier if parol and extrinsic evidence showed that environmental liabilities were not within the contemplation of the parties at the time of sale.<sup>195</sup>

The indemnifier also may attempt to limit its obligation to specific tasks or impose a monetary ceiling.<sup>196</sup> This strategy failed in *Emhart Industries, Inc. v. Duracell International, Inc.*<sup>197</sup> In addition to the expenses of the specifically agreed upon tasks of removing PCB contaminated materials and residues from the facility, the federal district court held defendant Duracell liable for attorney's fees, lost profits, and expenses for the shutdown of the facility in the period prior to the initiation of a cleanup plan.<sup>198</sup> The district court reasoned that because Emhart's losses from shutting down the facility were "incurred under or imposed by law," they were compensable by indemnifier Duracell.<sup>199</sup>

Another technique imposes a time restriction on the indemnity obligation. This strategy did not limit the seller's liability in *Southland Corp. v. Ashland Oil, Inc.*<sup>200</sup> The purchase and sale agreement included both an indemnity clause and the following two-year survival provision: "All of the representations, warranties, promises and agreements of the parties set forth in this Agreement shall survive the Closing for a period of two (2) years . . . regardless of what investigations the parties may have made before the Closing."<sup>201</sup> Ashland claimed that the parties intended to transfer all hazardous substance liabilities to Southland two years after closing. The *Southland* court disagreed and held that this provision barred only breach of contract claims based on indemnity; it was not an express assumption of liability by Southland.<sup>202</sup>

### B. Successor Liability

The Third Circuit applied the doctrine of corporate successor liability in several recent suits for contribution for site cleanup costs. In

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195. *Id.* at 35.

196. *Id.*

197. 665 F. Supp. 549 (M.D. Tenn. 1987).

198. *Id.* at 562, 570. Emhart shut down the facility temporarily, fearing it could be subject to criminal liability under the Toxic Substances Control Act.

199. *Id.* at 571. Duracell was not held responsible for Emhart's decision to close the facility and buy another plant because that would be an expansion of the indemnity beyond its terms. *Id.*

200. 696 F. Supp. 994, 1001-02 (D.N.J. 1988).

201. *Id.* at 1001 n.8.

202. *Id.* at 1001-02.

*United States v. Union Gas Co.*<sup>203</sup> predecessors of Union Gas owned and operated a facility that released hazardous substances. Years after the facility had been abandoned and dismantled, both the federal and state governments sued successor Union Gas for cleanup costs.<sup>204</sup> In *Smith Land & Improvement Corp. v. Celotex Corp.*<sup>205</sup> the Third Circuit reasoned that although CERCLA does not explicitly address corporate successor liability, it is a concept compatible with CERCLA's policy of funding cleanup by responsible parties.<sup>206</sup> The defendants' predecessor corporation sold asbestos contaminated property to Smith Land in 1963. The defendants claimed no liability because they never owned or operated the facility; the corporate merger occurred four years after the transfer of property.<sup>207</sup> The Third Circuit held that a successor corporation should bear the costs of cleanup rather than the taxpayers because the original corporation, its successors, and their stockholders realized savings from the failure to use nonhazardous means of disposal while the public realized only indirect benefits, if any at all.<sup>208</sup> Therefore, a corporation cannot escape a potentially large liability merely by sale to or merger with an innocent third party.

### C. Liability Beyond the Corporate Entity

Generally, the corporate entity is the party held liable for CERCLA cleanup costs.<sup>209</sup> Traditionally, the corporate form could be disregarded only by using federal or state common-law principles such as piercing the corporate veil, which extend the liability of a corporation beyond its assets to hold the parent corporation or individual corporate officers and shareholders personally liable for its CERCLA debts. Courts impose CERCLA liability beyond a corporate entity either derivatively by piercing the corporate veil or directly by expanding the statutory language of CERCLA section 107(a) to reach corporate officers and shareholders.<sup>210</sup>

#### 1. Parent Corporation Liability

CERCLA does not address parent company liability explicitly. Parent corporations have at least nominal control over the activities of

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203. 832 F.2d 1343 (3d Cir. 1987), *aff'd*, 109 S. Ct. 2273 (1989).

204. *Id.*

205. 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 837 (1989).

206. *Id.* at 91-92.

207. *Id.* at 88, 90.

208. *Id.* at 92.

209. See, e.g., McMahan & Moertl, *The Erosion of Traditional Corporate Law Doctrines in Environmental Cases*, 3 NAT. RESOURCES & ENV'T, Fall 1988, at 29.

210. See *id.*

their subsidiaries because they are usually the majority or sole shareholder of their subsidiaries. The doctrine of limited liability protects parent companies as shareholders from liability stemming from their subsidiaries' actions unless a court pierces the corporate veil. Courts are reluctant to pierce the corporate form absent fraud or a finding that the corporation is not a separate entity from its parent. In the 1985 decision of *Wehner v. Syntex Agribusiness*<sup>211</sup> the federal district court declined to pierce the corporate veil. The hazardous waste site owner, Agribusiness, was a subsidiary of Syntex U.S.A., which in turn was a wholly owned subsidiary of Syntex Corporation. Although Syntex Corporation participated in the management of Agribusiness to the normal extent of a parent's interest in its subsidiary, the court declined to assert jurisdiction over the parent corporation on the ground that Agribusiness was a separate corporate entity.<sup>212</sup> Likewise, in *In re Acushnet River & New Bedford Harbor Proceedings*<sup>213</sup> the federal district court held that a parent corporation of a "well capitalized, non-fraudulent, separate corporate subsidiary" that is the current owner of a hazardous waste site is not liable under traditional principles of corporate law.<sup>214</sup> The court also declined to analyze liability under section 107 because it found that limited liability was still the rule despite the important policies behind CERCLA.<sup>215</sup> More recently, another federal district court refused to hold the parent corporation liable unless the parent's control exceeded active participation in management and amounted to total domination of the subsidiary such that the subsidiary ceased to function as a separate entity.<sup>216</sup> Therefore, the majority of the case law supports limited corporate liability and the nonliability of a parent corporation.

The 1986 district court decision of *Idaho v. Bunker Hill Co.*<sup>217</sup> rep-

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211. 616 F. Supp. 27 (E.D. Mo. 1985).

212. *Id.* at 30. The *Wehner* court listed five factors that may destroy the presumption of corporate separateness:

"(a) The business transactions, property, employees, bank and other accounts and records of the corporations are intermingled;

(b) The formalities of separate corporate procedures for each corporation are not observed . . . ;

(c) The corporation is inadequately financed as a separate unit . . . ;

(d) The respective enterprises are not held out to the public as separate enterprises;

(e) The policies of the corporation are not directed to its own interests primarily but rather to those of the other corporation."

*Id.* (quoting H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 148, at 355-56 (1983)).

213. 675 F. Supp. 22 (D. Mass. 1987).

214. *Id.* at 32.

215. *Id.*

216. *Joslyn Corp. v. T.L. James & Co.*, 696 F. Supp. 222, 227, 230 n.19 (W.D. La. 1988) (citing the Fifth Circuit's "laundry list" of factors to consider when evaluating the degree of control a parent exercises over its subsidiary).

217. 635 F. Supp. 665 (D. Idaho 1986).

resents the minority position. The decision imposed liability on the parent corporation as the owner or operator under section 107(a)(2). The court compared the subsidiary's capital of eleven hundred dollars to the twenty-seven million dollars in dividends the parent received from the subsidiary's facility. Also, the parent as the sole stockholder had the authority to control hazardous waste disposal and releases and to implement actions to "prevent and abate the damage"; the subsidiary could not spend more than five hundred dollars on pollution control without the parent's approval. *Bunker Hill's* test for determining whether the parent becomes liable under CERCLA as an owner or operator considers whether the parent has the capacity to discover hazardous waste discharge, the authority to control the activities of the subsidiary including the discharge of hazardous wastes, and the capacity to prevent and abate the damage.<sup>218</sup>

## 2. Liability of Corporate Officers and Individual Shareholders

Corporate officers and shareholders qualify as persons<sup>219</sup> and may be liable individually under section 107 if they are current owners or operators of facilities, past owners or operators at the time of disposal, generators, or transporters that selected the disposal sites of hazardous substances. The EPA will pursue solvent individuals to recover cleanup costs if the liable corporation becomes insolvent, especially if the individual is a corporate officer.<sup>220</sup>

In 1986 the Eighth Circuit first ruled that an individual shareholder could be liable under the statutory language of CERCLA without piercing the corporate veil.<sup>221</sup> The Eighth Circuit reasoned that to impose liability only on the corporate form and not on the individual corporate officers who made the corporate decisions concerning the handling and disposal of the toxic substances would "open an enormous and clearly unintended loophole" in CERCLA.<sup>222</sup> The court emphasized that the authority to control the handling and disposal of hazardous wastes is critical, rather than actual physical control or possession.<sup>223</sup> Likewise, a federal district court held the president and sole shareholder of a metal electroplating business liable as an "operator" under

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218. *Id.* at 672.

219. CERCLA, *supra* note 1, § 101(21), 42 U.S.C. § 9601(21) (1982).

220. See EPA Memorandum: Guidance Memorandum Regarding CERCLA Enforcement Against Bankrupt Parties 4 (May 24, 1984).

221. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).

222. *Id.* at 743.

223. *Id.*

section 107 in *United States v. Northernair Plating Co.*<sup>224</sup> The court noted that the officer supervised personally the daily operation of the company including the disposal of hazardous wastes.<sup>225</sup>

In 1985 the Second Circuit found a corporate officer and shareholder liable as an "operator" under section 107(a) in *New York v. Shore Realty Corp.*<sup>226</sup> Although neither the corporate officer nor his company generated or transported any of the approximately 700,000 gallons of hazardous substances found on the Shore site, the officer knew of the existence of the hazardous wastes and formed Shore Realty solely for the purpose of purchasing the Shore site in an attempt to limit his personal liability.<sup>227</sup> The Second Circuit declined to pierce the corporate veil absent a showing of fraud or of using the business for personal as opposed to corporate interests and instead found direct liability under CERCLA.<sup>228</sup>

In sum, courts are likely to disregard the corporate form and find individual shareholders and corporate officers liable personally for the CERCLA debts of a corporation.<sup>229</sup> The two key elements to personal liability under section 107 are ownership of the corporation coupled with active participation in its management and the authority to control its daily actions with respect to hazardous substances. Courts are less likely to pierce the corporate veil and find parent corporations liable for the debts of their subsidiaries absent fraud or a gross lack of compliance with corporate formalities.

#### D. Bankrupt PRPs

The major stumbling block to spreading the costs of CERCLA liability is the possibility that even if a PRP is victorious against a defendant for cleanup costs, the defendant may escape liability by seeking refuge in bankruptcy. The corporate debtor need not be insolvent before filing for bankruptcy, and it need not relinquish possession and control of its business during reorganization under Chapter 11 of the Bankruptcy Code.<sup>230</sup> The filing of the bankruptcy petition stays most

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224. 670 F. Supp. 742 (W.D. Mich. 1987).

225. *Id.* at 747.

226. 759 F.2d 1032 (2d Cir. 1985).

227. *Id.* at 1037.

228. *Id.* at 1052.

229. See *supra* notes 221-28 and accompanying text. But see *Joslyn Corp. v. T.L. James & Co.*, 696 F. Supp. 222 (W.D. La. 1988).

230. The Bankruptcy Code comprises Title 11 of the United States Code, enacted as Title I of the Bankruptcy Reform Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101 to 151,326 (1982 & Supp. V 1987)). The Bankruptcy Amendments and Federal Judgeship Act of July 10, 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984), amended the Bankruptcy Code and provisions of Title 28 of the United States Code relating to bankruptcy

actions against the debtor including the enforcement of prepetition judgments, pending lawsuits, any exercise of control over the property of the estate, and collection of prepetition claims.<sup>231</sup> Upon the confirmation of debtor's reorganization plan, the debtor is discharged from debts arising before the date of confirmation.<sup>232</sup>

When a PRP with CERCLA cleanup obligations files a petition in bankruptcy, the competing national policies of the Bankruptcy Code and CERCLA clash. The goals of CERCLA, the prompt cleanup of hazardous waste sites and the payment of cleanup by those parties responsible for the waste,<sup>233</sup> conflict with the Bankruptcy Code's goals of giving debtors a fresh start by discharging their liabilities and distributing the cash value of the debtor's estate to creditors.<sup>234</sup> Additionally, due to the focus on rapid cleanup, Congress directed that CERCLA cleanup costs not be allocated until after the EPA investigates a site, decides what remedial measures are necessary, and determines which PRPs will bear the costs.<sup>235</sup> In contrast, the Bankruptcy Code permits the bankruptcy court to estimate contingent liabilities. This mechanism permits creditors to share in the assets of the estate before the liabilities have matured.<sup>236</sup> When conflicts between the Bankruptcy Code and other federal laws such as CERCLA reach the "substantial and material" threshold, the Bankruptcy Amendments and Federal Judgeship

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jurisdiction. Chapter 11 of the Bankruptcy Code defines the rights, powers, and duties of the debtor in possession. See 11 U.S.C. § 1107 (1982 & Supp. V 1987). A trustee is appointed only for cause under Chapter 11. See *id.* § 1104.

231. 11 U.S.C. § 362(a) (1982 & Supp. V 1987). The automatic stay is subject to the exceptions listed in *id.* § 362(b). See *infra* note 256.

232. 11 U.S.C. § 1141(d)(1) (1982); *cf. id.* § 1141(d)(3). Confirmation of a plan does not discharge a debtor if the plan will liquidate all of the property of the estate, the debtor's business is no longer a going concern after the plan is adopted, and the debtor would not meet the criteria for a liquidation discharge under § 727. *Id.* A nonindividual debtor filing a petition for Chapter 7 liquidation does not receive a discharge; all that remains after liquidation is a corporate shell empty of all assets. See *id.* § 522(b) (1982 & Supp. V 1987) (denying nonindividual debtor exemptions from property of the estate); *id.* § 541(a)(6) (Supp. V 1987) (allowing only individual debtors to retain postpetition income).

An individual Chapter 7 debtor may not receive a discharge for environmental violations resulting in debts not specifically excepted by § 523. For example, debts "for willful and malicious injury by the debtor to another entity or to the property of another entity" are excepted. *Id.* § 523(a)(6) (1982). Therefore, if after a timely request, followed by notice and a hearing, there is proof that an individual PRP intentionally disposed of toxic waste improperly with an actual intent to do harm or, in some courts, implied or constructive malice, the PRP will not be granted a discharge on its environmental liabilities. See *id.* § 523(c) (Supp. V 1987). A request made within 60 days of filing is timely. BANKR. R. 4007(c) (1988).

233. See, e.g., *In re Combustion Equip. Assoc.'s.*, 838 F.2d 35, 37 (2d Cir. 1988).

234. See *id.*

235. See *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 887-88 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986).

236. See *Combustion Equip.*, 838 F.2d at 37.

Act of 1984<sup>237</sup> authorizes the withdrawal of a case from a bankruptcy court to a federal court of general jurisdiction.<sup>238</sup> Withdrawal from the bankruptcy court to the "more balanced, or neutral, adjudicatory environment of the district court" would tend to benefit the party asserting CERCLA response interests in the debtor's estate.<sup>239</sup>

The law remains uncertain concerning when a claim arises in the context of bankruptcy.<sup>240</sup> Whether CERCLA liability becomes a claim in stages as the EPA incurs costs or whether it accrues as a whole at some point between the deposit of toxic wastes and the final cleanup will result in different outcomes in bankruptcy.<sup>241</sup> If the claim arises at the time a person generates, transports, or disposes of hazardous wastes, the person could make a preemptive strike and discharge its CERCLA liability in bankruptcy even before the EPA or a private party begins cleanup.<sup>242</sup> The EPA's position is that the claim does not arise until the party does the work for which it seeks reimbursement.<sup>243</sup>

237. Bankruptcy Amendments and Federal Judgeship Act of 1984, tit. I, subtit. C, Pub. L. No. 99-554, §§ 143, 144(b), 100 Stat. 3096 (1986) (codified at 28 U.S.C. § 157(d) (Supp. V 1987)). Section 157(d) reflects Congress's intent that bankruptcy courts should be limited in their control of matters outside the scope of bankruptcy. See 1 COLLIER ON BANKRUPTCY § 3.01, at 3-53 (15th ed. 1986).

238. In cases meeting the "substantial and material consideration" test, withdrawal is mandatory rather than discretionary. The "substantial and material" threshold, however, is not defined. A CERCLA plaintiff will prefer the district court forum while the defendant debtor will prefer to have all proceedings affecting its ultimate discharge resolved by the bankruptcy court. See *AT&T Co. v. Chateaugay Corp.*, 88 Bankr. 581, 584 (Bankr. S.D.N.Y. 1988) (allowing a private party plaintiff to remove its case against a debtor to district court to resolve the issue of when its right to contribution under § 113(f) of CERCLA arose); *In re Johns-Manville Corp.*, 63 Bankr. 600, 602 (Bankr. S.D.N.Y. 1986) (noting that Congress intended mandatory withdrawal for issues requiring interpretation of CERCLA).

239. See *Chateaugay Corp.*, 88 Bankr. at 584.

240. Section 101(4) of the Bankruptcy Code defines "claim" as:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(4) (1982). Congress intended that "claim" be given "the broadest possible definition . . . [to] permit[] the broadest possible relief in the bankruptcy court." H.R. REP. NO. 595, 95th Cong., 2d Sess. 309, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6266; S. REP. NO. 989, 95th Cong., 2d Sess. 22, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5808. The Bankruptcy Code determines explicitly when a right to payment arises while courts disagree on the issue. See *In re M. Frenville Co.*, 744 F.2d 332, 337 (3d Cir. 1984) (finding that absent an overriding federal law, state law determines when a right to payment arises), cert. denied, 469 U.S. 1160 (1985). But see *In re Baldwin-United Corp.*, 765 F.2d 343, 348 n.4 (2d Cir. 1985) (declining to follow *Frenville*).

241. The confirmation of a reorganization plan in Chapter 11 discharges the debtor only from § 101(4) claims arising before the date of confirmation. 11 U.S.C. § 1141(d)(1)(A) (1982).

242. See, e.g., *Johns-Manville*, 63 Bankr. at 602.

243. See *id.*

In 1988 the EPA estimated that it had 10,000 outstanding letters notifying parties of their potential CERCLA liability.<sup>244</sup> Arguably, if the CERCLA claim accrues upon receipt of the PRP letter, these 10,000 PRPs could receive a discharge of CERCLA liability by including an estimate of their potential liability in their bankruptcy schedule of claims.

The Second Circuit recently refused to grant a debtor a declaratory judgment on the issue of whether the debtor's discharge of two years earlier included its potential CERCLA liability arising from its landfill sites.<sup>245</sup> At the time of discharge, the PRPs had received notice of the presence of the hazardous wastes; the EPA had neither initiated action against the debtor or any other PRP nor decided if a cleanup action would be necessary.<sup>246</sup> The debtor did not include its potential CERCLA liability in its schedule of claims for the confirmation of its Chapter 11 plan.<sup>247</sup> The Second Circuit noted that a discharge of CERCLA liability may depend ultimately on whether the EPA requires the PRP to perform the cleanup pursuant to section 106 of CERCLA or if the EPA undertakes the cleanup and later sues the PRP for reimbursement under section 107 of CERCLA.<sup>248</sup>

The plaintiff also may assert an administrative expense priority<sup>249</sup> for cleanup costs incurred prior to the filing of a bankruptcy petition if the cleanup monies are necessary for the preservation of the estate.<sup>250</sup> Because toxic waste contaminated property may have little or no value prior to cleanup, many CERCLA response costs would meet this criterion.<sup>251</sup> In 1987 the Sixth Circuit ruled that expenditures made to com-

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244. See *In re Combustion Equip. Assocs.*, 838 F.2d 35 (2d Cir. 1988).

245. See *id.* at 36. Combustion Equipment filed a voluntary petition in 1980 for reorganization under Chapter 11 of the Bankruptcy Code. *Id.* In 1981 its subsidiary closed two landfill sites and filed a petition for liquidation under Chapter 7. *Id.* The EPA notified the subsidiary of its PRP status for the cleanup of the landfill sites in the fall of 1983. *Id.* Upon the confirmation of Combustion Equipment's reorganization plan in December 1983, those claims arising before the date of confirmation received a discharge pursuant to § 1141(d)(1). See 11 U.S.C. § 1141(d)(1) (1982). The EPA filed a claim for administrative expenses in 1986 against the subsidiary. *Combustion Equip.*, 838 F.2d at 36. Combustion Equipment's reorganized successor sought a declaration that its 1983 discharge included any liability for its subsidiary's CERCLA debts. *Id.*

246. *Id.* The PRP letter did not impose liability on the debtor. Rather, it stated that the debtor "may be liable for money expended" and "may have responsibility for undertaking remedial actions at the site." *Id.* at 38 (emphasis added).

247. *Id.* at 36; see also *Chateaugay Corp.*, 88 Bankr. at 586 (stating that "[a] debtor cannot hide behind confirmation of its plan to escape from liabilities that do not exist prior to confirmation").

248. See *Combustion Equip.*, 838 F.2d at 39.

249. See 11 U.S.C. § 503(b)(1)(A) (Supp. V 1987).

250. This administrative expense priority is allowed for "the actual, necessary costs and expenses of preserving the estate." *Id.*

251. In contrast, claims for damages caused during the prepetition period, CERCLA contribution claims, and general unsecured contract indemnity claims are not entitled to administrative

ply with state laws and to protect the health and safety of the public are "actual, necessary costs and expenses of preserving the estate" and therefore entitled to administrative expense priority.<sup>252</sup> However, this strategy is useful against only the current owner of the hazardous waste site. The administrative expense priority is not successful against debtors such as the other section 107 PRPs who contributed to the toxic waste problem at the site because the cleanup costs would result from property not owned by the debtor, and would not benefit the debtor's bankruptcy estate.<sup>253</sup>

It may be advantageous for the PRP to litigate as a defendant to the government's plaintiff if it fears that other liable parties may declare bankruptcy. The advantage of third-party action is that a governmental plaintiff has several strategies unavailable to the private party plaintiff. The most important advantage is that regulatory actions of governmental units, such as injunctions and fines, are excepted from the automatic stay mechanism of section 362 of the Bankruptcy Code.<sup>254</sup> Several 1988 appellate level decisions do not stay governmental units from fixing penalties against bankrupt companies for environmental violations. For instance, in *In re Commerce Oil Co.*<sup>255</sup> the actions of the state fell within the regulatory exception to the automatic stay under both the public policy and nonpecuniary purpose tests. The Sixth Circuit found that the state's actions of "removing, correcting or

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expense priority. See *In re Dant & Russell, Inc.*, 853 F.2d 700 (9th Cir. 1988).

252. *In re Wall Tube & Metal Prod. Co.*, 831 F.2d 118, 123 (6th Cir. 1987); see also *In re Distrigas Corp.*, 66 Bankr. 382, 386 (Bankr. D. Mass. 1986) (allowing a state a first priority administrative expense claim for reimbursement of funds spent in cleanup of debtor's contaminated property).

253. See, e.g., *Dant & Russell*, 853 F.2d at 700 (denying lessor administrative expense priority against lessee debtor-in-possession's estate); *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137, 141 (3d Cir. 1985) (denying lessor's general unsecured contract indemnity claim an administrative expense priority against the lessee debtor's estate).

254. 11 U.S.C. § 362 (1982 & Supp. V 1987). Although § 362(a)(1) generally stays judicial proceedings against the debtor, § 362(b)(4), (5) excepts actions or proceedings to enforce a governmental unit's regulatory or police powers. As stated in both the Senate and House Committee Reports:

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment.

H.R. REP. NO. 595, *supra* note 240, at 343, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 6299; S. REP. NO. 989, *supra* note 240, at 52, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 5838.

255. 847 F.2d 291 (6th Cir. 1988).

terminating pollution and determining the severity and effect of discharges on the receiving waters" and "punishing wrongdoers, deterring illegal activity, [and] recovering remedial costs of damage to the environment," are for protection of public health and safety and are not grounded in the state's pecuniary property interest in its natural resources.<sup>256</sup> The court noted that Congress enacted the police or regulatory exception to the automatic stay to prevent the bankruptcy court from becoming a safe harbor for environmental offenders.<sup>257</sup>

Likewise, in *United States v. Nicolet, Inc.*<sup>258</sup> the Third Circuit allowed the federal government to fix damages for already expended cleanup costs. The court reasoned that Congress gave the enforcement of environmental laws a higher priority than preservation of the debtor's estate for its creditors and the debtor's right to a cessation of collection activities.<sup>259</sup> The regulatory action exception is limited to injunctive relief, fines, penalties, the fixing or entry of a money judgment, and possibly attorney's fees.<sup>260</sup> One court expanded the public health and safety exception to include punitive damages or reimbursement of cleanup costs "in addition to or in lieu of injunctive relief . . . [because] the deterrence function of the relief sought will render the action one to protect the public health, safety, and welfare."<sup>261</sup> The automatic stay, however, will protect the debtor from enforcement of a money judgment obtained prior to the filing of the bankruptcy petition.<sup>262</sup>

## V. CONCLUSION

Once the government establishes the elements of CERCLA liability, a PRP is responsible for cleanup costs absent a valid statutory defense. A PRP's best strategy in most situations is early settlement with

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256. *Id.* at 295-96. The legislative history of § 362(b)(4) indicates:

This section [362(b)(4)] is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

124 CONG. REC. H11,089 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 6436, 6444-45 (statement of Rep. Don Edwards); 124 CONG. REC. S17,406 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 6505, 6513 (statement of Sen. Dennis DeConcini). CERCLA was enacted to protect the public health and safety. See *supra* note 252. Courts should not apply the pecuniary interest rule to bar exceptions to the automatic stay by governmental units acting pursuant to CERCLA or other environmental statutes. See *United States v. Mattiace Indus. Inc.*, 73 Bankr. 816, 819 (Bankr. E.D.N.Y. 1987).

257. *Commerce Oil*, 847 F.2d at 297 (citing *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group*, 700 F.2d 1279, 1283 (9th Cir. 1983)).

258. 857 F.2d 202 (3d Cir. 1988).

259. See *id.* at 207.

260. See *supra* note 256 and accompanying text.

261. *Mattiace Indus.*, 73 Bankr. at 819.

262. See 11 U.S.C. § 362(a)(2), (b)(5) (1982 & Supp. V 1987); see also *supra* note 256.

the EPA. Settlement avoids lengthy trials on the issue of liability<sup>263</sup> and the associated massive transaction costs.<sup>264</sup> Litigation dollars are better used for the cleanup itself. SARA instituted several attractive settlement options such as releases from future liability from governmental units. A NBAR offers the dual incentives of having the EPA perform the PRP search while allowing the settling PRP to avoid joint and several liability. If the EPA does not agree to a NBAR, the PRP still can pursue a mixed funding settlement that results in the PRP sharing the response costs with the government. In particular, the preauthorized mixed funding partial settlement offers the PRP the cost advantages of performing the cleanup itself and a guaranteed recovery from Superfund of the costs in excess of its liability. Regardless of the attractive settlement options, rarely will the EPA allow a PRP to pay only its fair share in settlement if the EPA expects less than a one hundred percent recovery of response costs.<sup>265</sup> When faced with the common problems of wastes of unknown origin or wastes attributed to defunct or bankrupt PRPs, the EPA will apply joint and several liability and require a PRP to pay more than its fair share percentage of cleanup costs upfront in a settlement.<sup>266</sup> In the majority of situations, therefore, if the EPA neither agrees to a NBAR nor preauthorizes the PRP's recovery from Superfund of costs in excess of its liability, the settlement agreement will burden the PRP with a disproportionate amount of the cleanup costs. The PRP must then pursue nonsettling PRPs in second tier CERCLA litigation to reduce its ultimate out-of-pocket cleanup expenses. In sum, an accurate, although oversimplified, observation is that

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263. Upon noting that the liability phase of trial ran more than 110 trial days, from 1983 until 1985, some commentators labeled the case of *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985), as the "Bataan Death March" of hazardous waste litigation cases. See Dubuc & Evans, *supra* note 3, at 10,198; see also *United States v. Ottati & Goss*, 694 F. Supp. 977 (D.N.H. 1988) (detailing the damages phase of the trial).

264. For example, in the government's suit against Conservation Chemical, the government incurred \$2 million and the PRPs incurred \$5 to \$12 million in pretrial expenses. Estimated cleanup costs were \$10 to \$18 million. One commentator estimates the cost of answering interrogatories in a toxic waste disposal case involving hundreds of generator PRPs at \$500,000. See Note, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 131 n.46 (1988).

The court may award the government prejudgment interest, attorney's fees, litigation costs, and reimbursement of employees' salaries incurred as a result of the government's enforcement action. See, e.g., *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 850-52 (W.D. Mo. 1984) (assessing costs of hundreds of thousands of dollars as expenses already incurred by the government, as well as prejudgment interest of nine percent per annum calculated as of the filing date of the amended complaint), *aff'd*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987). In addition, the *Northeastern Pharmaceutical* court found the defendants jointly and severally liable for any future removal, remedial, or monitoring costs. *Id.*

265. See Interim Settlement Memorandum, *supra* note 110, at 5037.

266. *Id.*

as the PRP's disproportionate share of settlement costs increases, the advantages of settlement decrease.

Litigation may be the preferred strategy in other situations as well. If cleanup costs are clearly divisible and joint and several liability is not anticipated, the PRP could achieve its goal of liability equal to its fair share of cleanup costs in one court proceeding. Second, if any governmental unit acted as an owner or operator in a nonregulatory capacity, counterclaims or third-party claims against those governmental units could reduce by the principle of recoupment the amount due. Third, unlike settlements containing reopeners, once a party's liability is reduced to judgment following litigation, the party is protected from additional cost recovery actions by the same governmental units. Fourth, a 1988 House Report indicates that the EPA will be willing to compromise its claim, once it considers the difficulties of collecting.<sup>267</sup>

In all situations, the PRP will want to identify as many other PRPs as possible in order to reduce its equitable share of liability and potential out-of-pocket costs. The PRP bears the burden of proving apportionment of liability in first tier settlement or litigation and second tier contribution actions against other PRPs. Using section 107, the liable party may construct a family tree of liability. The chain of title of ownership of the toxic waste disposal site provides a framework to chart all previous owners of the site and their lessee operators.<sup>268</sup> Because prior owners or operators incur liability only if they owned or operated the facility "at the time of disposal of hazardous substances,"<sup>269</sup> it is necessary to obtain information concerning each corporation's generation, treatment, and disposal of hazardous substances. Although this information typically is unavailable to one outside the corporation, government records can provide data on past usage.<sup>270</sup> If any of the hazardous

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267. See SUPERFUND REPORT, *supra* note 14, at 429.

268. The EPA prepared a procedure manual for locating PRPs for a hazardous waste site. See OFFICE OF LEGAL & ENFORCEMENT COUNSEL, EPA, PROCEDURES FOR IDENTIFYING RESPONSIBLE PARTIES UNCONTROLLED HAZARDOUS WASTE SITES—SUPERFUND (Feb. 1982) (final draft), reprinted in *Superfund Reauthorization: Judicial and Legal Issues: Oversight Hearings Before the Subcomm. on Administrative Law & Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 111 (1985).

269. CERCLA, *supra* note 1, § 107(a), 42 U.S.C. § 9607(a) (1982).

270. One method of discovering the past usage of the site is to look at historical aerial photos available from federal agencies such as the Department of Agriculture, and the states' Geologic Survey. A search of county title and tax records, state and county landfill location records, and federal, state, and local environmental regulatory agencies may yield names and usage information. See SUPERFUND REPORT, *supra* note 14, at 414.

The EPA may provide a wealth of information. The EPA is required to complete a PRP search within a year of when a site is proposed for the NPL. Section 122(e) of SARA authorizes the EPA to release the names and addresses of PRPs to each other, the volume and nature of hazardous substances contributed by each PRP, and the rankings of PRPs by volume, during settlement negotiations. SARA, *supra* note 11, § 122(e), 42 U.S.C. § 9622(e) (Supp. IV 1986). In

materials discovered at the site originated outside the premises, the PRP should construct additional lists of identifiable off-site generators, their transporters, and any subcontractors employed by the transporters. One commentator advises using private detectives to locate toxic waste transporters who may identify the generators they serviced.<sup>271</sup> Last, the PRP should look beyond the explicit scope of section 107 to any party connected even tenuously with the site. If any of the section 107 parties appear to be insolvent, defunct, or judgment proof, the PRP should look to their successor corporations, parent corporations, and individual corporate officers and shareholders for recovery.

Both federal and state governments predict an increasingly aggressive pursuit of cleanup actions. Additionally, a PRP is faced with strict joint and several liability for soaring cleanup costs. In order to achieve its goal of reducing its cleanup liability to an equitable share of the total costs, the PRP must investigate all strategies and options available for spreading the costs of environmental cleanup among all persons who contributed to the damage.

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addition, its CERCLIS data base contains reports from state, local, and federal agencies on approximately 30,000 potentially hazardous sites. 53 Fed. Reg. 5192 (1988). Section 116(a) of SARA sets goals for the EPA to complete preliminary assessments by Jan. 1, 1988, and site inspections, where needed, by Jan. 1, 1989, for all sites listed in CERCLIS. *See* SARA, *supra* note 11, § 116(a), 42 U.S.C. § 9616(a) (Supp. IV 1986). By the end of 1988, the EPA had made a preliminary assessment of approximately 27,000 sites and had inspected about 9000 sites. 53 Fed. Reg. 51,962 (1988). Recently, the EPA expanded CERCLIS to include removal sites in addition to its coverage of remedial and enforcement sites. *Id.* at 51,399.

271. *See* Graham, *Minimizing Legal and Cleanup Costs at Hazardous Waste Sites*, in *Practical Approaches to Reduce Environmental Cleanup Costs*, 317 P.L.I. REAL EST. L. & PRAC. 29, 43 (1988) (noting that an expense of \$300,000-\$400,000 spent on identifying additional PRPs is a prudent business strategy when faced with a landfill cleanup cost of \$70-\$80 million).

