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INTRODUCTION

Over a decade ago, in response to heightened awareness of the public health threat posed by abandoned hazardous waste sites, Congress enacted the Comprehensive Environmental Re-

1 See Patrick P. McCurdy, Every so Often Something Goes Wrong, CHEMICAL WK., Aug. 16, 1978, at 5 (recognizing high risk that chemicals pose to people and environment, and urging chemical industry to take remedial action). Perhaps the most infamous pre-CERCLA hazardous waste site was “Love Canal,” located in Niagara Falls, N.Y. Id. Residents of a Niagara Falls community built on an abandoned hazardous waste site suffered devastating health effects as a result of exposure to chemicals which seeped through the ground. See Richard Roth, Long-Buried Poisons Ooze Out of the Ground, WASH. POST, Aug. 5, 1978, at A2 (describing nightmarish site and effects on residents). Letters from President Carter transmitting proposed cleanup legislation to Congress, as well as several committee reports, cited the Love Canal disaster. H.R. Doc. No. 149, 96th Cong., 1st Sess. 1-2 (1979) (letter from President Carter); S. REP. No. 848, 96th Cong., 2d Sess. 7-12 (1980) (committee report); S. REP. No. 848, 96th Cong., 2d Sess. 96, 104 (1980) (letters from President Carter); H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 19 (1980) (committee report). But see Michael P. Dunne et al., The Health Effects of Chemical Waste in an Urban Community, 152 MED. J. AUST. 592, 594 (1990) (reporting no greater incidence of cancer and other serious diseases in people living near waste site when compared to control group). This study did indicate that residents near the site suffered higher levels of stress and anxiety than the general population, which can cause overall poor health. Id.; see also Holly L. Howe, U.S. DEP’T OF HEALTH AND HUMAN SERVS., PUBLIC CONCERN ABOUT CHEMICALS IN THE ENVIRONMENT: REGIONAL DIFFERENCES BASED ON THREAT POTENTIAL, 105 Pub. Health Rep. 186 (1990) (reporting results of study conducted in New York State). Residents of three New York State regions were surveyed regarding their perceptions of environmental problems. Id. at 186. The survey, completed by 4601 people, id. at 188, measured respondents’ concerns regarding personal or familial exposure to toxic environmental substances, environmental contamination caused by pollution, specific health effects associated with toxic exposure, and economic consequences flowing from hazardous environmental conditions. Id. at 187. Results of the study indicate that although the threat posed by an environmental hazard may be
in a specific situation, the public may nonetheless perceive a grave danger. In 1986

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, see infra note 2, created the Agency for Toxic Substances and Disease Registry ("ATSDR"). The purpose of ATSDR is to "prevent or mitigate adverse human health effects and diminished quality of life resulting from exposure to hazardous substances in the environment." Division of Health Studies, Agency for Toxic Substances and Disease Registry, Hazardous Waste Sites: Priority Health Conditions and Research Strategies, 267 JAMA 1180 (1992). ATSDR has identified seven categories of human health diseases and disorders that may relate to environmental health risks. Further research is necessary to determine the exact relationship between the diseases and environmental conditions and to develop diagnostic and treatment procedures. Id.

2 Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified in various sections of titles 26 and 42 of the United States Code). The statute is also commonly known as "Superfund." See Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Envtl. L. 1 (1982). Members of Congress had been working on various toxic waste cleanup bills for over three years before Superfund was finally passed. Id. at 1. The law that was enacted was partly derived from three different bills: H.R. 7020, 96th Cong., 2d Sess. (1980); H.R. 85, 96th Cong., 1st Sess. (1979); and S. 1480, 96th Cong., 1st Sess. (1979). Id. at 2. A lame duck session of Congress considered and passed the legislation after it was hurriedly assembled as a substitute bill. Id. at 19. Republicans and Democrats joined together to prevent the failure of the environmental law; concessions were made in both the House and Senate, and the law was quickly passed, rife with purported inadequacies. Id. at 2, 19. Due to its origin, CERCLA's legislative history is somewhat fragmented and does not lend itself well as an interpretative aid to the complex statute. Id. at 2. At the time of CERCLA's enactment, other environmental laws were already in existence, and CERCLA was intended in part to take up where previous law, specifically the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6987 (1976 & Supp. 1978), left off. Id.; U.S. General Accounting Office, Hazardous Waste, Corrective Action Cleanups Will Take Years to Complete 17 (1987) ("Many RCRA facilities can be expected to ultimately become Superfund sites . . ."). CERCLA, coupled with RCRA, provides sufficient authority "to begin the cleanup of old hazardous waste sites and to avoid the consequences of new hazardous waste spills, for the protection of health and the environment." Grad, supra, at 2. RCRA is a comprehensive system that monitors hazardous waste from "cradle to grave" by establishing mandatory standards for the identification, tracking, and disposal of certain substances. Frederick R. Anderson et al., Environmental Protection: Law and Policy 558-63 (1984). CERCLA incorporates by reference the definition of "hazardous substance" used in RCRA and three other environmental statutes. 42 U.S.C. §§ 9601(14), 9602(a), (b); see also Clean Air Act, 42 U.S.C. § 7412 (1982); Clean Water Act, 33 U.S.C. § 1321(b) (1982); Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2606 (1982). CERCLA was the first law to deal with abandoned hazardous waste sites. Elizabeth Ann Glass, Superfund and SARA: Are there any Defenses Left?, 12 Harv. Envtl. L. Rev. 385, 387 (1988).

Most states have enacted environmental laws that are analogous to CERCLA and other federal laws. See generally Daniel P. Selmi & Kenneth A. Manaster, State Environmental Law §§ 6.05, 9.04 (1992) (providing overview of state law in shadow of CERCLA). The effect of state law on a "potentially responsible party" ("PRP") will
Congress amended CERCLA in what is collectively known as the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). SARA added an important provision to CERCLA that provides potentially responsible parties ("PRPs") with a right to contribution from other liable parties. SARA, however, also provides that this latter group will be protected from contribution claims when it resolves its liability through settlements. The apparent conflict between these different subsections of CERCLA vary from jurisdiction to jurisdiction. Richard M. Hall, Survey of State Enforcement, in ENVIRONMENTAL LAW 531, 533-34 (1988). CERCLA's state/federal relationship is somewhat like a partnership, id. at 538, the implications of which are beyond the scope of this Note. Unlike many federal laws, CERCLA does not preempt state power. Section 114 states: "Nothing in this chapter shall be construed or interpreted as pre-empting any State from imposing any additional liability or requirements . . . ." 42 U.S.C. § 9614(a) (1988).

3 Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675) (1988 & Supp. 1992). President Reagan was strongly opposed to SARA because it imposed excise taxes on petroleum and feedstock chemicals. William H. Rodgers, Jr., ENVIRONMENTAL LAW § 8.2, at 483-84, 499 (1992). Nevertheless, he signed it into law on October 17, 1986, after the bill had passed both Houses of Congress by margins greater than needed to override a veto. Id. at 484. Like CERCLA, SARA is a complex piece of legislation. Its goals may be condensed into four general categories: (1) to correct shortcomings of CERCLA, (2) to respond to court and agency decisions, (3) to keep the Environmental Protection Agency ("EPA") in check, and (4) to initiate studies and long-term measures. Id. at 485-86. Importantly, SARA also served to replenish the Superfund. Id. at 499. CERCLA originally appropriated $1.6 billion to Superfund. Jack Lewis, Superfund, RCA, and UST: The Clean-up Threesome; Love Canal Legacy—Where Are We Now?, EPA J., July-Aug. 1991, at 8. In 1986, SARA extended the program for five more years and authorized an additional $8.5 billion; Superfund was again continued in 1990 with an additional $5.1 billion. Id. at 9. These fundings bring the cumulative authorization of Superfund capital to $15.2 billion. Superfund, Current Progress and Issues Needing Further Attention: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 102d Cong., 2d Sess. 193 (1992) (statement of Peter F. Guerrero, Assoc. Dir., Envtl. Protection Issues, Resources, Community, and Economic Dev. Div.). The repeated replenishment of Superfund indicates that the cleanup of America's hazardous wastes is a more extensive project than originally anticipated in 1980. Rodgers, supra, at 499.

4 See 42 U.S.C. § 9613(f)(1) (1988); see also infra notes 21-32 and accompanying text. Although the statute did not expressly provide for them, contribution claims had been enforced under CERCLA before the 1986 amendments. See, e.g., United States v. Ward, 22 Env't Rep. Cas. (BNA) 1235 (E.D.N.C. 1984) (finding that Congress intended federal common law to govern CERCLA liability); see also Elizabeth F. Mason, Note, Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin's Lead, 19 B.C. ENVTL. AFF. L. REV. 73, 92 (1991) (citing legislative history supportive of contribution claims).

has resulted in unpredictable consequences for both settlors and nonsettlers. Conflicting policy issues underlie the various statutory provisions and have given rise to somewhat inconsistent judicial interpretations. Consequently, settlors often remain uncertain about the finality of their CERCLA liability.

Part One of this Note examines the policy issues and congressional intent underlying the CERCLA provisions relevant to settlement and contribution. Part Two discusses recent court decisions and synthesizes a majority rule on contribution claims. Finally, Part Three considers whether SARA has accomplished Congress' goals pertinent to settlements and whether changes should be made to the statutory language when CERCLA is considered for reapproval this year.

I. THE STATUTE

A. Policy and Purpose

The impetus behind CERCLA was an interest in cleaning up toxic waste sites. The drafters intended the statute to be remedial and, rather than burdening taxpayers, delegated cleanup

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7 See infra notes 9-18 and accompanying text. Congress wants responsible parties to pay the price of cleanup, but it also seeks to implement these cleanups quickly and economically. Mason, supra note 4, at 87. Most sites, however, involve numerous parties, and locating PRPs, determining liability and costs, and devising remedial measures is expensive and time-consuming. See infra notes 13-14. Thus, Congress' two goals seem to be inherently in conflict.

8 See Rudolph F. Pierce & Daniel R. Avery, CERCLA's 'Contribution' Bar at Issue, Nat'L J., Sept. 20, 1993, at 23, 27 ("Judicial resolution of this issue will directly affect the value of contribution protection to a party contemplating settlement with the EPA."); see also Lynnette Boomgaard & Charles Breer, Surveying the Superfund Settlement Dilemma, 27 LAND & WATER L. REV. 83, 101-05 (1992) (discussing cases involving contribution claims against settlors).

9 COMM. ON ENV'T. AND PUB. WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUB. L. 96-510, AT V (Comm. Print 1983) available in WESTLAW, CERCLA-LH database ("[C]urrent events focused attention on the cleanup of dumps containing toxic wastes, and this issue was the driving force that ultimately brought forth the law.").

10 See 1991 COUNCIL ON ENVT'L. QUALITY ANN. REP. 111. CERCLA is not a regulatory law. Rather, its mission is responsive, mandating cleanup action at polluted
costs to parties who produced and profited from the use of hazardous substances. As the time for CERCLA's reapproval drew near, two principal criticisms began to emerge: cleanups were not taking place quickly enough, particularly as PRPs litigated among themselves, and litigation costs were high, exhausting finances that could be better directed toward cleanup efforts. The strict, joint, and several liability structure of CERCLA had successfully imposed the burden of locating recalcitrant parties on sites. Id. "The 1980 ... Act ... created a program to identify and clean up releases of hazardous substances stemming from accidents or uncontrolled hazardous waste sites." Id. (emphasis added).

11 Boomgaarden & Breer, supra note 8, at 84-85. The $1.6 billion "Superfund" created by CERCLA to finance the cleanup of hazardous waste sites was derived from taxes on the chemical industry. Glass, supra note 2, at 385; see 42 U.S.C. §§ 9631-9633 (1988); see also Rodgers, supra note 3, at 499 (indicating that Superfund imposed $2.759 billion excise tax on petroleum, $1.365 billion excise tax on feedstock chemicals, $0.51 billion tax on imported chemical derivatives, and obtained $1.25 billion from general revenues). SARA increased the fund to $8.5 billion. See 42 U.S.C. § 9611 (1988 & Supp. IV 1992); cf 26 U.S.C. § 9507 (1988 & Supp. IV 1992) (tax code provision relating to Superfund).

12 See, e.g., 131 Cong. Rec. S12,158, S12,160 (daily ed. 1985) (statement of Sen. Riegle) ("The problem is huge, the cost is great, and progress to date in cleaning up sites has been slow.").

13 See, e.g., Reauthorization of Superfund: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation, 99th Cong., 1st Sess. 1241, 1298 (1985) (statement of William Bailey, on behalf of American Insurance Association). "[P]otentially responsible parties (PRPs) believe they cannot acquiesce to liability under the current system, because to do so would subject them to such potentially enormous costs for site cleanup . . . that their very economic survival would be threatened."). Id.

14 Id. at 1339-40. "This litigation is and will continue to be complex, time-consuming and incredibly expensive." Id. (statement of American Insurance Association).


Although CERCLA, as enacted in 1980, did not explicitly impose joint and several liability, case law developed that interpreted the statute as imposing such liability. See, e.g., United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983); Colorado v. ASARCO, Inc., 608 F. Supp. 1484 (D. Colo. 1985). Congress confirmed this interpretation in enacting the 1986 amendments, stating that:

The Committee fully subscribes to the reasoning of the court in the seminal case of United States v. Chem-Dyne Corporation . . . which established a uniform federal rule allowing for joint and several liability in appropriate CERCLA cases . . . . The Committee believes that this uniform federal rule on joint and several liability is correct and should be followed. It is unnecessary and would be undesirable for Congress to modify [sic] this uniform rule. Thus, nothing in this bill is intended to change the application of the uniform federal rule of joint and several liability enunciated by the Chem-Dyne court.
other PRPs instead of the government, but had failed to encourage settlements. By statute, the Superfund program was to expire automatically in 1985. At that time, however, Congress enacted SARA to address CERCLA’s weaknesses. One of SARA’s primary goals is to encourage settlements and thereby funnel resources to site cleanups instead of litigation.

Pursuant to this goal, Congress enacted sections 113(f)(1) to (f)(3). Section 113(f)(1) expressly provides a right to contribution, codifying case law that interpreted the original CERCLA provisions. Although CERCLA contained no express right to


See 132 Cong. Rec. S14,895-02 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford). “The theory underlying Superfund’s liability scheme was, and is, that the Government should obtain the full costs of cleanup from those it targets for enforcement, and leave remaining costs to be recovered in private ... actions ... .” Id.

See, e.g., Linda J. Wilson, Why Superfund Suits are Hard to Settle for Good, CHEMICAL WK., Dec. 9, 1987, at 8 (describing how EPA’s approach to settlements discourages many parties).

42 U.S.C. § 9633(c)(2)(D) (1976 & Supp. IV 1980). The statute, as passed, was the result of a compromise of House and Senate bills which differed in breadth of coverage and scope of liability. Grad, supra note 2, at 2. The compromise bill was quickly drafted and passed during the closing moments of the 96th Congress. Id. This hurried passage, surrounded by controversy, led to the provision that required funding to expire in 1985. Glass, supra note 2, at 390.

See supra note 3; see also ROGERS, supra note 3, at 485 (describing SARA’s goals “to confirm, expand, and refine the cleanup aims of the 1980 CERCLA.”).

See Mason, supra note 4, at 87.


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 ... . 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 or section 9607 of this title.

Id.

contribution, the courts had inferred such a right,\textsuperscript{23} reasoning that CERCLA is not punitive in nature and that the right to contribute is necessary to promote Congress’ interests in achieving

\textsuperscript{23}See Kristian E. Anderson, \textit{Note, The Right to Contribution for Response Costs Under CERCLA}, 60 \textit{Notre Dame L. Rev.} 345 (1985). The issue of contribution under CERCLA did not become important until the joint and several nature of CERCLA liability was established by the federal courts. \textit{Id.} at 355-56. If a party can be held jointly and severally liable for an entire cleanup effort, the ability to seek contribution from other PRPs becomes essential. \textit{See id.} at 356. By 1983, courts had applied a joint and several liability standard to CERCLA cases. \textit{See United States v. Chem-Dyne Corp.}, 572 F. Supp. 802, 808-10 (S.D. Ohio 1983) (rejecting “blanket adoption” of joint and several liability standard as “inconsistent with the legislative history of CERCLA,” but implying that joint and several liability should be assessed on case-by-case basis); \textit{United States v. Conservation Chem. Co.}, 589 F. Supp. 59, 62-63 (W.D. Mo. 1984) (accepting \textit{Chem-Dyne} rationale regarding joint and several liability under CERCLA); \textit{see also Memorandum from Frank Shepherd, Assoc. Adm’r for Legal Counsel and Enforcement, to Anne M. Gorsuch, EPA Adm’r (July 27, 1981), available in LEXIS, Envirn Library, Agency File (“Congress did not intend to preclude courts from imposing joint and several liability in all cases. Instead, Congress intended that standards of liability be determined on a case-by-case basis.”)).

quick and efficient cleanups and protecting Superfund resources from depletion.\textsuperscript{24} A right to contribution encourages responsible parties to initiate cleanup measures because they may seek costs from other PRPs.\textsuperscript{25} Cleanups should therefore take place more quickly and efficiently.\textsuperscript{26} The joint and several liability structure of the statute\textsuperscript{27} allows the government to hold a small number of PRPs responsible for cleanup of an entire site,\textsuperscript{28} since a right to contribution provides an incentive for the named parties to seek out other PRPs.\textsuperscript{29} The subsequently larger pool of defendant PRPs spreads the cleanup costs more fairly and increases the total amount of private funds available.\textsuperscript{30} The parties responsible for the wastes will absorb the cleanup expenses, thus utilizing private resources rather than Superfund resources.\textsuperscript{31}

Section 113(f)(2) provides a contribution bar for settling parties,\textsuperscript{32} extinguishing their liability for contribution. Section

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\textsuperscript{24} See New Castle County, 642 F. Supp. at 1268-69. The court in New Castle County stated that:

[A] right to contribution under CERCLA would enhance unique federal interests in two substantial ways. First, the Federal Government is authorized by CERCLA to take action against responsible persons to achieve compliance with the goals of the Act . . . . Because CERCLA liability is joint/several, the Government needs to sue only a limited number of responsible parties in order to recover all costs of cleanup and remedial operations . . . . With a right to contribution available to CERCLA defendants, they will be willing to undertake the burden to locate and implead other responsible persons into a CERCLA action . . . . As the size of the defendant pool increases, the chances for settlement of the suit and achievement of one of the federal government's objectives under the Act—site cleanup at the expense of responsible parties—is met.

Second, a CERCLA right to contribution . . . protects the Superfund's financial resources from depletion . . . since it encourages private parties to cleanup hazardous sites for which they are responsible . . . . The use of private funds to cleanup sites saves Superfund resources and enables those moneys to be used to remedy conditions at other inactive hazardous sites where responsible parties either cannot be identified or are judgment proof.

\textit{Id.} (citations omitted).

\textsuperscript{25} See id. at 1269.
\textsuperscript{26} Id.
\textsuperscript{27} See supra note 15.

\textsuperscript{29} See Anderson, \textit{supra} note 23, at 356.
\textsuperscript{30} See \textit{supra} note 24.
\textsuperscript{31} See \textit{supra} note 24.

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such
113(f)(3) creates a disincentive for PRPs to reject settlement opportunities by authorizing enforcement or contribution actions against nonsettling parties. Importantly, these provisions preserve settlors' contribution rights and the government's right of action against nonsettlers. These changes in the statute have been characterized as applying a "carrot and stick" approach to settlements, alluding to Congress's recognition that parties will not voluntarily settle unless they are somehow rewarded.

B. How CERCLA Works

Once the United States Environmental Protection Agency ("EPA") locates a hazardous waste site, it conducts a preliminary investigation to determine the way the site has been used, what wastes are present, and whether the site poses a danger to the public health. The most serious sites—determined by criteria

settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Id.


(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in [section 113(f)(2)].

Id.

Id. 34 Id. 35 E.g., Topol & Snow, supra note 28, § 7.15, at 174. The "carrot" is the protection gained if one settles, and the "stick" is that nonsettlers must make up the difference if the settlor settles for less than its proportionate share. See id. 36 See generally Mason, supra note 4, at 87-89, 104-07 (discussing settlements and incentives they provide to PRPs). Congress intended that the contribution bar and the right to sue nonsettling PRPs would encourage PRPs to enter into settlements voluntarily. Id. These provisions were intended to allow settling PRPs to save money and reach a degree of finality regarding their liability. Id. Without these incentives, most PRPs would wait to be held responsible. Id. CERCLA's settlement process is set forth in § 122 of SARA, 42 U.S.C. § 9622 (1988), which essentially adopted the existing EPA settlement policy. See Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034-01 (1985). Parties who have only a de minimis share of liability are specifically addressed and are encouraged to "cash out" of the hazardous waste site. See 42 U.S.C. § 9622(g). 37 William N. Hedeman et al., Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,413,
such as amount and toxicity of wastes, number of people exposed, and the actual or potential contamination of ground water—are placed on the National Priorities List ("NPL"). Once a site is listed on the NPL, the EPA may either require responsible parties to clean up the site or employ Superfund resources for cleanup and seek cost recovery from PRPs.

Regardless of which course of action the government chooses, PRPs must eventually be located. In theory, all PRPs should be located. The EPA identifies hazardous waste sites through several statutory reporting requirements. Resources, Community, and Economic Dev. Div., U.S. General Accounting Office, Superfund: Extent of Nation's Potential Hazardous Waste Problem Still Unknown (1987) [hereinafter GAO Report I]. CERCLA required all past or present owners and operators of facilities to notify the EPA by June 1981 of any known, suspected, or likely releases of hazardous substances at the owners' facilities. Id. As a result, 11,000 sites were reported. Id. A 1980 amendment to the RCRA required states to establish identification and reporting programs and states were offered federal grants to assist them in this effort. Id. From these and other sources, the EPA formed a database, originally known as the Emergency and Remedial Response Information System (ERRIS), listing 9500 hazardous waste sites. Id. In 1985, the EPA formed the Comprehensive Environmental Response, Compensation, and Liability Information System ("CERCLIS") by merging ERRIS and other databases. Id. Once a site is entered into CERCLIS, it is evaluated through a series of progressively detailed assessments to determine the kind of remedial action needed. Id.

38 Hedeman et al., supra note 37, at 10,415; see Lewis, supra note 3, at 9. Sites are numerically rated for inclusion on the NPL according to the Hazard Ranking System ("HRS"). Travis P. Wagner, The Complete Guide to the Hazardous Waste Regulations 299-301 (2d ed. 1991). The HRS assigns a numerical value to factors that reflect the actual or potential danger of contamination to groundwater, surface water, and air. Id. Any site that receives an HRS rating of 28.5 or higher, out of a possible 100, may be placed on the NPL. Id. The top priority site in each state is also placed on the NPL. Id. Additionally, if the Department of Health and Human Services has issued a health advisory in connection with a particular site, it may be added to the priority list. GAO Report I, supra note 37, at 9-10. The NPL, which periodically appears in the Federal Register, is more like a guide than a directive, and the EPA may also take action at sites not listed on the NPL. Wagner, supra, at 300-01. Sites which are listed, however, are certain and significant threats to the public health. Id. “CERCLA stipulates that the NPL contain at least 400 sites; as of July 1987, it contained 802 sites, with an additional 149 proposed for inclusion. Historically, up until 1984, roughly 8 percent of CERCLIS sites were added to the NPL.” GAO Report I, supra note 37, at 10. By 1992, the NPL listed 1275 sites. Resources, Community, and Economic Dev. Div., U.S. General Accounting Office, Superfund: EPA Action Could Have Minimized Program Management Costs 11 (1993).

39 42 U.S.C. § 9606 (1988). Parties subject to action under this section may be liable to the government for fines or punitive damages. Id. §§ 9606(b)(1), 9607(c)(3) (imposing fines up to $25,000 per day and treble damages).

40 See id. § 9604(a)(1) ("[T]he President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of . . . such hazardous substance, pollutant, or contaminant . . . ").

41 Id. § 9607.
located. In practice, however, this is extremely difficult to accomplish and highly impractical because of CERCLA's expansive liability structure, in which hundreds of parties may be associated with one site. As a result, PRP searches can be very costly, and it is not unusual for the EPA to identify the minimum number of parties to commence an action. Consequently, the burden of locating and suing absentee PRPs then shifts to those PRPs named as parties by the EPA. This situation is precisely why the contribution and settlement provisions in SARA are critical.

A Remedial Investigation and Feasibility Study ("RI/FS") must be conducted before cleanup can begin. The RI/FS involves the examination of conditions at the site and the analysis of methods that may be used for cleanup. If the EPA decides to compel the identified PRPs to carry out the cleanup, it will oversee the RI/FS conducted by the PRPs. If the site is to be cleaned using Fund resources, the EPA will conduct the study. It is common

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42 See Hedeman et al., supra note 37, at 10,417. The EPA usually hires contractors and civil investigators to search for PRPs, which "entails significant costs for the Agency." Id. Information from local offices, such as property tax records, may be used to aid identification. Wagner, supra note 38, at 324-25. Trash receptacles, drum labels, abandoned vehicles, and license plates at the site are also used as leads in the investigation. Id. The EPA has even taken out newspaper advertisements to find PRPs. Hedeman et al., supra note 37, at 10,417.

43 Section 107(a) of CERCLA imposes liability upon: (1) the current owner or operator of the site; (2) any owner or operator of the site at the time the waste was disposed there; (3) any person who arranged for disposal, storage, or treatment of wastes at the site; and (4) any transporter who carried wastes to the site. 42 U.S.C. § 9607(a) (1988).

44 Hedeman et al., supra note 37, at 10,417.

45 Hedeman et al., supra note 37, at 10,417-19. The EPA encourages identified PRPs to form organizations to facilitate the cleanup process. Committees represent the group in negotiating settlement agreements and handling other matters, such as technical issues regarding cleanup, allocating costs among PRPs, and locating other liable parties. Id.

46 For a complete description of the RI/FS process, see Wagner, supra note 38, at 302-12.

47 Resources, Community, and Economic Dev. Div., U.S. General Accounting Office, Superfund: Problems With the Completeness and Consistency of Site Cleanup Plans 13 (1992) [hereinafter GAO Report II]. The RI/FS is an in-depth site study that assesses site contamination and estimates the risks posed to the surrounding community and environment. Id. "The feasibility study lists and evaluates alternatives for treating or containing the waste. On the basis of the site study, the proposed plan selects and recommends a particular cleanup remedy. Public comment on the plan is then solicited . . . . EPA and PRPs generally hire private contractors to perform the actual study." Id.

48 See 42 U.S.C. § 9606 (1988); see also supra note 40.

49 GAO Report II, supra note 47, at 15.

50 See 42 U.S.C. § 9604 (1988); see also supra note 40.
for identified PRPs to conduct a “shadow” RI/FS in this instance to protect their own interests in defending future enforcement actions. After the RI/FS is completed, a preferred cleanup plan is selected and documented in the Record of Decision (“ROD”) which is made available for public comment. The next two phases of cleanup are the Remedial Design (“RD”) and Remedial Action (“RA”) phases. During the RD, the previously selected remedy is refined, and a plan of implementation is designed. The actual implementation of the design takes place during the RA.

Throughout the RI/FS process, and occasionally into the early stages of remedial action, the EPA encourages PRPs to enter into settlement agreements with the government. Settlement agreements or consent decrees usually specify the settling PRP’s remedial obligations. If the PRP is a “de minimis” contributor to

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51 See Hedeman et al., supra note 37, at 10,419; see also David R. Hopper, Cleaning Up Contaminated Waste Sites, CHEMICAL ENGINEERING, Sept. 4, 1989, at 99-100. Many times, engineers actively involved with a process or facility know far more about the types of materials used, manufacturing and waste-treatment practices, and wastes produced at the site than the regulatory agency involved in the site investigation. The engineer’s active participation in the regulatory process can ensure a less time-consuming and more cost-effective study . . . . Such a focused approach . . . ensures that sufficient data are collected to characterize the real problems at a site.

52 GAO REPORT II, supra note 47, at 14-15. Generally, the Record of Decision (“ROD”) serves two purposes: (1) it provides a detailed description of the remedy selected and the various other measures considered, and (2) it documents decisions regarding whether wastes are to be treated or contained. Id. Other matters addressed in the ROD include a description of current or potential threats to human health and the environment, identification of key assumptions made during the RI/FS, and documentation of target cleanup goals. Id. For a detailed description of the Remedy Selection and Record of Decision process, see WAGNER, supra note 38, at 317-20.


54 Id.

55 See WAGNER, supra note 38, at 324. The terms of a settlement between government and a PRP are embodied in a consent decree, which specifies the PRP’s remedial obligations pursuant to the agreement. Id. Settlements may also be entered through administrative orders which are not subject to judicial review. Id.; see also 42 U.S.C. § 9622(h)(1) (1988) (“The head of any department or agency with authority to undertake response action . . . may consider, compromise, and settle a claim under 9607. . .”). For a description of CERCLA settlement agreements, and the impact of 1986 amendments on them, see TOPOL & SNOW, supra note 28, § 7.15, at 147-73.

56 See WAGNER, supra note 38, at 324. When a settlement involves remedial actions, it must take the form of a consent decree. 42 U.S.C. § 9622(d)(1)(A). This decree, however, is not an acknowledgement of “an imminent and substantial endangerment or liability,” and it is inadmissible in judicial proceedings except as provided in the Federal Rules of Evidence. WAGNER, supra note 38, at 324.
the hazardous waste site, the EPA may negotiate a final settlement of liability\textsuperscript{58} whereby the PRP simply makes a payment to the Fund.\textsuperscript{59} In some cases, the EPA allows a “mixed funding” settlement which requires both the PRP and the government to fund portions of the cleanup.\textsuperscript{60} In any one of these settlement arrangements,

\textsuperscript{58} 42 U.S.C. \textsection 9622(g) (1988) (addressing de minimis settlements). Although the statute does not explicitly define which parties qualify as de minimis contributors, the EPA provided guidance on this issue in 1987. De minimis parties are those who “contributed hazardous substances in an amount and of such toxic or other hazardous effects as to be minimal in comparison to other hazardous substances at the facility.” Superfund Program: De minimis Contributor Settlements, 52 Fed. Reg. 24,333, 24,334 (1987); see also 42 U.S.C. \textsection 9622(g)(1)(A) (1988) (addressing minimal wastes). Determination of de minimis contributors is site specific.

If, for example, all PRPs at the site disposed of waste of similar toxicity and hazardous nature, e.g., organic solvents, then those PRPs who had contributed a minimal amount (in relation to the total amount at the facility) could qualify for de minimis status because their waste was not more toxic or otherwise hazardous than other hazardous substances at the site. If, on the other hand, a PRP disposed of a minimal amount of a waste which is more highly toxic or which exhibits other more serious hazardous effects than other hazardous substances at the site, then that PRP, despite the minimal amount of his contribution, normally would not qualify for treatment as a de minimis party.


\textsuperscript{58} See 42 U.S.C. \textsection 9622(g)(1) (1988) (addressing expedited final settlement); see also 52 Fed. Reg. 24,333 (1987) (describing de minimis settlement process). Settlement agreements between a PRP and the government ordinarily contain a “reopener” provision that allows the government to sue a settlor at a later time “concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies . . . that remedial action has been completed at the facility concerned.” 42 U.S.C. \textsection 9622(f)(6)(A) (1988). In extraordinary situations the President may exclude this exception if the language of the agreement will assure the protection of the environment and public from future releases. Id. \textsection 9622(f)(6)(B). De minimis settlement agreements appear more attractive in terms of finality of liability because they are not required to contain reopener provisions. Id. \textsection 9622(f)(6)(A) (excepting de minimis agreements under subsection (g)). De minimis settlers may become liable in the future, however, if information reveals that they are no longer eligible for de minimis status, or if costs exceed a specified amount. See Torol & Snow, supra note 28, \textsection 7.15, at 195.

\textsuperscript{60} See Hedeman et al., supra note 37, at 10,424. In the early days of CERCLA, the government strove for 100% cost recovery in settlements with PRPs, and it would not consider proposals for less than 80% of the cleanup costs. Frank B. Cross, Settlement
ments, the right of contribution of either the government or of a settling PRP is preserved against any PRP who is not a party to the consent decree.\textsuperscript{61} Furthermore, a settling PRP is protected from contribution claims "regarding matters addressed in the settlement."\textsuperscript{62}

II. CASE LAW

A. Cost Recovery Under Sections 107 and 113

Before Congress granted the explicit right of contribution by adding section 113(f)(1),\textsuperscript{63} courts had interpreted section 107(a)\textsuperscript{64} to contain an implied right of contribution.\textsuperscript{65} The courts reasoned that when liability is joint and several,\textsuperscript{66} general principles of tort law dictate that a right of contribution exists.\textsuperscript{67} Before 1986, Under the 1986 Superfund Amendments, 66 OR. L. REV. 517, 530 (1987). Although the EPA relaxed its standards in 1985, its policy “objective [was] still to recover one hundred percent of the cleanup costs.” \textit{Id.} In the 1986 amendments, Congress expressly provided for settlements that do not cover 100% of cleanup costs. \textit{Id.} at 539. In fact, the 1986 amendments provide “no floor on the percentage of cleanup costs for which the EPA may settle.” \textit{Id.} Section 122(b)(1) authorizes the government to enter into mixed funding settlements whereby a PRP can settle its liability by funding only a portion of the cleanup at a site. \textit{See} 42 U.S.C. § 9622(b)(1) (1988). The government funds the rest, and retains the burden of seeking cost recovery from recalcitrant PRPs. \textit{See Hedeman et al., supra note 37, at 10,424}. This arrangement is not used frequently, however, because EPA officials do “not feel comfortable providing PRPs with federal funds to clean up a site” which they created. \textit{Id.}

\textsuperscript{61} \textit{See supra} notes 32-34 and accompanying text.
\textsuperscript{62} 42 U.S.C. § 9613(f)(2) (1988); \textit{see supra} note 32.
\textsuperscript{63} 42 U.S.C. § 9613(f)(1) (1988); \textit{see supra} note 21.
\textsuperscript{64} \textit{See supra} notes 32-34 and accompanying text.
\textsuperscript{65} 42 U.S.C. § 9607(a), (e) (1988); \textit{see supra} note 15. Section 107(e)(a) is the section from which the strict, joint, and several liability standard was derived. \textit{See supra} note 15. Section 107(e)(2) states that “[n]othing in this subchapter . . . shall bar a cause of action that an owner or operator or any other person subject to liability under this section . . . has or would have, by reason of subrogation or otherwise against any person.” \textit{Id.} § 9607(e)(2).
\textsuperscript{66} \textit{See supra} note 15.
\textsuperscript{67} \textit{See, e.g., Conservation Chem. Co.}, 619 F. Supp. at 224 (citing \textsc{Restatement (Second) of Torts} § 886A).

The \textit{Restatement (Second) of Torts} § 886A states the general rule:
PRPs always brought CERCLA cost recovery claims under section 107. Since the enactment of SARA, however, the issue has frequently arisen whether section 113(f)(2), which bars contribution claims against parties who have settled, also bars cost recovery claims arising under section 107(a). Some courts and commentators argue that SARA divides cost recovery claims brought by PRPs against settlors into two distinct categories:

(1) Except as stated in subsections (2), (3) and (4), when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them.

(2) The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability, and is limited to the amount paid by him in excess of his share. No tortfeasor can be required to make contribution beyond his own equitable share of the liability.

(3) There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm.

(4) When one tortfeasor has the right of indemnity against another, neither of them has a right of contribution against the other.

68 See supra note 65 (citing cases finding implied right to contribution).

70 See Transtech, 798 F. Supp. at 1085 (describing plaintiff’s argument distinguishing between § 107 and § 113 claims); see generally Boomgaard & Breer, supra note 8, at 101-05 (discussing distinction between sections and reviewing cases in which it was at issue). “Nonsettlers will likely waste no time in testing the opportunity presented by ... Burlington Northern to pierce the veil of contribution protection by characterizing their claims as seeking cost recovery rather than contribution.” Id. at 105.

Subsection 113(g) of CERCLA, which covers statutes of limitation, treats the two causes of action separately. Actions for “recovery of the costs referred to in section 9607 ... must be commenced ... within 3 years after completion of [a] removal action ... (and) within 6 years after initiation of physical on-site construction of the remedial action.” 42 U.S.C. § 9613(g)(2) (1988). However, “[n]o actions for contribution ... may be commenced more than 3 years after (A) the date of judgment ... or (B) the date of an administrative order ... .” § 9613(g)(3).

Subsection 107(b) provides a list of specific defenses to liability under subsection 107(a). These defenses are limited to “(1) an act of God; (2) an act of war; [or] (3) an
claims covering cost recovery of privately initiated cleanups\textsuperscript{71} and (2) section 113 claims covering contribution claims of EPA-initiated cleanups.\textsuperscript{72} This approach, therefore, focuses on whether the remedial action at a particular site was taken voluntarily.

In \textit{Burlington Northern Railroad Co. v. Time Oil Co.},\textsuperscript{73} the court recognized this distinction when it refused to bar a cost recovery claim brought by a voluntary PRP settlor against another PRP settlor.\textsuperscript{74} The two parties in \textit{Burlington Northern} owned adjoining lots that were found to be contaminated with hazardous material and consequently designated as a Superfund site by the EPA in the early 1980s.\textsuperscript{75} Prior to the commencement of any litigation, the plaintiff entered into a consent decree with the government and cleaned up its lot accordingly.\textsuperscript{76} At that time, the defendant did not enter into a settlement agreement and later failed to comply with certain actions ordered by the EPA.\textsuperscript{77} As a result, the EPA itself cleaned up the site and then commenced a civil suit against the defendant to recover costs.\textsuperscript{78} It was not until 1988 that the defendant reluctantly settled with the government.\textsuperscript{79}

\textsuperscript{71} See Transtech, 798 F. Supp. at 1085 ("Plaintiffs . . . contend that since they voluntarily began their clean-up operation, theirs is a cost recovery action under Section 107."). These claims are termed "cost recovery" claims, and are distinguished from "contribution" claims, in which a party seeks to share the liability imposed upon it. \textit{Id.}

\textsuperscript{72} \textit{Id.} at 1085, 1087. These claims are arguably viewed as the only true contribution claims under CERCLA. "By its very language, Congress enunciated a strong desire for settlements as the best means to effectuate the goals of CERCLA, concluding that immunity from contribution liability would be the proverbial 'carrot' to coax the parties into settling." \textit{Id.} at 1087. The Transtech court believed that the plaintiff's "argument . . . would drain the words 'voluntary' and 'contribution' of any meaning whatsoever." \textit{Id.} at 1087.

\textsuperscript{73} 738 F. Supp. 1339 (W.D. Wash. 1990).

\textsuperscript{74} \textit{Id.} at 1342-43.

\textsuperscript{75} \textit{Id.} at 1340.

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} See \textit{id.}


The court rejected the defendant’s argument that its 1988 settlement protected it from the plaintiff’s claims for cost recovery under CERCLA section 113(f)(2). Although the Burlington Northern court could have denied the defendant’s motion for summary judgment on simpler and sounder grounds, it chose to acknowledge that two distinct causes of action exist under CERCLA.

The courts in two other cases, United States v. Hardage and Key Tronic Corp. v. United States Air Force, similarly approved

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81 738 F. Supp. at 1341. The court found that the plaintiff’s claim was for relief distinct from “matters addressed in the settlement” between defendant and the government, and thus was not subject to contribution protection under § 9613(f)(2). Id. at 1342; see 42 U.S.C. § 9613(f)(2) (1988). The court also recognized that the plaintiff had reached a settlement and incurred its costs before SARA was enacted. “There is no evidence that [Burlington] could have anticipated the creation of § 9613(f), or that the new section was intended to retroactively apply to litigation and settlements occurring before 1986.” 738 F. Supp. at 1342. The court might have reached the same result by using either of these determinations alone, but nonetheless discussed other issues. See id. at 1342-43; see also Boomgaard & Breer, supra note 8, at 104-05 (discussing Burlington Northern); infra notes 93-97 and accompanying text (discussing phrase “matters addressed in settlement”).

82 738 F. Supp. at 1342 (“The language of CERCLA includes . . . distinctions between contribution actions and cost recovery actions that lend weight to the interpretation that Congress intended to maintain the separate avenues of recovery.”). Although the court’s examination of the statute is arguably dicta, it poses a potential weakness for settlors seeking protection from contribution. See Boomgaard & Breer, supra note 8, at 103-05.

83 750 F. Supp. 1460 (W.D. Okla. 1990), aff’d, 982 F.2d 1436 (10th Cir. 1992), cert. denied, 114 S. Ct. 500 (1993). As a third party plaintiff, the Hardage Steering Committee sought to recover response costs from de minimis parties who had settled with the EPA. Id. at 1507; see Walch, supra note 69, at 775. The court found that the agreement could not address private response costs incurred by other PRPs because the government did not have the authority to settle these claims. Id. The court further determined that the Steering Committee’s § 107 claim was not barred by the language of § 113. Id. at 775-76. The court agreed, stating that:

[A] response cost claim is an original claim to [recover] . . . money that private party defendants have spent for their own response measures . . . . A contribution claim is a derivative claim in which a defendant attempts to transfer to a third-party some of the liability asserted against it by the plaintiff.

Id. at 776 (quoting United States v. Hardage, No. CIV-86-1401-P, slip op. at 70 (W.D. Okla. Sept. 22, 1989) (order granting partial summary judgment)).

84 766 F. Supp. 865 (E.D. Wash. 1991), rev’d, 984 F.2d 1025 (9th Cir. 1993), aff’d in part, rev’d in part, 114 S. Ct. 1960 (1994). In Key Tronic, the plaintiff entered into a consent decree with the EPA. Id. at 867. Simultaneously, the EPA was treating other parties, including the United States Air Force, as de minimis contributors, and entered into a settlement agreement with them. Id. Subsequently, the plaintiff sued the Air Force and other parties for its costs incurred prior to the consent decree. Id. The
the distinction between cost recovery actions under section 107 and contribution actions under section 113. Although each of these courts acknowledged and approved the distinction, none of them clearly explained what criteria should be examined to determine the character of a claim. These decisions, therefore, provide little guidance regarding the potential liability and costs to parties considering settlement. Such a lack of predictability, it appears, begins to unravel Congress' desire to encourage parties to enter into settlement agreements.

It is submitted that a much more logical and workable approach to interpreting SARA is to treat recovery claims and claims for contribution alike. A recent court decision described the statutory relationship: "[W]hen properly construed, the two sections work together, one governing liability and the other governing contribution from those found liable. First, the plaintiff must show that the defendant has incurred section 107(a) liability. Then, it can sue for contribution under section 113(f)(1)."

This court found that § 113 did not preclude the claims because Key Tronic sought recovery of costs incurred "directly at [its] own initiative, . . . [rather than] indemnity from settling PRPs for prospective liability to the United States . . . ." Key Tronic Corp. v. United States, No. C-89-694-JLQ, slip op. at 7 (E.D. Wash. Aug. 9, 1990).

Cf. Walch, supra note 69, at 770-73 (analyzing Burlington Northern and Key Tronic decisions).

See Walch, supra note 69, at 777-78.

It is difficult to glean the purpose of the courts' distinctions from the opinions in [Burlington Northern], Hardage, and Key Tronic . . . . An "increased measure of finality" . . . will not result if courts adopt the language and theory proffered by the [Burlington Northern], Key Tronic, and Hardage courts because it appears that a PRP incurring direct costs may circumvent the effect of any settlement offering contribution protection.

Id.; see also Barry S. Neuman, No Way Out? The Plight of the Superfund Nonsettlor, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,295 (July 1990). "[A] court's approval of a consent decree has been held to be a judicial act . . . . [A] court must independently satisfy itself that the decree is fair, adequate, reasonable, in the public interest, and consistent with the Constitution and the mandate of Congress." Id. at 10,297; see also James A. Rogers & Miriam R. Nemetz, CERCLA Contribution Protection: When Do CERCLA Settlements Bar Claims Against Settlors?, in HAZARDOUS WASTES, SUPERFUND, AND TOXIC SUBSTANCES 95, 103 (A.L.I. Oct. 28, 1993) ("Despite the broad language employed by some of the decisions rebuffing response cost claims, their facts may leave room for argument that response costs incurred truly independently of a government enforcement action may give rise to viable claims under § 107, notwithstanding later government settlements.").

Transtech Indus., Inc. v. A & Z Septic Clean, 798 F. Supp. 1079, 1086 (D.N.J. 1992) (citing Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989)) appeal dismissed, 5 F.3d 51 (3d Cir. 1993), cert. denied, 114 S. Ct. 2692 (1994). The Transteck court acknowledged that if distinctions between § 107 and § 113 were accepted, the plaintiff's position would not be improved because its actions were not voluntary;
interpretation avoids undermining Congress' policy of encouraging settlements and therefore expedites the cleanup process.\textsuperscript{88} It is submitted that Congress did not create a new cause of action by adding section 113; rather, it confirmed one that had previously been implied.\textsuperscript{89} A majority of courts supports this rationale,\textsuperscript{90} as is reflected in recent decisions that reject the \textit{Burlington Northern} and \textit{Hardage} reasonings.\textsuperscript{91}

rather, the measures were undertaken only after threats from the government. \textit{Id.} at 1086-87; \textit{see} County Line Inv. Co. v. Timney, 933 F.2d 1508, 1516 (10th Cir. 1991). "We think [the plaintiff's] argument fails because it requires viewing this provision in isolation. Instead, the contribution provisions of section 113 should be seen as part of the larger statutory scheme .... [Section 107(a)] must be the source for any right to contribution plaintiffs may have." \textit{Id.}; \textit{see also} Akzo Coatings, Inc. v. Aigner Corp., 803 F. Supp. 1380, 1386 (N.D. Ind. 1992) (citing Environmental Transp. Sys., Inc. v. ENSCO, Inc., 763 F. Supp. 384, 388-89 (C.D. Ill. 1991), aff'd, 969 F.2d 503 (7th Cir. 1992)), \textit{aff'd in part, rev'd in part,} 30 F.3d 761 (7th Cir. 1994). "The extent of a party's liability under § 9613 comes into play after the party is found responsible under § 9607(a)." \textit{Id.} at 1386 (emphasis added).

\textsuperscript{88} \textit{See} \textit{HOUSE COMM. ON ENERGY AND COMMERCE, SUPERFUND AMENDMENTS OF 1985, H.R. REP. No. 253, 99th Cong., 2d Sess., pt. 1, at 80 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 2862.} "In addition to encouraging settlement .... section [113] will help bring an increased measure of finality to settlements. Responsible parties who have entered into a judicially approved good faith settlement under the Act will be protected from paying any additional response costs to other responsible parties in a contribution action." \textit{Id.}

\textsuperscript{89} \textit{See supra} notes 20-31 and accompanying text.

\textsuperscript{90} \textit{See, e.g.,} Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132, 1137 (D.R.I. 1992) ("Thus, with Section 113, Congress did not add a new cause of action, but showed that it was only affirming and making clear an existing cause of action for contribution under Section 107."); Elf Atochem N. Am., Inc. v. United States, 833 F. Supp. 488, 492 (E.D. Pa. 1993) (stating that SARA was enacted to provide PRPs with contribution rights and observing that "[u]nder § 9613(f) [of SARA], Plaintiff must first prove Defendant is a responsible party under § 107(a)"); \textit{see also} United States v. ASARCO, Inc., 814 F. Supp. 951, 956 (D. Colo. 1993) ("Under CERCLA's scheme, section 107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties.") (citations omitted).

\textsuperscript{91} \textit{See, e.g.,} Dravo Corp. v. Zuber, 804 F. Supp. 1182 (D. Neb. 1992), aff'd, 13 F.3d 1222 (8th Cir. 1994). In \textit{Dravo}, Judge Kopf stated:

I am not inclined to follow \textit{Hardage} .... Even if [the plaintiff] incurred "independent response costs," [its] costs so expended reduced its liability to the United States to the extent of the remedial utility of the response .... Thus, because the response costs, no matter when or why they were incurred, will reduce [the plaintiff's] liability to the United States .... a "response cost claim" is indistinguishable from a claim for contribution ....

Still further, if the \textit{Hardage} rational [sic] were adopted it would inject into the .... settlement process a significant degree of uncertainty about the exposure of the settling party to non-settling parties ....

\textit{Id.} at 1189 (citation omitted). The court in \textit{Dravo} found that "the \textit{Hardage} rational [sic] frustrates, rather than furthers, the Congressional intent." \textit{Id.; see also} United States v. Colorado & E. R.R., 832 F. Supp. 304, 307 (D. Colo. 1993) ("The protection
The statute’s liability and recovery scheme clearly leaves non-settlors at a disadvantage in that they may bear a disproportionate share of liability. Nonsettlors often argue that this inequitable construction of sections 107 and 113 is incorrect, particularly since CERCLA strives to spread the cost of site cleanup between the responsible parties. The consequences, although unfair, are subordinate to SARA’s fundamental purpose of expediting the cleanup process by encouraging responsible parties to undertake remedial action. Under the amended version of CERCLA, PRPs receive little benefit by not coming forward either to attempt a settlement or otherwise. Nonsettlors’ complaints are misdirected toward the courts; they belong with the legislature.

B. Circumstances in Which Settlors are Not Protected

Even if section 107 cost recovery actions are treated as contribution claims, there are instances in which a settlor’s immunity against these actions may not be upheld.

1. When Matters Are Not Addressed in the Settlement

Section 113(f)(2) provides as follows: “A person who has ... [settled] ... shall not be liable for claims for contribution regarding matters addressed in the settlement.” Construction of the agreement itself, therefore, is critical in determining whether a specific contribution claim will be barred. In Akzo Coatings, Inc. v. Aigner Corp., the district court addressed this problem and set


92 See supra note 91.


94 See supra note 24.

95 See supra note 3.

96 See Pretty Prods., 780 F. Supp. at 1495.


forth certain factors to be considered in determining whether a claim involves "matters addressed in the settlement." These factors include "the particular hazardous substance at issue in the settlement, the location of the site in question, the time frame covered by the settlement, and the cost of the cleanup."\textsuperscript{100} The \textit{Akzo} court examined each of these factors before finding that the contribution claims brought against the settling defendants arose from matters addressed in the settlement and, therefore, were barred.\textsuperscript{101} Despite a party's settlor status, it may have to pay when sued for costs arising from matters outside the scope of its settlement agreement.\textsuperscript{102}

2. When Parties Do Not Comply with the Consent Decree

Implicit in the contribution bar of section 113(f)(2) is the requirement that the settlor actually comply with the terms of its settlement agreement.\textsuperscript{103} If a party does not comply with the terms of the decree, its protection from further liability may be lost.\textsuperscript{104} However, since compliance with a consent decree may be complicated and take years to effectuate,\textsuperscript{105} the requirements set forth in the agreement itself are crucial in determining the scope of a settlor's contribution protection.

\textsuperscript{100} Id. at 1385 (quoting United States v. Union Gas Co., 743 F. Supp. 1144, 1154 (E.D. Pa. 1990)).
\textsuperscript{101} Id. at 1384.
\textsuperscript{102} E.g., United States v. Colorado & E. R.R., 832 F. Supp. 304 (D. Colo. 1993). In \textit{Colorado & E. R.R.}, third-party defendants, who had entered into a consent decree with the government, were denied a motion for summary judgment because there was a genuine issue of material fact regarding costs covered under the settlement. \textit{Id}. at 307.
\textsuperscript{104} E.g., \textit{Colorado & E. R.R.}, 832 F. Supp. at 307 (finding no contribution protection for party who has not paid $100,000 due under settlement); Dravo Corp. v. Zuber, 804 F. Supp. 1182, 1186 (indicating that failure to comply with consent decree terminates contribution bar) \textit{aff'd}, 13 F.3d 1222 (8th Cir. 1994).
\textsuperscript{105} Aside from de minimis settlements, where parties "cash out," see supra notes 55 and 56, a typical agreement sets forth with particularity the remedial action which the settlor must undertake, as well as any funding which the settlor must provide. \textit{Wagner}, supra note 38, at 324 (discussing settlements). Past costs for items such as the RI/FS, see supra note 47 and accompanying text, or preliminary removal steps, may be addressed in the settlement agreement as well. \textit{Wagner}, supra note 38, at 324. These documents are lengthy and quite complex. For illustrations of the complex nature of consent decrees, see 1989 EPA Consent LEXIS 226 (May 30, 1989) (consent decree related to Love Canal, see supra note 1) and 1989 EPA Consent LEXIS 194 (Feb. 28, 1989) (consent decree between Key Tronic Corp. and government, see supra note 84).
3. Claims for Indemnity

Indemnification agreements are addressed in section 107(e), which states in part: "No indemnification, hold harmless, or similar agreement shall be effective to transfer liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." At first glance, these two sentences apparently contradict each other. A careful reading of the plain language, however, reveals that although parties may not escape their statutory liability, they may transfer responsibility for costs arising from that liability.

106 42 U.S.C. § 9607(e)(I), (2) (1988). The full text of these subsections provide:

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

107 Id. The 1986 amendments did not change this provision; it existed in CERCLA as enacted in 1980. See 42 U.S.C. § 9607(e) (1980).


An indemnification agreement between private parties differs from a private settlement agreement between parties. See, e.g., Lyncott Corp. v. Chemical Waste Management, 690 F. Supp. 1409, 1416-17 (E.D. Pa. 1988) (rejecting indemnification argument but barring contribution claim because of terms of private settlement agreement). Most courts will approve contribution bars in private settlements of CERCLA under either § 113(f)(2) or general contribution principles. Rogers & Nemetz, supra note 86, at 115; see also Denver v. Adolph Coors Co., 829 F. Supp. 340, 344 (D. Colo. 1993) ("[W]hile section 113(f)(2) does not itself provide authority for private-party contribution bars, such bars are clearly in keeping with the spirit of both facilitating settlement as well as CERCLA."). Courts will, however, usually apply the Uniform Comparative Fault Act ("UCFA") approach to these contribution actions rather than the Uniform Contribution Among Tortfeasors Act ("UCATA") approach, which is applied in cases in which the PRP-settlor entered into an agreement with the government. Rogers & Nemetz, supra note 86, at 116; see supra note 23 (noting differences in UCFA and UCATA apportionment schemes).
A strong majority of courts has interpreted the provision in this manner.\textsuperscript{109} Settlement parties who have expressly agreed to indemnify other PRPs may try to escape their contractual liability by raising the contribution bar of section 113.\textsuperscript{110} The few courts that have directly addressed this argument, however, have rejected it, indicating that settlors should not be released from their indemnity agreements.\textsuperscript{111} Such a conclusion, based on a review of CERCLA's


A minority view has emerged in the Sixth Circuit, declining to uphold indemnification agreements between PRPs. In AM Int'l Inc. v. International Forging Equip., 743 F. Supp. 525, 529-30 (N.D. Ohio 1990), the court found that a contractual indemnification agreement was not enforceable because both parties were PRPs at the site. Later, in CPC Int'l., Inc. v. Aerojet-Gen. Corp., 759 F. Supp. 1269, 1282-83 (W.D. Mich. 1991), the court agreed with AM Int'l's reasoning, stating: "This outcome is consistent with the statute's broad policies of encouraging cleanups and placing the burden of their costs on those responsible for hazardous waste problems. In addition, . . . this result is consistent with the legislative history of section 107(e)(1)." Id.; see also Jones-Hamilton Co. v. Kop-Coat, Inc., 750 F. Supp. 1022, 1026 (N.D. Cal. 1990) (following Ninth Circuit precedent but approving Sixth Circuit's reasoning), aff'd in part, rev'd in part, 959 F.2d 126 (9th Cir. 1992). These courts seem to misinterpret the language and legislative history of the provision. Ellis, supra note 108, at 1954.

\textsuperscript{110} Daniel R. Avery, Enforcing Environmental Indemnification Against a Settling Party Under CERCLA, 23 SEToN HALL L. REV. 872, 875 (1993). Enforcement of an indemnification agreement is difficult. A court "will cast a very leery and critical eye towards any contractual language that purports to allocate environmental cleanup responsibility." Id.

\textsuperscript{111} Id. at 892 n.81; see also United States v. Cannons Eng'g Corp., 899 F.2d 79, 91-92 (1st Cir. 1990) ("Although such immunity [via indemnification] creates a palpable risk of disproportionate liability . . . [it] promotes early settlement and deters litigation."); United States v. Pretty Prods., Inc., 780 F. Supp. 1488, 1496 (S.D. Ohio 1991) ("[T]he parties . . . should have negotiated mutually acceptable indemnification provisions and included them in their contracts."); Central Ill. Pub. Serv. Co. v. Industrial Oil Tank & Line Cleaning Serv., 730 F. Supp. 1498, 1507 (W.D. Mo. 1990) ("CERCLA . . . permits enforcement of an indemnity agreement."). These courts prohibited claims for equitable indemnity against settling parties, indicating a different result for contractual indemnification. See infra note 116 (discussing equitable indemnification).
legislative history\textsuperscript{112} and public policy considerations,\textsuperscript{113} suggests that contractual indemnity does not fall within the meaning of "contribution" as set forth in section 113.\textsuperscript{114} Rather, public policy strongly favors freedom of contract with which courts are reluctant to interfere.\textsuperscript{115} It should be noted that, in this context, courts distinguish contractual indemnification from indemnification based on equitable grounds.\textsuperscript{116} Much disfavor is cast upon attempts to shape a barred contribution claim into an equitable indemnification claim.\textsuperscript{117}

C. General Rule

A PRP who enters into a CERCLA settlement with the government should consider the language of the agreement carefully. The PRP will only receive protection from future claims regarding those matters addressed in the settlement.\textsuperscript{118} Contribution, cost recovery, and equitable indemnity claims are generally barred as long as the settlor does not default on the agreement.\textsuperscript{119} The language of the agreement should reflect factors such as the nature of the contamination at the site, the time period involved, locations within the site boundaries, and potential costs involved. Parties

\textsuperscript{112} Avery, supra note 110, at 891-92.
\textsuperscript{113} Ellis, supra note 108, at 1957. The freedom to contract is deeply rooted in American jurisprudence. Id. Rights to indemnification between PRPs are most likely bargained for and received in exchange for consideration. Id. Consequently, if courts do not give effect to these contracts, settlors would be unjustly enriched. See Miller, supra note 107, at 348-49.
\textsuperscript{114} Avery, supra note 110, at 894.
\textsuperscript{115} See supra note 111. But see Pretty Prods., 780 F. Supp. at 1496 n.7 ("Even if [the] claim for indemnification was based on a contractual provision, this Court would be skeptical of any attempt to make an end run around CERCLA's contribution immunity.").
\textsuperscript{116} See, e.g., Allied Corp. v. Frola, No. CIV. A87-462, 1993 WL 338970, at *10 (D.N.J. Sept. 21, 1993). Equitable indemnity arises when there is a special relationship between two parties such that one should be liable rather than the other. Id. Relationships such as principal-agent, bailor-bailee, lessor-lessee, union-union member, and employer-employee support a finding of equitable indemnity. Id. Equitable indemnification claims against CERCLA settlors will, however, probably be barred, since the nonsettlor's "indemnity claim is merely a disguised claim for contribution." Id. at *11. "[A] noncontractual indemnity claim, by definition and extrapolation, 'is in effect only a more extreme form [of a claim for] contribution.'" Pretty Prods., 780 F. Supp. at 1496 (citations omitted).
\textsuperscript{117} See, e.g., Pretty Prods., 780 F. Supp. at 1496 n.7.
\textsuperscript{118} See supra notes 97-102 and accompanying text.
\textsuperscript{119} See supra notes 103-105 and accompanying text.
may contractually shift the financial burden of site cleanup, notwithstanding any settlements with the government.¹²⁰

III. IS THE STATUTE WORKING?

A. Criticism

Criticism of CERCLA is widespread. President Clinton succinctly expressed this critical sentiment when he stated: "We all know it doesn't work. Superfund has been a disaster."¹²¹ Members of both the public and private sectors have echoed this dissonant view.¹²² These detractors typically point to three basic flaws of CERCLA: (1) cleanups are rarely completed, (2) litigation and other transaction costs are too high, and (3) the strict, joint, and several liability standard is unfair.¹²³ These concerns sound disturbingly similar to those that SARA was intended to correct.¹²⁴ It is likely, therefore, as reauthorization for Superfund

¹²⁰ See supra notes 106-109 and accompanying text.
¹²¹ See Ted Williams, The Sabotage of Superfund: The Federal Program Has Cost Billions, Cleaned Up Little, and Satisfied No One, 95 AUDUBON 30, 31 (July-Aug. 1993) (quoting President in reference to 1994 reauthorization hearings); see also Keith Schneider, New View Calls Environmental Policy Misguided, N.Y. TIMES, Mar. 21, 1993, § 1, at 1. As governor of Arkansas, Bill Clinton criticized the progress at a dumpsite in his state after officials spent millions of dollars to accomplish little more than to create numerous technical documents and legal bills. Id. at 30.
¹²² Administration Dedicated to Reform of Law, EPA Deputy Administrator Tells NACEPT Panel, Daily Envtl Rep. (BNA), Nov. 9, 1993. Carol Browner, the EPA administrator, has commented that Superfund "needs not just cosmetic changes, but a fundamental change." Id. at A9; see Williams, supra note 121, at 31 ("No one remotely connected with Superfund is happy about the way it has functioned."); Charles de Saillan, In Praise of Superfund, 35 ENV'T 42, 42 (Oct. 1993) ("M]uch of the criticism of Superfund has originated from large industrial corporations and their insurance carriers.").
¹²³ See generally Williams, supra note 121, at 30-37; Hedeman et al., supra note 37, at 10,415-23 (describing in detail the many transaction costs incurred in CERCLA claim).
¹²⁴ See supra notes 12-20 and accompanying text.
legislation approaches, that legislators will consider whether the statute has demonstrated any improvement over the past seven years. Specifically, it must be determined whether the settlement and contribution provisions enacted in 1986 have helped further Congress' purposes and intent. Perhaps it is time to restructure the basic CERCLA program to foster greater efficiency in cost and cleanup. It is submitted, however, that such a restructuring of the statute will not correct CERCLA's faults; rather, CERCLA's goals can only be accomplished through an improved enforcement program.

1. Why Are the Sites Not Being Cleaned?

A glance at the statistics seems to indicate that Superfund is simply not effectuating cleanup. Only forty sites have been deleted from the NPL, which currently lists 1275 other sites, during Superfund's lifetime.\textsuperscript{125} It may, however, prove meaningful to look beyond the numbers. For instance, a site is deleted from the NPL only after cleanup is completed such that no further threat of release exists.\textsuperscript{126} Cleanup itself takes six to eight years, at

\textsuperscript{125} See U.S. General Accounting Office, Superfund: Cleanups Nearing Completion Indicate Future Challenges 2-3 (1993) [hereinafter GAO Report III] (Report to the Chairman, Subcommittee on Superfund, Recycling, and Solid Waste Management, Committee on Environment and Public Works, U.S. Senate). In 1991 the EPA created a new "construction-complete" category, responding to criticism that cleanup at NPL sites was taking place too slowly. Id. This category includes sites where construction of cleanup remedies is complete, but further long-term efforts, such as groundwater treatment, are required before the site will be removed from the NPL. Id. The EPA believed that progress at the waste sites had been underreported before this category was created. Id. at 18. The Agency's goal was to have 150 sites either placed in the construction-complete category or removed from the NPL by the end of fiscal year 1992. Id. The goal was met, with remedy construction completed at 109 sites and 40 sites deleted from the NPL by September 30, 1992. Id.; see also Statement of EPA Administrator Browner on Reauthorization of Federal Superfund Program, (May 12, 1993), reprinted in 7 Toxics L. Rep. (BNA) 1510, (May 19, 1993) [hereinafter Browner Statement]. Historically, sites have been added to the NPL at a rate of 100 sites per year and experts expect this rate to continue over the next several years. Lewis, supra note 3, at 9. In addition, over 30,000 other sites are slated for Agency investigation. See Blake Early, Debate on Superfund Reauthorization Continues, Don't Overlook the Progress Under Superfund, 15 Nation's Cities Wkly. 5 (Oct. 5, 1992).

\textsuperscript{126} See GAO Report III, supra note 125, at 17.

Before EPA deletes a Superfund site from the NPL, all work at the site must be completed and all threats to human health and the environment must be controlled. The state must also concur with the decision to delete the site from the NPL. When EPA determines that all appropriate work is completed, including implementing any restrictions on future land use at the site and a plan for site maintenance, the agency may place a notice of intent
It is logical, therefore, to conclude that cleanup projects begun during the early years of the Superfund program are only now reaching completion. Moreover, most NPL-listed sites have been stabilized, and cleanup is underway, lessening the threat to the public health. It is submitted that two major factors have slowed site cleanup: technological limitations and inordinately high standards of "clean."

Before CERCLA was enacted, environmental cleanup technology simply did not exist. The unique nature and complexity of each Superfund project led to time-consuming and expensive remedial plans. As PRPs were faced with enormous cleanup projects and huge costs, they were compelled to develop new and more efficient cleanup technology.

To delete the site from the NPL in the Federal Register. The public has 30 days to comment on the proposed deletion, and EPA must respond to any comments. The site may not be deleted unless state agencies concur that the site protects human health and the environment, and the state or responsible parties agree to maintain the site.

Id.; see also Lewis, supra note 3, at 9.

127 Lewis, supra note 3, at 10. Sites on the NPL pose many challenges; they are on the list precisely because they are the worst hazards. Cleanup is complex and involves consideration of a site's physical characteristics (hydrology, geology, and topography), type (landfill, manufacturing plant, or metal mine), and chemical characteristics. Id. Some cleanups take considerably longer than others. Consider, for example, the McCall Waste Site in Fullerton, California. Aviation fuel dumped at this site during World War II has seeped up to the ground's surface as a sludge containing toxins such as sulfur dioxide and benzene. The site has been listed on the NPL for more than ten years, and it has not yet been properly cleaned. Transcript # 464-1 (CNN news broadcast, Nov. 26, 1993). The average time to complete a RI/FS, before a site is even listed on the NPL, is eight years. William H. Rodgers, Jr., A Superfund Trivia Test: A Comment on the Complexity of the Environmental Laws, 22 Env't. L. 417, 421 (1992).

129 See de Saillan, supra note 122, at 43. In 1991, Superfund had "treated, isolated, neutralized, or removed from the environment 13 million cubic yards of contaminated soil and solid wastes, a billion gallons of liquid waste, 6 billion gallons of contaminated groundwater, and 316 million gallons of polluted surface water." 1991 Council on Env'tl. Quality Ann. Rep. 111; see also Browner Statement, supra note 125.

128 See Lewis, supra note 3 at 8, 10.

130 See Rodgers, supra note 127, at 421-22.

131 Industries are developing innovative ways to put old technology to new uses. In the case of United States v. Cannons Eng'g Corp., 899 F.2d 79, 79 (1st Cir. 1990), for example, which began in the 1980s, the EPA wanted a group of PRPs to build an incinerator to remove wastes. The companies devised a more economical cleanup plan that involved vacuum extraction, a technology usually used in construction. See Farsighted View of the Environment, 16 Nat. L.J., Nov. 8, 1993, at S4 (profiling attorney representing group of PRPs in Cannons). As a result, tens of millions of dollars were saved. Id.
cleanup has become an industry in itself. It is submitted that CERCLA's strict, joint, and several liability standard has spawned positive advances in technology and has forced companies to handle hazardous materials more responsibly. American companies have found that it is worthwhile to invest in a clean operation today to avoid being subject to a Superfund claim tomorrow.

Much debate has centered on the question of "how clean is clean"? Some commentators believe that valuable resources are being used to pursue unnecessary remedial goals after all realistic risks have been eliminated. For example, one site located in Mississippi is in the final stages of a $20 million cleanup project. Although the land is located in an industrial area—it has been home to a lumber mill, a turpentine plant, and a chemical manufacturer—the EPA insists that the site meet standards that would render it suitable for any purpose, including residential

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132 See Industry Leaders Tell Clinton Officials What Policies Would Promote Technology, Int'l Bus. & Fin. Daily (BNA) (Nov. 9, 1993). The United States has emerged as a world leader in environmental technology, in large part due to CERCLA's harsh liability standard. See id. American companies are presently attempting to enter the global market for environmental controls, with positive effects expected for the American economy. Id.

133 See Williams, supra note 121, at 37. Peter Berle, president of the National Audubon Society and former commissioner of the New York Department of Environmental Conservation, has said, Joint and several liability has put the fear of God into everybody, which means they are careful in ways they never were before in what they do with their waste. I also think the cost risk of inappropriate toxic-waste disposal has been the major impetus toward waste minimization. When it gets too expensive to deal with it, then you make less.

Id.

134 E.g., Browner Statement, supra note 125; see also Matt Roush, How Clean is Clean? Contaminated Land is Barrier to Redevelopment, 9 Cran's Det. Bus. 14 (Jan. 4, 1993) (observing that high standard of "clean" discourages land redevelopment); see also Superfund Easing Standards Can Result in a Cleaner Nation, Det. Free Press, Feb. 7, 1994, at 6A ("[A] consensus is building that the EPA's back-to-Eden standards are too rigid, too costly and more likely to produce lawsuits than improvements in health."); Superfund: Cleanups Nearing Completion, Future Challenges, and Possible Cleanup Approaches, Hearings Before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Senate Comm. on Environment and Public Works, 103d Cong., 1st Sess. 8 (Sept. 9, 1993) (statement of Peter F. Guerrero, Associate Director, Environmental Protection Issues, Resources, Community, and Economic Dev. Div.) ("[O]pinions range from the belief that all sites should be completely cleaned to pristine conditions to the belief that cleanup decisions should be made on a site-by-site basis.").

135 E.g., Browner Statement, supra note 125 (acknowledging various criticisms of CERCLA).

136 See Schneider, supra note 121, at 30.
Consideration for residential use includes the possibility that children might play in the area some day. According to EPA guidelines, this site will not be removed from the NPL until the soil meets standards that would allow a child to consume one-half of a teaspoon of dirt every month for seventy years without having an increased risk of cancer.\footnote{Schneider, supra note 121, at 30.}

2. Why Are Costs So High?

It is indisputable that the costs to PRPs involved in a CERCLA claim are enormous.\footnote{See Rodgers, supra note 127, at 421-22. An average CERCLA cleanup costs $24 million; some sites have cost as much as $50 billion. Id. at 422. There are cases in which the RI/FS alone costs nearly $10 million. Id. at 421-22. See generally Hedeman et al., supra note 37, at 10,419 (estimating average cost of RI/FS to be $1.3 million).} Many blame these costs on the law's imposition of strict, joint, and several liability.\footnote{See Hedeman et al., supra note 37, at 10,414. The EPA has attempted to utilize alternative mechanisms to ease the burden placed on PRPs, but these methods do not alter the underlying theory of liability. Id. As a result, transaction costs generally remain high. Id.; see also Casey Bukro, EPA Out to Clean Up 'Ridiculous' Situation; Superfund's Record of Mismanagement and Waste Targeted, Chi. Trib., Apr. 11, 1994, (Business), at 1. “Yes, the costs of cleanup need to be shared, but this is ridiculous. Small business owners are coming in and telling us they've been driven almost

Recent legislative proposals address this seemingly bizarre situation. See Tom Kenworthy, Overhaul is Proposed for Law Governing Cleanups of Hazardous Waste Sites, Wasu. Post, Feb. 4, 1994, at A17 (highlighting proposed revisions in Superfund). “[A] far-reaching change contained in the proposal would permit different approved levels of restoration for hazardous waste sites based on their probable future use. For example, a site in an industrial area would no longer be required to be cleaned sufficiently to make it safe for a day care center or residential housing.”

The 1986 Amendments directed the EPA to use existing federal or state environmental standards or criteria to determine the necessary level of “clean” at Superfund sites. U.S. General Accounting Office, Hazardous Waste: Corrective Action Cleanups Will Take Years to Complete 32 (1987). The EPA collectively refers to these possible cleanup standards as Applicable or Relevant and Appropriate Requirements (“ARARs”). Id. The three most common types of ARARs are subclassified as: (1) Maximum Contaminant Levels (“MCLs”), (2) state environmental standards, and (3) federal water quality criteria. Id. at 33. Some sites may contain hazardous chemicals which do not easily fit into any of the ARARs. Id. The EPA, realizing this, has developed additional guidance and criteria, resulting in a broad array of cleanup standards. See id. at 33-34. Selection of the appropriate standard depends upon site-specific factors, including: (1) the use and potential use of water at the site, (2) the presence of groundwater or surface water, (3) the particular chemicals found at the site, and (4) the state standards applicable at that location. Id. at 34. CERCLA contains a rarely used “fund-balancing” provision which provides that “if EPA determines that the cost of attaining an ARAR for a particular site would be too high and dilute the Superfund moneys available for other cleanup efforts, EPA could require a less stringent, though still protective, level of cleanup.” Id.\footnote{See Hedeman et al., supra note 37, at 10,414. The EPA has attempted to utilize alternative mechanisms to ease the burden placed on PRPs, but these methods do not alter the underlying theory of liability. Id. As a result, transaction costs generally remain high. Id.; see also Casey Bukro, EPA Out to Clean Up 'Ridiculous' Situation; Superfund's Record of Mismanagement and Waste Targeted, Chi. Trib., Apr. 11, 1994, (Business), at 1. “Yes, the costs of cleanup need to be shared, but this is ridiculous. Small business owners are coming in and telling us they've been driven almost

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140 See Hedeman et al., supra note 37, at 10,414. The EPA has attempted to utilize alternative mechanisms to ease the burden placed on PRPs, but these methods do not alter the underlying theory of liability. Id. As a result, transaction costs generally remain high. Id.; see also Casey Bukro, EPA Out to Clean Up 'Ridiculous' Situation; Superfund's Record of Mismanagement and Waste Targeted, Chi. Trib., Apr. 11, 1994, (Business), at 1. “Yes, the costs of cleanup need to be shared, but this is ridiculous. Small business owners are coming in and telling us they've been driven almost
standard brings along with it the right to contribution as well as the settlement provisions. A pertinent issue is whether Congress should do away with these provisions or otherwise improve the enforcement program to minimize costs.

A recent study by the RAND Institute for Civil Justice concluded that between 1986 and 1989 insurers spent an average of eighty-eight percent of their Superfund-related outlays on litigation and other transactional costs. During the same time period, however, industrial companies spent twenty-one percent, and the government eleven percent, of their respective outlays on the same costs. These numbers probably reflect the willingness of insurance companies to aggressively litigate their policyholders’ CERCLA-related claims. Insurance companies somewhat
to bankruptcy by the legal costs associated with Superfund. Id. (quoting Carol Browner, EPA Administrator). Joint and several liability allows the EPA to burden one or two PRPs with the task of bringing the numerous other liable parties into court. Id. One Chicago lawyer has characterized the liability rules as "grotesquely unfair," accusing the EPA of suing "politically acceptable" targets, such as Fortune 500 companies with deep pockets. . . . "So the agency typically leaves the dirty work to responsible parties to go after the small fry." Id. (quoting environmental attorney Russ Selman).

141 See de Saillan, supra note 122, at 43 (citing RAND study and commenting on its analysis).
142 de Saillan, supra note 122, at 43.
143 See Bruce F. Freed, The Politics of Pollution Liability, 89 Best's Rev. 38, 40 (Property-Casualty Insurance ed., Mar. 1989) (noting that numerous manufacturing companies have sued insurance carriers seeking pollution coverage under old policies). Insurance companies take the position that they should not bear the costs of hazardous waste site cleanups.

There are . . . three strong arguments why passing pollution cleanup costs to insurers does not serve the public’s best interests . . . .

First, there is the harsh reality that even bleeding the property/casualty industry white would not provide enough money to pay for toxic waste cleanup. Even the drastic step of spending the industry’s entire surplus . . . would be insufficient to cover more than a fraction of the total cleanup costs. And the insurance business would grind to a halt in the process.

Second, passing cleanup costs through to insurers violates the doctrine of making the polluter pay. Where is the financial disincentive to pollution when a manufacturer can cut corners in waste disposal and then send the cleanup bill to its insurers? . . .

Third, passing tough pollution cleanup costs to insurers forces them to continue their current practice of avoiding all pollution exposures. Ultimately, it is in everyone’s best interest to see the restoration of a viable insurance market for the traditional "sudden and accidental" pollution risk.

Id. at 40, 95; see also Williams, supra note 121, at 36 ("A Rand Corporation study reveals that between 1986 and 1989 insurers spent $1.3 billion on Superfund. Of this $1 billion went to defending themselves against their policyholders or defending their policyholders against the EPA.").
1994] SETTLEMENT AND CONTRIBUTION PROVISIONS 523

rashly began selling policies covering environmental disasters during the beginning of the wave of environmentalism in the early 1980s. Later, when policyholders tried to collect on their policies, they often found that their coverage was limited.

Some of the huge cleanup costs are probably due to poor control or oversight. When the EPA takes an enforcement approach by cleaning up the site and later seeking costs from PRPs, it hires contractors to perform the investigative and remedial work. Often, the same contractor will be hired to perform both types of work, thereby creating a conflict of interest. Contractors have a great incentive to unnecessarily inflate the projected cleanup costs if it seems likely that they will be performing the job themselves. It is important that the EPA closely mon-


145 See Environmental Pollution: Insurance Issues, Ins. Info. Inst. Rpt. (Ins. Info. Inst.) (Nov. 1994). The Superfund law created insurance issues that had never been contemplated when the policies that are now being called upon to pay for clean up costs were drafted and priced, and when the underwriters considered the risks involved in insuring the owners of these sites. These issues are being played out in the courts. Id.; see also Paul V. Majkowski, Note, Triggering the Liability Insurer’s Duty to Defend in Environmental Proceedings: Does Potentially Responsible Party Notification Constitute a “Suit”? 67 St. John’s L. Rev. 383, 388 (1993) (“PRPs have looked to their . . . insurers for performance of the duty to defend . . . . Some insurers have refused to provide PRPs with representation.”).


Superfund’s contract management controls and oversight need to be improved . . . . Most . . . contractors work under cost-reimbursable contracts that promise to pay all of a contractor’s allowable cost and provide little incentive for contractors to control their costs . . . .

. . . . Since most Superfund contractors are reimbursed for their costs, EPA should carefully review contractors’ spending plans before approving them, check bills for reasonableness before paying them, and verify charges later by auditing contractor records. Our reports . . . showed that EPA has not adequately used these controls. Its regional office staffs have approved contractor budgets without making their own estimates of what project costs should be and paid bills without adequate scrutiny. . . . Six of EPA’s contractors we selected for study had been paid over $1 billion in fiscal years 1983 through 1990, but most of this amount had not been audited.

Id.

147 See Williams, supra note 121, at 33 (noting that contractor hired to develop remediation plan for polluted harbor was later awarded $19.4 million contract connected with cleanup).
itor expenses to prevent frivolous expenditures and the padding of expense accounts by newly hired contractors.\textsuperscript{148} Other conflicts of interest arise when the same contractor performs work for both the government and private parties at the same site.\textsuperscript{149}

Costs could also be minimized if the EPA more often allowed settling PRPs to conduct the remediation, since a PRP who performs the remedial work has a personal stake in overseeing contractors to control costs.\textsuperscript{150} Other efficiency factors also favor allowing PRPs to conduct cleanups. For instance, a PRP is often more familiar with the site, the characteristics of the contaminants, the nature of past and present operations at the site, and the physical characteristics of the land.

It can be very beneficial to have small contributors cash out early through de minimis settlements.\textsuperscript{151} Transaction costs are substantially reduced, and the smaller parties are protected from being dragged into costly battles with the larger parties. The EPA is presently working on restructuring its internal procedures in an effort to utilize de minimis settlements more efficiently.\textsuperscript{152}

\textsuperscript{148} See Williams, supra note 121, at 33-34 ("EPA investigators found that 23 companies hired for hazardous waste cleanup in 1988 and 1989 spent 28 percent of their $265 million budget on wasteful administrative costs."). In one particular case, an inquiry by the House Subcommittee on Oversight and Investigations revealed that a contractor had billed $4100 for basketball, baseball, and football tickets; $167,900 for employee picnics and parties; $15,000 for an office party which served thousands of dollars worth of chocolates stamped with the company logo; $63,000 for advertising; $10,000 for a catered cruise; and $100 for a Christmas party dance instructor. \textit{Id.} The company president claimed, "No matter what differences of opinion exist on the manner in which we allocate costs, [my company's] charges to the government are fair to the taxpayer." \textit{Id.}

\textsuperscript{149} See generally U.S. GENERAL ACCOUNTING OFFICE, SUPERFUND CONTRACTS: EPA'S PROCEDURES FOR PREVENTING CONFLICTS OF INTEREST NEED STRENGTHENING (1989) (assessing EPA's overall system for preventing conflicts of interest).

\textsuperscript{150} See In re Bell Petroleum Servs., Inc., 3 F.3d 889, 904-06 (5th Cir. 1993) (determining that EPA's choice of alternate water supply was "arbitrary and capricious").

\textsuperscript{151} Stephen C. Jones, Early Settlements Finally May Catch On (pts. 1 & 2), NAT'L. L.J., Nov. 15, 1993, at 22, NAT'L. L.J., Nov. 22, 1993, at 18. A new type of settlor, "de micromis," is being introduced into the EPA's procedures. \textit{Id.} The contamination level cut-off for de micromis eligibility is lower than for de minimis eligibility. \textit{Id.} These smallest of small contributors can cash out their liability without paying a premium, unlike de minimis settlors who normally must pay a premium from 50% to 100% of their contribution cost. \textit{Id.}

\textsuperscript{152} \textit{Id.}; see also Superfund, Techniques to Reduce Legal Expenses Have Not Been Used Often: Hearings Before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Senate Comm. on Environment and Public Works, 103d Cong., 1st Sess. 14 (1993) (statement of Keith O. Fultz, Director of Planning and Reporting Resources, Community, and Economic Dev. Div.). As of September 1993, the EPA had entered into de minimis settlements at only 73 of 1074 nonfederal Superfund sites.
3. Why Should the Strict, Joint, and Several Liability Structure Be Retained?

To a large extent, litigation between PRPs reflects the novelty of the Superfund statute. As legal issues have been resolved in the courts, PRPs have become better able to predict the consequences of their actions.\textsuperscript{153} Parties now realize that if they fail to get involved early, other parties who do will have a distinct advantage, including the right to seek contribution from them. At least two courts have imposed Rule 11\textsuperscript{154} sanctions against litigants who brought contribution claims against settling parties.\textsuperscript{155} As litigants understand more clearly how the statute's liability and contribution provisions apply,\textsuperscript{156} litigation costs should decrease. When parties enter into out-of-court settlements with the government, it is possible to avoid litigation costs altogether. As time progresses, therefore, one can expect to see more money spent on site cleanups rather than lawsuits. It is suggested that a change

\textsuperscript{153} De Saillan, \textit{supra} note 122, at 43 ("[I]n recent years, the majority of Superfund cleanups have been financed through out-of-court settlements or administrative orders that were complied with voluntarily.").

\textsuperscript{154} \textit{Fed. R. Civ. P.} 11.

\textsuperscript{155} See \textit{Avnet, Inc. v. Allied-Signal, Inc.}, 825 F. Supp. 1132, 1142 (D.R.I. 1992); United States v. Alexander, 771 F. Supp. 830, 841 (S.D. Tex. 1991), \textit{vacated}, 981 F.2d 250 (5th Cir. 1993). These cases clearly indicate that unnecessary litigation under CERCLA will not be tolerated. They are illustrative of the view that settling parties are insulated from contribution claims. Furthermore, they put an end to further litigation on the issue, thereby helping to prevent transaction costs from rising needlessly.

in the structure of the current law would vitiate the experience gained in the last twelve years and initiate a whole new round of litigation.

**CONCLUSION**

As CERCLA comes due for reauthorization, the goals and progress of SARA will be re-examined. Although by some measurements it appears that the 1986 amendments have been ineffective, looking further it is clear that some progress has been made. The contribution and settlement provisions, which Congress enacted to effectuate more efficient cleanups by voluntary parties, have been frequently litigated. Judicial interpretation has resulted in a majority rule holding that settlers who come forth early will be protected from contribution claims. The courts have extended the contribution protection provided in CERCLA section 113 to cost recovery claims arising under section 107. It is also clear that potentially responsible parties may shift only their financial responsibility, not their statutory liability, through contractual agreements. It is submitted that the basic structure of the statute need not be changed. Nevertheless, it is suggested that a clause should be added to ratify judicial interpretation of section 113(f)(2). The revised subsection should read, "A person who has resolved its liability to the United States . . . in a . . . settlement shall not be liable for claims for contribution or for recovery of costs regarding matters addressed in the settlement." This addition would help clarify congressional intent concerning the contribution and settlement provisions of CERCLA. Although the language of the statute needs only minor adjustments, the statute's enforcement program requires more drastic change. If the problem areas of the program are identified and improved, CERCLA's positive use as a tool to improve hazardous waste conditions will become more apparent.

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