

PRIVATE-PARTY HAZARDOUS MATERIAL LITIGATION

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1. INTRODUCTION

Superfund practice has undergone significant changes since its enactment in 1980.¹ Gone are the large multiparty sites with their endless steering committee meetings. , “Voluntary cleanups” and other alternative methods of dealing with contaminated sites appear to have largely supplanted the once ubiquitous government initiated CERCLA actions to recover “response” costs or to compel cleanup of hazardous materials,² which have both decreased in number and cost. Nevertheless, litigation between private parties involving the release or disposal of hazardous material continues relatively unabated. These litigations usually include: (i) contribution claims when one responsible party has paid or will have to pay for the governments’, another party’s, or its own clean-up costs;³ (ii) contractual claims arising from the sale or transfer of contaminated property; and (iii) “toxic tort” claims brought by persons not in privity with the PRPs who have suffered personal or property damages, resulting from the PRPs’ hazardous material spills or disposals. The Superfund law made in these “private” litigations further changes and limits the government’s options in the clean-up proceedings that it does commence.

The causes of action asserted in these types of private-party litigation typically include Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607, 9613, Section 7003 of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6973, and a plethora of common law theories ranging from contract to strict liability. Some or all of these may be pled in any one case. However, the common themes that run through most of this litigation are the nature of the hazardous materials, the complexity of their remediation, the relative liability of the parties for the claimed cleanup costs (or other damages), and the compelling

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¹ “Superfund” is the common name for the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601 et seq.

² “Hazardous material” is the generic phrase used by the authors to encompass “hazardous substances” as defined by CERCLA, 42 U.S.C. § 14; “hazardous wastes” as defined by RCRA, 42 U.S.C. § 6903(5) or listed pursuant to 42 U.S.C. § 6921, and toxic pollutants designated under the Clean Water Act, 33 U.S.C. § 1317(a).

³ In the jargon of CERCLA litigation, defendants or respondents are known as “responsible parties”, but are more commonly referred to as “PRPs”, which stands for “potentially responsible parties.”

presence of the government as regulator (if not litigant).⁴

2. PRIVATE PARTY LITIGATION UNDER CERCLA

CERCLA Section 107(a), 42 U.S.C. § 9607(a), creates strict retroactive liability for four categories of PRPs for the costs of investigating and cleaning up a site ("response costs" in CERCLA parlance) from which there has been a "release or threat of release of hazardous substances."⁵

To establish its prima facie case under either Section 107 or Section 113 of CERCLA, a private party must plead and prove that a defendant falls into one of these four categories of PRPs: (1) current owners and operators of a facility, (2) past owners or operators at the time of disposal of any hazardous substance, (3) any person who arranged for disposal or treatment of a hazardous substance release from a facility; and (4) transporters of hazardous substances who selected the disposal or treatment site. 42 U.S.C. § 9607(a)(1)-(4).⁶ Unlike the State or federal government, private litigants must also plead and prove that they incurred statutory "response costs" which are "necessary"

⁴ For example, under Section 106 of CERCLA, the federal government can, through a unilateral administrative order, force a responsible party to clean up a hazardous material site even though EPA has already signed a consent order which obligates a different PRP to perform a complete site cleanup. See United States v. Occidental Chem. Corp., 1999 U.S. App. LEXIS 34339 (3rd Cir. 1999). Since Section 106 of CERCLA shields settling parties (such as the consent order signatory in the above case) from future private-party contribution actions, rulings such as these have a strong coercive effect on parties to settle with EPA, even if they believe they are not responsible for contamination. Those who do not, run the risk of having to perform a cleanup with no other party to turn to for contribution under Section 113.

⁵ 42 U.S.C. § 9607(a)(4). In order to trigger CERCLA liability, there must be a release or threatened release of "hazardous substances." The definition of "hazardous substance" is found in CERCLA, 42 U.S.C. § 9601(14), and includes designated substances (40 C.F.R. § 302.4), and any other "imminently hazardous chemical substance or mixture." United States v. Alcan Aluminum Corp., 990 F.2d 711, 720 (2d Cir. 1993). Such "hazardous substances" include, but need not "rise to the level of being classified as hazardous waste" under RCRA. Prisco v. State of New York ("Prisco"), 902 F. Supp. 374, 385 (S.D.N.Y. 1995); see RCRA, 42 U.S.C. § 6903(5).

⁶ B.F. Goodrich v. Betkoski ("Betkoski"), 99 F.3d 505, 514 (2d Cir. 1996), cert. denied sub nom. Zolto Drum Co. v. B.F. Goodrich, 524 U.S. 926 (1998). Corporate parents and even individual officers may be held derivatively or directly liable as "operators" under Section 107. Derivative liability attaches only if the corporate veil can be pierced. However, a corporate parent which actively participates in, and exercises control over, the operations of its subsidiary's facility, may be held directly (as opposed to derivatively) liable as an "operator" under CERCLA § 107(a)(2). See United States v. Bestfoods, 524 U.S. 51 (1998). A parent's direct operator liability requires more than just control over the facility's general operations, but specifically over those operations relating to hazardous substances. See U.S. v. Kayser-Roth Corp., 272 F.3d 89, 102 (1st Cir. 2001) ("Whatever the ambiguity created by [*Bestfoods*] references to [general facility operations], we think it is clear that direct operator liability requires and ultimate finding of the parent's involvement with "operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations").

and consistent with the National Contingency Plan (“NCP”).⁷

Moreover, as explained below, unlike a Section 107 governmental plaintiff, a private party PRP bringing a “contribution” action against other PRPs under Section 113 has the additional burden of proving each defendant PRP’s equitable “allocable share” of response costs.⁸

a. “Response Costs” Recoverable Under CERCLA

Under CERCLA, private parties may recover only necessary “response costs” incurred consistent with the NCP. Generally, these are costs expended to investigate and remove hazardous substances from the environment, prevent or minimize their further release or migration, or reduce the risk of harm to public health or the environment. CERCLA, 42 U.S.C. §§ 9601(23), (24).

Response costs, however, do not include traditional tort damages for personal or property injury.⁹ Nor do they include, in most cases, attorney fees expended in recovering cleanup costs.¹⁰ And while the government may recoup “medical monitoring” for public health effects of contamination, those costs may not be recovered in private party actions.¹¹

⁷ See City of New York v. Chemical Waste Disposal Corp., 836 F. Supp. 968, 978 (E.D.N.Y. 1993). The National Contingency Plan is established by 40 CFR Part 300 and sets forth the federal standards that must be applied for the removal and remediation of oil and hazardous substances.

⁸ See United States v. Taylor, 909 F. Supp. 355, 361 and n.4 (M.D.N.C. 1995); United States v. Atlas Minerals & Chemicals, Inc. (“Atlas Minerals”), 41 Env’t Rep. Cas. (BNA) 1417, 1478 (E.D. Pa. 1995). Compare United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507-08 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1999) (contribution plaintiff must demonstrate that the harm was divisible and that it paid more than its fair share).

⁹ See, e.g., Artesian Water Co. v. Government of New Castle County (“Artesian Water”), 659 F. Supp. 1269, 1285-86 (D. Del. 1987), aff’d in part and remanded in part, 851 F.2d 643 (3d Cir. 1998) (in enacting CERCLA, Congress “clearly manifested an intent not to provide compensation for economic losses or personal injury resulting from the release of hazardous substances”).

¹⁰ Key Tronic Corp. v. United States (“Key Tronic”), 511 U.S. 809, 815-22 (1994). However, attorney fees incurred in implementing the remedy or spent in identifying PRPs--as opposed to suing them--are probably recoverable, since engineers or other consultants could have incurred those fees as well. Id. at 1968; Franklin County Convention Facilities Authority v. American Premier Underwriters (“Franklin County”), 240 F.3d 534 (6th Cir. 2001)(legal work that is “closely tied” to the actual cleanup may constitute a necessary response cost.) Compare Calabrese v. McHugh, 170 F.Supp.2d 243, 267-68 (D. Conn. 2001)(attorney’s “investigative work to uncover the identity of the corporate successor” to previously identified PRP “were not fees for work closely tied to the actual cleanup, nor work that would benefit the entire cleanup effort” but “litigation expenses” not encompassed within the definition of “response costs”).

¹¹ Prisco, 902 F. Supp. at 410-11.

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CERCLA provides two distinct types of actions for private parties to recoup response costs: cost recovery actions under Section 107(a) and contribution actions under Section 113(f). These sections create different rights for plaintiff and defendant PRPs.

(1) Section 107

The federal and state governments have historically used section 107 of CERCLA to recover the costs incurred in investigating and remediating hazardous substance sites. Under CERCLA Section 107(a), liability is strict, joint and several,¹² subject to limited defenses.¹³ Because of “joint” liability, one PRP defendant can be held responsible for all the harm at a site, unless that PRP can establish that: (i) its harm is divisible; (ii) its waste did not cause the incurrence of response costs; or (iii) some other reasonable basis for apportionment.¹⁴ While available in theory, these affirmative defenses to Section 107’s “joint and several” liability scheme are extraordinarily difficult to prove.¹⁵

Although CERCLA Section 107 clearly authorizes private parties to bring actions to recover response costs,¹⁶ the United States Courts of Appeals for nearly every Circuit have

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¹² See, e.g., United States v. Rohm & Haas Co. (“Rohm & Haas”), 2 F.3d 1265, 1279-80 (3d Cir. 1993); United States v. Monsanto Co. (“Monsanto”), 858 F.2d 160, 168-70 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); United States v. Chem-Dyne Corp. (“Chem-Dyne”), 572 F. Supp. 802, 806-08 (S.D. Ohio 1983).

¹³ Statutory defenses to Section 107 are limited to: (1) acts of God; (2) acts of war; and (3) acts or omissions of unrelated third parties. 42 U.S.C. § 9607(b)(1)-(4). But see discussion, infra.

¹⁴ See, e.g., United States v. Alcan Aluminum Corp., 964 F.2d 252, 270-71 (3d Cir. 1992) (“Alcan I”) (PRP is entitled to establish “that the harm [at a site] is divisible” and that there is “a reasonable basis for apportionment”; if it does so it “should be held liable only for the response costs relating to that portion of the harm to which it contributed”); United States v. Alcan Aluminum Corp., (“Alcan II”), 990 F.2d 711, 722 (2d Cir. 1993) (PRP may entirely escape CERCLA liability “if it could prove that its [waste], when mixed with other hazardous wastes, did not contribute to the release and resulting clean-up costs” e.g. “where its pollutants did not contribute more than background levels of contamination and also cannot concentrate”).

¹⁵ Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp. (“Centerior”) 153 F.3d 344, 348 (6th Cir. 1998) (“given the nature of hazardous waste disposal, rarely if ever will a PRP be able to demonstrate divisibility of harm, and therefore joint and several liability is in the norm”); United States v. Alcan Aluminum Corp., 97 F. Supp. 2d 248, 268-69 (after trial Court found that “Alcan’s emulsion contained PCBs, which are not naturally occurring substances that have ‘background levels,’” and therefore, Alcan did “not fit within the special category of defendants who can escape all liability under CERCLA”). But see Matter of Bell Petroleum Services, Inc. (“Bell Petroleum”), 3 F.3d 889, 902-03 (5th Cir. 1993) (PRP successfully proved “reasonable basis” for apportioning a single harm and escaped joint and several liability).

¹⁶ See CERCLA §107(a)(4)(B), 42 U.S.C. §9607(a)(4)(B). See also Key Tronic, 511 U.S. at 812 n.7; In re Hemingway Transport, Inc., 993 F.2d 915, 931 (1st Cir.), cert. denied, 510 U.S. 914 (1993).

squarely held that plaintiffs who fall within the four categories of CERCLA responsible persons are limited to Section 113 contribution actions.¹⁷ These courts have reasoned that when one PRP sues another PRP "for an appropriate division of the payment one of them has been compelled to make that PRP is by definition making a [Section 113(f)] claim for contribution."¹⁸

On the other hand, many courts that have addressed the issues have held that "any person" who is not a PRP (because one of CERCLA's defenses applies) or who is an "innocent" PRP may directly sue other PRPs to recover response costs under Section 107.¹⁹ The Tenth Circuit, however, recently bucked this trend, firmly holding that a landowner who could not establish any of the defenses in § 9607(b), "is a PRP under CERCLA. And because [it] is a PRP, it may not proceed with two independent suits under both §§ 9607 and 9613(f), but instead may only proceed with an action for contribution under § 9613(f)."²⁰ While "[t]here may be a superficial attraction to allowing 'innocent PRPs' to proceed under § 9607(a)...[b]ecause these landowners had nothing to do with the release of hazardous waste," the Court ultimately found the reasoning of cases such as

¹⁷ See Bedford Affiliates v. Sills ("Bedford"), 156 F.3d 416 (2d Cir. 1998), Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co. ("High Point"), 142 F.3d 769, 776 (4th Cir.), cert. denied, 525 U.S. 963, 119 S.Ct. 407 (1998), Centerior Service Co. v. Acme Scrap Iron and Metal Corp. ("Centerior"), 153 F.3d 344, 356 (6th Cir. 1998); Pinal Creek, supra, New Castle, supra, Redwing Carriers, Inc. v. Saraland Apartments ("Redwing Carriers"), 94 F.3d 1489 (11th Cir. 1996); United States v. Colorado & Eastern R.R. Co. ("Colorado & Eastern R.R. Co."), 50 F.3d 1530, 1536 (10th Cir. 1995); United Technologies Corp. v. Browning Ferris Industries ("United Technologies"), 33 F.3d 96, 99-101 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995); Akzo Coatings I, 30 F.3d at 764.

¹⁸ Bedford, 156 F.3d at 424 ("a quintessential claim for contribution [occurs] where a party seeks to apportion liability for an injury for which it is also directly liable"); Colorado & Eastern R.R. Co., 50 F.3d at 1536 (same); United Technologies, 33 F.3d at 99-101; Akzo Coatings I, 30 F.3d at 764; See also Matter of Reading Co., 900 F. Supp. 738, 748 (E.D. Pa. 1995), aff'd, 115 F.3d 111 (3d Cir. 1997) ("contribution" should be given its plain meaning); Avnet, Inc. v. Allied-Signal, Inc. ("Avnet"), 825 F. Supp. 1132 (D.R.I. 1992); Transtech Industries, Inc. v. A&Z Septic Clean, 798 F. Supp. 1079 (D.N.J. 1992), cert. denied sub nom. Mayco Oil & Chemical Co. v. Transtech Industries, 512 U.S. 1213 (1994). Nevertheless, when the federal or State government is also a PRP, many courts have found that CERCLA's text and underlying policy allows them to maintain both a Section 113 action and a Section 107 action. See, e.g., United States v. Manzo, 182 F. Supp. 2d. 385 (D.N.J. 2001)(United States may maintain a Section 107 action even if it is a PRP); United States v. Friedland, 152 F.Supp. 2d. 1234 (D. Colo. 2001)(same); but see United States v. Scott's Liquid Gold, Inc., 934 F. Supp. 362 (D. Colo. 1996)(United States limited to Section 113 action where its agencies are PRPs).

¹⁹ See, e.g., Seventh Circuit: Nutrasweet Co. v. X-L Eng'g Co. ("Nutrasweet") 227 F.3d 776, 784 (7th Cir. 2000) (a private party plaintiff may bring an action under § 107(a), even if it is technically a PRP, so long as that plaintiff "did not pollute the site in any way"); Redwing Carriers, 94 F.3d at 1496; Akzo Coatings I, 50 F.3d at 764; M&M Realty Co. v. Eberton Terminal Corp., 977 F. Supp. 683, 686 (M.D. Pa. 1997) (noting that every court that has faced the issue has concluded that a PRP who can establish CERCLA's "innocent landowner" defense can sue other PRPs for joint and several liability).

²⁰ See, Morrison Enterprises v. Mcshares, Inc., 302 F.3d 1127, 1135 (10th Cir. 2002).

Nutrasweet unpersuasive.²¹ Acknowledging, “under § 9613(f), there is a theoretical risk that ‘innocent PRPs’ might bear some of the costs of liability,” the Court saw “little risk of this result occurring.” The Court reasoned:

If the plaintiffs are truly "innocent PRPs," then there should be little difficulty in making the additional required showing [under § 113(f)] that the defendant PRPs should bear the entire cost under the equitable factors.²²

In addition, it “might be unfair to allow ‘innocent PRPs’ to proceed under §9607 and transfer all of the potential liability to other PRPs because there may be ‘orphan shares’ of liability for bankrupt or judgment-proof defendant PRPs that should be equitably divided among the plaintiffs and other defendant PRPs.” While these defendant PRPs “may attempt to reimpose that liability on the plaintiff PRPs (or other PRPs) through a new contribution action under §9613(f),” the Court recognized that this result would lead to a judicially disfavored “chain reaction of multiple, and unnecessary lawsuits.”²³

Because of the split in the Circuits on this issue, and the high bar set for “innocence” even in those Circuits that recognize an “innocent PRP exception”, the difference between a Section 107 “cost recovery” action versus a Section 113 “contribution action” remains an important one.²⁴

²¹ Id. at 1134-35.

²² Id. At 1135.

²³ Id. See Section 2(e), infra, for a complete discussion of the “orphan share” issue.

²⁴ Even in those cases that have allowed “innocent PRPs” to proceed under § 107, the standard for innocence sets a high bar that most courts have been unwilling to lower. See, e.g., Bedford, 156 F.3d at 424-25 (plaintiff not entitled to bring a Section 107 action because, even though plaintiff was found only five percent liable as a past and present owner of the property, and even though it did not actively contribute to the contamination at the site, it was still liable as a PRP and therefore limited to a Section 113 contribution action.); Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc., 191 F.3d 409, 416 (4th Cir. 1999)(“[I]f an ‘innocent party’ exception is even possible...it would therefore seem prudent to limit its applicability to those who can make out one of the defenses to liability that § 107 itself provides); The Burlington Northern And Santa Fe Railway Co. v. Cargill, 1999 U.S. Dist. LEXIS 18357 (D. Kansas 1999)(rejecting cases such as Rumpke of Ind., Inc. v. Cummins Engine Co., Inc., 107 F.3d 1235, 1241 (7th Cir. 1997), which held that a PRP who denies contributing to the contamination may maintain a Section 107 until proven otherwise). But see Thomson Precision Ball Co. LLC v. PSB Assocs., 2001 U.S. Dist. LEXIS 340, *7-*8 (D. Conn. January 3, 2001)(plaintiff was entitled to bring a Section 107 action as an “innocent landowner with respect to its claims based on the hazardous substances not disclosed by defendants” even though plaintiff knew of discrete contamination when it bought the property, where that contamination was unrelated to the response costs it was seeking to recover from the prior owner); Ninth Avenue Remedial Group v. Allis-Chalmers Corp. (“Ninth Avenue”), 974 F. Supp. 684, 691 (N.D. Ind. 1997)(despite precedents which all “clearly state[] that a PRP can only sue for contribution,” court nevertheless denied motion to dismiss Section 107 cost recovery claim of PRP who has neither admitted nor been adjudicated liable under CERCLA; if the PRP is later found liable, however, it may only sue under Section 113).

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(2) Section 113

As enacted, Section 113 states, in part:

(1) Contribution. Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [42 U.S.C. § 9607(a)], during or following any civil action under section 106 [42 USCS § 9606] or under section 107(a) [42 US.C. § 9607(a)].

The right of contribution under Section 113 has become increasingly significant both because CERCLA case law has restricted the ability of non-innocent PRPs to bring Section 107 actions, and because Section 113 can provide PRP “volunteers” under state voluntary cleanup programs a federal avenue for recouping cleanup costs, even if denied that right under Section 107.

The statutory language of Section 113 leaves no doubt that a PRP can initiate a contribution action against another PRP (or group of PRPs) when the plaintiff-PRP is itself the subject of an enforcement action under Section 106 or 107 of CERCLA. But can a PRP maintain a Section 113 claim absent a civil action having first been brought against it under § 106 or § 107(a)? That is, for example, can a plaintiff PRP recover in a Section 113 contribution action response costs incurred in a voluntary cleanup, or one compelled under a state administrative proceeding or local enforcement action?

Until recently, many Circuit Courts allowed such actions without ever directly answering this question in the affirmative.²⁵ Moreover, several District Courts had expressly rejected defendant PRP attempts to plead, as an affirmative defense to a § 113(f)(1) claim, that no civil action under § 106 or 107(a) is pending against the plaintiff PRP.²⁶ All of that changed in December 2004, when the United States Supreme Court

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²⁵ See, e.g., Crofton Ventures LP v. G & H Partnership, 2001 U.S. App. LEXIS 16594, No. 00-1517, 2001 WL 829885 (4th Cir. July 24, 2001)(allowing § 113(f)(1) contribution action in voluntary cleanup of facility after notifying state); Amoco Oil v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989) (permitting contribution claim under § 113(f)(1) to proceed in the absence of a civil action under § 106 or § 107(a)); see also PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610 (7th Cir. 1998); Centerior, 153 F.3d 344; Sun Company, Inc., v. Browning-Ferris, Inc., 124 F.3d 1187 (10th Cir. 1997).

²⁶ See, e.g., Coastline Terminals of Connecticut, Inc. v. USX Corp., 2001 WL 844722, *3 (D. Conn. June 12, 2001)(holding that a § 113(f)(1) claim is not barred merely because the PRP has not been threatened with liability in the form of a § 106 or § 107 action); Mathis v. Velsicol Chemical Corp., 786 F. Supp. 971, 975 (N.D. Ga. 1991)(§ 113(f)(1) "by its plain terms and meaning prevents . . . [the maintenance of] a defense concerning the pendency of a civil action under CERCLA"); Johnson County Airport Comm'n v. Parsonitt Co., Inc., 916 F. Supp. 1090, 1095 (D. Kan. 1996)("nothing in the language of section 113(f)" prohibits a PRP from asserting claims for contribution under the statute in the absence

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handed down its decision in Cooper Industries, Inc. v. Aviall Services, Inc., 125 S.Ct. 577 (2004) (“Aviall”).

The Aviall decision changed significantly the legal landscape for contribution claims brought under CERCLA. In a 7-2 opinion rejecting the settled law in nearly every federal circuit, the Supreme Court held that a PRP under CERCLA cannot use § 113(f)(1) to seek cleanup cost contribution from other PRPs unless that PRP first has been sued by the government under either section 106 or 107(a).²⁷ As noted above, up until Aviall, § 113(f)(1) contribution actions routinely were brought by PRPs who were at risk of, but had not yet been subjected to, government-initiated cost recovery actions.

The Supreme Court’s decision was based largely upon the language of § 113(f)(1), which specifies that any PRP “may seek contribution from any other [PRP], *during or following any civil action* under [CERCLA section 106 or 107(a)].” The Court of Appeals for the Fifth Circuit,²⁸ which the Supreme Court reversed, had viewed this language in light of another section of 113(f)(1) providing that, “[n]othing 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 106 or 107(a)].” The Supreme Court rejected the Fifth Circuit’s interpretation because it effectively rendered superfluous the “during or following any civil action” language of section 113(f)(1). The Supreme Court interpreted the “savings clause” language that the Fifth Circuit had focused on as preserving common-law contribution claims, but not creating an independent CERCLA cause of action.²⁹

It is important to note that Aviall will not impact a private party’s right to seek contribution under section 113(f)(3)(B), an alternative right to contribution under CERCLA, so long as that party has resolved its liability for a response action by entering into an administrative or judicially-approved settlement with the state or federal government. While there is scant case law on the subject of what constitutes an “administrative settlement” so as to qualify a PRP to bring an action under section 113(f)(3)(B), it appears that an Order on Consent entered into between the PRP and a state’s environmental department would suffice.

Neither does Aviall preclude PRPs from seeking to recover their cleanup costs in state common-law actions or pursuant to state statutory provisions. In addition, a PRP could consider bringing under 42 U.S.C. § 6972(a)(1)(B), RCRA’s citizen suit provision

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of a civil action under § 106 or § 107(a)).

²⁷ 125 S.Ct. at 586.

²⁸ 263 F.3d 134 (5th Cir. 2001).

²⁹ 125 S.Ct. at 583-84.

(discussed in more detail in Section 3, below). Section 6972(a)(1)(B) allows a plaintiff to obtain injunctive relief based on the defendant's involvement with hazardous or solid waste which may cause an imminent "endangerment;" however, the PRP would be limited to obtaining injunctive relief, not money damages. Thus, RCRA would only be a viable or practical option for a PRP where the contamination at issue has not been cleaned up, and where the current owner would be willing to defer development until obtaining an injunction ordering the culpable party to remediate the site. The primary advantage of a RCRA citizen suit is the potential for any prevailing plaintiff to recover its attorneys' fees.

When a PRP does bring a Section 113 action, in contrast to "joint and several" liability available under Section 113(f), a plaintiff under Section 113(f) may recover only severally from each defendant. In other words, in a Section 113 action each defendant is responsible only for its proportionate share of harm at the site.³⁰ Thus, unlike a Section 107 PRP defendant, a Section 113 PRP defendant has no burden to establish "divisibility" of harm; rather the Section 113 plaintiff has the added burden of establishing each defendant's share of liability relative to its own.

CERCLA provides no guidance on what factors a court should consider in determining a PRP's fair share of cleanup costs. Thus, in contribution proceedings, a court "may allocate response costs among liable parties using such equitable factors as [it] determines are appropriate."³¹ Such equitable allocation becomes particularly complicated in instances where PRPs have obtained "contribution protection" under § 113(f)(2) by settling with the government,³² or where a large "orphan share" exists.³³

b. Section 107 Statutory Defenses

CERCLA practitioners had often repeated the adage that once a defendant fell into one of the four categories of responsible persons under CERCLA Section 107(a), Section 107(b) established only three affirmative defenses to defeat that liability: (1)

³⁰ See, e.g., Pinal Creek Group v. Newmont Mining Corp. ("Pinal Creek"), 118 F.3d 1298, 1301 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); United Technologies, 33 F.3d at 103; Akzo Coatings, Inc. v. Aigner Corp. ("Akzo Coatings I"), 30 F.3d 761, 764 (7th Cir. 1994). But see discussion at Section IV, infra.

³¹ 42 U.S.C. §9613(f)(1); New Castle County v. Halliburton NUS Corp. ("New Castle"), 111 F.3d 1116, 1121 (3d Cir. 1997). Some of the myriad "equitable factors" which courts and private allocators have applied in litigation and ADR are discussed, infra.

³² As discussed infra, to encourage parties to settle with the government, Section 113(f)(2) immunizes parties settling with EPA or State authorities from future contribution actions.

³³ An "orphan share" is essentially the share of response costs attributable to insolvent or defunct parties who have no ability to pay. The "orphan share" problem, as it relates to allocation of response costs, is discussed infra.

acts of God; (2) acts of war; and (3) acts or omissions of unrelated third parties.³⁴ This maxim became obsolete on January 11, 2002 when President George W. Bush signed the signed the Small Business Liability Relief and Brownfields Revitalization Act (the “SBLA”) into law.³⁵ The SBLA amends CERCLA’s Section 107 liability scheme to include two additional liability defenses – the De Micromis exemption and the Municipal Solid Waste exemption, which are discussed below. But as these new defenses are yet untested, the “Third Party Defense” (for now) remains the only Section 107 defense to have found some measure of success. 42 U.S.C. § 9607(b)(3).³⁶

(1) The Third-Party Defense

This defense is available to a party who, though technically a “responsible person” under CERCLA Section 107(a), has no connection to the hazardous substances disposed on a site.³⁷

The Lashins case is a good example of this defense at work. There, the State sued to recover its CERCLA response costs from Lashins Arcade Co., the current owner of a contaminated shopping mall and a responsible party under Section 107(a)(1). Though the actual disposal of those substances had ceased fifteen years before Lashins purchased

³⁴ 42 U.S.C. § 9607(b)(1)-(4); see, e.g., Betkoski, 99 F.3d at 514 (plaintiff entitled to summary judgment if defendant cannot establish one of the three affirmative defenses in Section 107(b)); Velsicol Chemical Corp. v. Enenco, Inc., 9 F.3d 524, 530 (6th Cir. 1993)(“[S]ection 107(b)...set[s] forth the universe of defenses to section 107 liability”).

³⁵ Pub. L 107-118, January 11, 2002.

³⁶ The Third Party Defense, 42 U.S.C. § 9607 (b)(3), provides that:

There shall be no liability under [CERCLA]...for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by...

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act of omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant...if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions....

³⁷ See, e.g., State of New York v. Lashins Arcade Co. ("Lashins"), 91 F.3d 353, 355 (2d Cir. 1996); Delaney v. Town of Carmel, New York, 55 F. Supp.2d 237, 253 (S.D.N.Y. 1999).

the mall, the State argued that Lashins was not entitled to the third-party defense under Section 107(b)(3) because: (1) Lashins' contract to buy the property from a "responsible person" was a "contractual relationship"; (2) Lashins' failure to conduct a pre-purchase investigation evidenced a lack of "due care"; and (3) Lashins' subsequent failure to conduct a remedial investigation exhibited a further lack of "due care."

The Second Circuit rejected all three of these arguments and affirmed the summary judgment dismissing the complaint against Lashins because of the third-party defense set forth in Section 107(b)(3). Relying on its previous decision in Westwood Pharmaceuticals, Inc. v. National Gas Distributors Corp., 964 F.2d 85 (2d Cir. 1992), the court held that:

the phrase 'in connection with a contractual relationship' in [Section 107(b)(3)] requires more than the mere existence of a contractual relationship between the owner of land on which hazardous substances are or have been disposed of and a [responsible] third party ... the contract between the landowner and the third party must relate to the hazardous substances or allow the landowner to exert some element of control over the third party's activities.

Lashins, 91 F.3d at 362.

(2) "De Micromis" Exemption and "De Minimis" Settlement

The recently enacted "De Micromis exemption", Section 107(o), provides that a person who arranges for the disposal of a hazardous substance, often referred to as a CERCLA "generator," or a transporter shall not be liable for response costs at a facility on the National Priorities List ("NPL")³⁸ if "the total amount of waste material containing hazardous substances generated by a person or transported by a person "was less than 110 gallons or 200 pounds of solid waste material."³⁹ A critical limitation on this

³⁸ The NPL is EPA's list of the Nation's highest priority "facilities" requiring remediation. See 40 CFR Part 300, Appendix B.

³⁹ SBLA, Section 102(a) (creating new CERCLA section 107(o), 42 U.S.C. § 9607(o)). That section reads:

(1) In general

Except as provided in paragraph (2), a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under this chapter if liability is based solely on paragraph (3) or (4) of subsection (a), and the person, except as provided in paragraph (4) of this subsection, can demonstrate that--

(A) the total amount of the material containing

(...continued)

exemption is that it only applies to NPL sites, and is limited temporally to instances where all or part of the disposal, treatment or transport of such waste material occurred before April 1, 2001. Significantly, in a Section 107 cost recovery action brought by the government, the PRP has the burden of proving entitlement to this exemption. But in a Section 113 contribution action, the Section 113 plaintiff now has the threshold burden of proving that the waste disposed by the defendant does not fall within the De Micromis exemption.

The De Micromis exemption is not absolute; Section 107(o) makes an exception to the De Micromis exemption in cases where EPA determines that the hazardous substances disposed of “have contributed significantly, either individually or in the aggregate, to the costs of the response action or natural resource restoration with respect to the facility.”⁴⁰ It remains to be seen how EPA interprets this exception, but

(...continued)

hazardous substances that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation); and

(B) all or part of the disposal, treatment, or transport concerned occurred before April 1, 2001.

⁴⁰ Id., §9607(o)(2), which provides:

(2) Exceptions

Paragraph (1) shall not apply in a case in which--

(A) the President determines that--

(i) the materials containing hazardous substances referred to in paragraph (1) have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility; or

(ii) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility; or

(...continued)

there certainly is an opportunity for the exception to swallow the rule should EPA take an aggressive view with regard to the “contribution” of the hazardous substance to the harm at a particular site. Moreover, the Act provides that EPA’s determination as to whether the materials contribute significantly to response costs is not subject to judicial review.⁴¹

Section 122(g) authorizes administrative and judicial de minimis settlements when the claim involves a minor portion of the response costs at the facility and, in EPA’s judgment, the amount and toxicity of hazardous substances contributed by the settling party are minimal in comparison to other hazardous substances at the facility.

This type of settlement is appropriate for small volume generators (usually less than 1%) whose waste contains no greater toxicity than anyone else.

Section 122(g)(7) was amended in 2002 to codify DOJ and EPA practice of settling with PRPs who have a limited ability to pay. In addition, § 122(g)(8) was added requiring that settlements under § 122(g) require that the PRP waives all claims (including contribution) against other PRPs (“unless the President determines that requiring a waiver would be unjust.”). Revised Model CERCLA De Minimis Contributor Consent Decree and Administrative Order on Consent is at 60 Fed. Reg. 62,849 (Dec. 7, 1995).

(2) Municipal Solid Waste Exemption

The SBLA also adds a liability exemption for persons responsible for the disposal of municipal solid waste at an NPL site.⁴² The exemption, however, does not extend to

(...continued)

(B) a person has been convicted of a criminal violation for the conduct to which the exemption would apply, and that conviction has not been vitiated on appeal or otherwise.

⁴¹ Id., §9607(o)(3), which provides:

(3) No judicial review

A determination by the President under paragraph (2)(A) shall not be subject to judicial review.

⁴² CERCLA section 107(p), 42 U.S.C. § 9607(p). That section provides:

(1) In general

Except as provided in paragraph (2) of this subsection, a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under

(...continued)

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paragraph (3) of subsection (a) of this section for municipal solid waste disposed of at a facility if the person, except as provided in paragraph (5) of this subsection, can demonstrate that the person is--

(A) an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated with respect to the facility;

(B) a business entity (including a parent, subsidiary, or affiliate of the entity) that, during its 3 taxable years preceding the date of transmittal of written notification from the President of its potential liability under this section, employed on average not more than 100 full-time individuals, or the equivalent thereof, and that is a small business concern (within the meaning of the Small Business Act (15 U.S.C. 631 et seq.)) from which was generated all of the municipal solid waste attributable to the entity with respect to the facility; or

(C) an organization described in section 501(c)(3) of Title 26 and exempt from tax under section 501(a) of Title 26 that, during its taxable year preceding the date of transmittal of written notification from the President of its potential liability under this section, employed not more than 100 paid individuals at the location from which was generated all of the municipal solid waste attributable to the organization with respect to the facility.

For purposes of this subsection, the term "affiliate" has the meaning of that term provided in the definition of "small business concern" in regulations promulgated by the Small Business Administration in accordance with the Small Business Act (15 U.S.C. 631 et seq.).

Section 9607(p)(4) defines "municipal solid waste" as:

waste material--

(i) generated by a household (including a single or multifamily residence); and

(ii) generated by a commercial, industrial, or institutional entity, to the extent that the waste material--

(I) is essentially the same as waste normally generated by a household;

(II) is collected and disposed of with other municipal

(...continued)

transporters of such waste and, ironically, is not available to municipalities. Rather, the exemption is strictly limited to: (i) an owner, operator or lessee of residential property from which the waste was generated; (ii) a business entity that employs not more than 100 full-time workers during the last three years preceding the date of notification by EPA of potential CERCLA liability; and (iii) a not-for-profit organization employing 100 or fewer employees at the location where the waste was generated.⁴³ As with the De Micromis exemption, this exemption also does not apply in cases where EPA determines that the municipal solid waste contributed significantly to response costs at the site and EPA's determination regarding that issue is not subject to judicial review.⁴⁴

(...continued)

solid waste as part of normal municipal solid waste collection services; and

(III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

The statute then goes on to provide examples, which “include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.” 42 U.S.C. §9607(p)(4)(B). Expressly excluded from this definition, are “(i) combustion ash generated by resource recovery facilities or municipal incinerators; or (ii) waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households.” Id., §9607(p)(4)(C).

⁴³ Id., §9607(p)(2), which provides:

(2) Exception

Paragraph (1) shall not apply in a case in which the President determines that--

(A) the municipal solid waste referred to in paragraph (1) has contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility;

(B) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter; or

(C) the person has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility.

⁴⁴ Id., §9607(p)(3), which states:

(3) No judicial review

(...continued)

(3) Contiguous Property And Passive Disposal Defenses

Finally, the SBLA adds a new CERCLA § 107(q) that creates a defense from liability under CERCLA section 107(a)(1) or (2) for owners or operators of a facility “that is or may be contaminated by a release or threatened release of a hazardous substance from real property that is not owned by that person.”⁴⁵ In order to qualify for this defense, the property owner must establish “by a preponderance of the evidence,” that it fulfills eight separate conditions.⁴⁶ Under this provision, EPA can also issue an assurance that no enforcement action under CERCLA will be initiated against an owner or operator of contiguous property, thereby reducing uncertainty in financing.⁴⁷

This new provision partly codifies and (to a degree) expands upon what has judicially evolved as a “passive migration” or “passive disposal” defense to liability under CERCLA §107(a)(2). This federal common law defense allows former owner/operators of a contaminated site to escape liability under CERCLA (and RCRA) for the “passive migration” of chemicals which were already in the ground when the plaintiff purchased the site, or which have flowed under the site from another site.⁴⁸ Unlike the new CERCLA § 107(q), however, this defense does not apply to current owners and operators under CERCLA § 107(a)(1) who are liable without regard to the “time of disposal”.

The Ninth Circuit recently surveyed the “passive disposal” field of cases and

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A determination by the President under paragraph (2) shall not be subject to judicial review.

⁴⁵ SBLA, Section 221 (creating CERCLA section 107(q), 42 U.S.C. 9607(q)).

⁴⁶ These conditions are that the owner: (1) did not cause, contribute or consent to the release or threatened release; (2) is not a PRP or the result of a reorganization of a PRP, or affiliated with any other person that is a PRP at the site through “any direct or indirect familial relationship or any contractual, corporate, or financial relationship”; (3) takes reasonable steps to stop any continuing release, prevent any threatened future release and prevent or limit human, environmental or natural resource exposure to any hazardous substance released; (4) fully cooperates, assists and provides access to persons authorized to perform the cleanup activities; (5) complies with any land use restrictions and does not impede the effectiveness of any institutional control at the site; (6) complies with all information requests; (7) complies with other legally required notices with regard to any release of hazardous substances; and (8) conducted “all appropriate inquiry” with regard to the property and did not know or have reason to know that the property was or could be contaminated by one or more hazardous substances from other real property not owned by the person . Id.

⁴⁷ Id. (new CERCLA section 109(q)(3), 42 U.S.C. § 9607(q)(3)).

⁴⁸ See, e.g., United States v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996).

concluded that “there is no clear dichotomy among the[m]...”⁴⁹ Rather, they “fall in a continuum”, with the Sixth Circuit taking “an ‘active-only’ approach”, the Second and Third Circuits “addressing only the spread of contamination (and leaving open whether migration must always be ‘active’ to be a ‘disposal’)” and, finally, the Fourth Circuit “concluding that ‘disposal’ includes passive migration, at least in the context of leaking underground storage tanks.”

In Carson Harbor, the contamination on the property included tar-like and slag materials that “moved through the soil” and that may have leached “lead and/or TPH” from that material into the soil. Having examined the range of decisions on this issue, the Ninth Circuit held that the “gradual passive migration of contamination through the soil that allegedly took place during the [past owners’] ownership” may have been characterized as “spreading,” “migration,” “seeping,” “oozing,” and possibly “leaching.” But “none of those words fits within the plain and common meaning” of the words that CERCLA uses to define “disposal”: discharge, deposit, injection, dumping, spilling, leaking, or placing. Of these “the only one that might remotely describe the passive soil migration here is ‘leaking.’” But “[t]he circumstances here are not like that of the leaking barrel or underground storage tank envisioned by Congress...or a vessel or some other container that would connote ‘leaking.’”⁵⁰ Therefore, the Court concluded, there was no “disposal,” and affirmed the district court’s grant of summary judgment dismissing the CERCLA § 107(a)(2) claims against the past owner defendants. *Id.* at 879-80.⁵¹

c. Other CERCLA Defenses

Section 107 does not contain the only defenses to CERCLA liability. While they are somewhat scattered throughout its provisions, CERCLA’s other statutory defenses also allow a PRP to avoid CERCLA liability. Moreover, the courts have established a body of federal common law defenses that may, under the right circumstances, prove equally effective in escaping CERCLA’s liability net.

(1) Innocent Purchaser Defense

CERCLA’s “innocent purchaser” defense arises from the definition of “contractual relationship” contained in Section 101(35) for purposes of a Section 107(b)(3) third-party defense.⁵² This defense is really an exception to an exception. The defense protects a

⁴⁹ Carson Harbor Vill., Ltd. v. Unocal Corp. (“Carson Harbor”) 270 F.3d 863, 876-77 (9th Cir. 2001), cert den, 2002 U.S. LEXIS 2176 (U.S. Apr. 1, 2002).

⁵⁰ *Id.* at 879-80.

⁵¹ *Id.*

⁵² See, e.g., Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., (“Westwood Pharmaceuticals”) 964 F.2d 85 (2d Cir. 1992); United States v. A & N Cleaners & Launderers, Inc., 788 F. Supp. 1317 (S.D.N.Y. 1992).

person from liability for releases from property acquired after the disposal or placement of hazardous substances on the property, if the person used due care with regard to the hazardous substances, and if the person can establish (i) acquisition of the property without knowing, or having any reason to know, that the hazardous substances were there;⁵³ (ii) it is a government entity that acquired the facility involuntarily or through eminent domain;⁵⁴ or (iii) acquisition of the facility by inheritance or bequest.⁵⁵

The recently enacted SBLA amends this defense with respect to the following: (1) it makes clear that the defense applies to easement holders and tenants as well as property owners; (2) it requires that the purchaser establish that it took reasonable steps to stop continuing releases, prevent future releases and prevent or limit any human, environmental or natural resource exposure, consistent with the newly added bona fide prospective purchaser defense; and (3) it further defines what constitutes “all appropriate inquiry” for the purpose of this defense and the bona fide prospective purchaser defense.⁵⁶

⁵³ See Foster v. United States, 922 F. Supp. 642, 1996 U.S. Dist. Lexis 4162, *29 (D. D.C. 1996) (even defendant who meets requirements of innocent purchaser defense, still must establish he satisfied "due care" requirement of CERCLA section 107(b)(3)(a) and "precautions" requirement of CERCLA section 107(b)(3)(b)).

⁵⁴ See, e.g., Hercules v. United States EPA, 938 F.2d 276, 281 (D.C. Cir. 1991) (CERCLA amendments extend innocent landowner defense to government entities that acquire contaminated property involuntarily). See also City of Emeryville v. Elementis Pigments Inc., 2001 U.S. Dist. 4712 (N.D. Cal., March 6, 2001) (a city that acquired contaminated property under its eminent domain authority for redevelopment is not liable for cleanup costs).

⁵⁵ See Snediker Developers L.P. v. Evans, 773 F.Supp. 984, 990 (E.D. Mich. 1991) (person who acquires property by inheritance is entitled to assert innocent landowner defense).

⁵⁶ SBLA, Section 223 (amending CERCLA section 101(35), 42 U.S.C. § 9601(35)). The Act requires EPA to promulgate regulations to define what is required to constitute “all appropriate inquiry” by an innocent landowner (and through incorporation of this definition, a person asserting the bona fide prospective purchaser defense). This will be accomplished through the process of regulatory negotiation, but must take into account the following ten statutory criteria:

- The results of an inquiry by an environmental professional;
- Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility;
- Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land-use records, to determine previous uses and occupancies of the real property since the property was first developed;
- Searches for recorded environmental clean-up liens against the facility that are filed under federal, state, or local law;
- Reviews of federal, state, and local government records, waste disposal records, underground

(...continued)

(2) **Bona Fide Purchaser Defense**

In addition to clarifying the “innocent landowner” defense, the SBLA adds a new defense to CERCLA liability for “bona fide prospective purchasers”.⁵⁷ The Act defines bona fide prospective purchaser as “a person (or a tenant of a person) that acquires ownership of a facility” after enactment of the SBLA, and who: (1) acquires ownership after all disposal of hazardous substances at the facility; (2) made “all appropriate inquiry” into the previous ownership and uses of the facility; (3) provided all legally required notices with regard to discovery or release of hazardous substances at the

(...continued)

storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records concerning contamination at or near the facility;

- Visual inspections of the facility and adjoining properties;
- Specialized knowledge or experience on the part of the defendant;
- The relationship of the purchase price to the value of the property if the property was not contaminated;
- Commonly known or reasonably ascertainable information about the property; and
- The degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination by appropriate investigation.

Until this regulation is finalized, the Act sets two different interim standards for conducting “all appropriate inquiry” that apply depending on the date the property was purchased, which will remain in effect until EPA promulgates final federal standards:

- For, properties purchased before May 31, 1997, the law provides that a court shall consider the following when making a determination with respect to a defendant: specialized knowledge or experience of the defendant, relationship of the purchase price to the value of uncontaminated property, commonly known information about the property, obviousness of contamination, and the ability of the defendant to detect contamination by appropriate detection.
- For properties purchased after May 31, 1997, the law requires the use of procedures developed by the American Society for Testing Materials (ASTM), in particular ASTM's standard E1527-97, or “Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process.” In the final rule “Clarification to Interim Standards and Practices for All Appropriate Inquiry Under CERCLA and Notice of Future Rulemaking Action,” EPA establishes that the current ASTM standard, E1527-00, will also meet the “all appropriate inquiry” requirement for site characterizations and assessments.

See <http://www.epa.gov/swerosps/bf/aai/aaifs.htm>

⁵⁷ SBLA, Section 222 (creating CERCLA section 107(r), 42 U.S.C. § 9607(r)).

facility; (4) exercised “appropriate care with respect to hazardous substances found at the facility”; (5) fully cooperated with and provided access to persons authorized to conduct response actions at the facility; (6) complied with any land use restrictions established in connection with any response action at the facility; (7) complied with all EPA information requests; and (8) is not a PRP or affiliated with a PRP through a familial relationship or any contractual, corporate or financial relationship, other than the relationship that conveyed or financed title to the facility, or by a contract for the sale of goods and services.⁵⁸

A person that falls within the above definition is entitled to a defense to current owner liability under section 107(a)(1) of CERCLA as long as they do not impede the performance of a response action or natural resource restoration.⁵⁹ The bona fide prospective purchaser defense also includes a provision that is intended to capture any financial windfall profits from owners who buy property below market value (and therefore avoid CERCLA liability) but who then benefit from an EPA cleanup at the property and realize a profit on resale. Specifically, that provision mandates that if there are unrecovered response costs incurred by the United States at a facility in which an owner is not liable because of the “bona fide prospective purchaser defense, the United States shall have a lien on the facility for those response costs.⁶⁰ The amount of the lien shall not exceed the increase in fair market value of the property attributable to the response action at the facility at the time of sale or other disposition of the property.

(3) **Secured Creditor Defense**

CERCLA § 101(20)(A) excepts from the definition of “owner or operator” secured creditors who hold “indicia of ownership primarily to protect [a] security interest in [a] vessel or facility.” This “lender liability” exception was the subject of conflicting judicial interpretations until 1996, when Congress resolved the judicial disputes by enacting the Asset Conservation, Lender Liability and Deposit Insurance Protection Act.⁶¹ This legislation relieves lenders from liability if they do not participate in the management or exercise actual control over the operations at a facility from which there has been a release of hazardous substances.

(4) **The Consumer/Useful Product Exception**

The definition of hazardous substance includes all manner of chemicals, including those that cannot easily be characterized as waste. However, material that is a product as

⁵⁸ Id. (creating new CERCLA definition 101(40), 42 U.S.C. § 9601(40)).

⁵⁹ Id. (creating new CERCLA section 107(r), 42 U.S.C. § 9607(r)).

⁶⁰ Id.

⁶¹ Pub. L. No. 104-208 (H.R. §3610), §§2501-05 (September 30, 1996).

opposed to waste, and is in consumer use, may nonetheless fall outside the ambit of CERCLA under the consumer product exception.⁶²

Two separate views presently exist as to the meaning of the consumer product exception. The first is that the consumer product exception applies to all substances that are considered economically useful.⁶³ The exception acquires considerable breadth under this approach as it precludes CERCLA liability in every case that does not involve a waste material.

The second approach purports to rely on the ordinary meaning of the term consumer product, and construes the exception as covering only products used for personal, household, or family consumption. This view permits the imposition of CERCLA liability in cases involving useful, non-waste products, so long as there is no consumer product in consumer use under the ordinary meaning of that phrase. Thus, it does not significantly restrict the scope of CERCLA liability.⁶⁴

The Circuit Courts have only infrequently addressed the issue, and therefore, a resolution of these two views remains to be seen.⁶⁵

⁶² CERCLA § 101(9); that section defines facility broadly to include:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel. (Emphasis added).

⁶³ Uniroyal Chemical v. Deltech Corp., 160 F.3d 238 (5th Cir. 1998). See, also, e.g., Knox v. AC & S, Inc., 690 F. Supp. 752, 756 (S.D. Ind. 1988) (asbestos-containing insulation, sold between businesses, could be considered a consumer product); Electrical Power Bd. of Chattanooga, 716 F. Supp. at 1080 (holding that electrical transformers that leaked dielectric cooling fluid containing polychlorinated biphenyl ("PCBs") are consumer products in consumer use); Vernon Village, 755 F. Supp. at 1150 (holding that contaminated drinking water is a consumer product in consumer use based on the apparent reasoning that water is a useful product).

⁶⁴ See, e.g., United States v. M/V Santa Clara I, 887 F. Supp. 825, 842 (D.S.C. 1995) (holding that consumer product exception not applicable in case where shipping containers carrying barrels of arsenic trioxide were lost from vessel in heavy seas); KN Energy Inc. v. Rockwell Int'l Corp., 840 F. Supp. 95, 99 (D. Colo. 1993) (holding that pipelines sealed with substance containing PCBs were commercial facilities, not consumer products in consumer use); Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1232-34 (E.D. Pa. 1993) (holding that railcars that leaked PCBs while used in commuter train service not consumer products in consumer use); CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc., 769 F. Supp. 432, 438 (D.N.H. 1991) (holding that commercial hotel built with asbestos-containing materials not consumer product in consumer use); see also Nat'l Railroad Passenger Corp. v. New York City Housing Auth., 819 F. Supp. 1271, 1276 (S.D.N.Y. 1993) (support pillars and undersides of building coated with asbestos are not consumer products in consumer use).

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(5) The Petroleum Exclusion

CERCLA exempts "petroleum, including crude oil or any fraction thereof" and various forms of natural gas from the statutory definition of hazardous substance.⁶⁶ Accordingly, cleanup costs for oil contamination are not recoverable under CERCLA. However, courts have sharply limited the application of the petroleum exclusion in such a manner as to deprive waste sludge disposal of favorable treatment under CERCLA.⁶⁷

Moreover, the discharge of oil is a source of liability under statutes other than CERCLA. For example, the Oil Pollution Act assigns liability for removal costs and damages to responsible parties for "discharge of oil, into or upon the navigable waters or adjoining shorelines"⁶⁸

(6) The Pesticide Exclusion

CERCLA affords an extremely narrow exclusion from liability for response costs in connection with the "application of a pesticide product registered under the Federal Insecticide, Fungicide Act."⁶⁹ However, the statute specifically preserves the right to sue for damages and removal or remediation costs under other applicable federal or state law.⁷⁰ Defendants that have sought to rely on this exclusion to escape liability for the

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⁶⁵ See Uniroyal Chem. Co. v. Deltech Corp., 160 F.3d 238, 254 (5th Cir. 1998)(discussing the few Circuit Court decisions)(citations omitted). Several circuit courts have addressed the "usefulness" of products in the context of "arranger" liability under CERCLA § 107(a)(3) and have not reached a uniform resolution. Compare Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160, 164 (2d Cir. 1999)(sale of unused chemicals in their unadulterated form "without additional evidence that the transaction includes an 'arrangement' for the ultimate disposal of a hazardous substance" does not subject person to arranger liability under Section 107(a)(3)) with Carter-Jones Lumber Co. v. Dixie Distrib. Co., 166 F.3d 840, 845 (6th Cir 1999)(lower court not clearly erroneous in determining that sale of transformers was arranging for disposal of a hazardous substance).

⁶⁶ CERCLA § 101(14), 42 U.S.C. § 9601(14), states in relevant part:

The term "hazardous substance" does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance [pursuant to] this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

⁶⁷ See, e.g., Cose v. Getty Oil Co., 4 F.3d 700, 706 (9th Cir. 1993)(discarded crude oil tank bottoms are not "crude oil or a fraction thereof" and thus are not entitled to CERCLA's petroleum exclusion.)

⁶⁸ Oil Pollution Act § 1002(a), 33 U.S.C. § 1702(a).

⁶⁹ CERCLA § 107(i), 42 U.S.C. § 9607(i).

⁷⁰ Id. CERCLA § 107(i), 42 U.S.C. § 9607(i), states in relevant part:

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disposal of pesticides have learned just how narrow it is. For example, in United States v. Louisiana-Pacific Corp.,⁷¹ a district court in California held that spills of a registered pesticide incidental to the application of the chemical are not excluded releases.⁷² Accordingly the defendant was held liable for cleanup costs arising from the ground disposal of sludge from a fungicide-dipping tank used to treat lumber.⁷³

(7) Federally Permitted Releases

Federally permitted releases are exempted from Section 107 and notification requirements,⁷⁴ but it must be noted that a PRP is still liable for "response costs or damages" but "pursuant to existing law in lieu of this section."⁷⁵ CERCLA provides a lengthy statutory definition of what constitutes a federally permitted release, with reference to permits issued under numerous federal statutes.⁷⁶

(8) Recycler Exclusions

(...continued)

Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

⁷¹ United States v. Louisiana-Pacific Corp., 1994 U.S. Dist. Lexis 12303 (E.D. Cal. 1994).

⁷² Id. at *26.

⁷³ Id. at *27.

⁷⁴ CERCLA § 103(a) and (b)(1)-(3), 42 U.S.C. § 9603(a) and (b)(1)-(3).

⁷⁵ United States v. Freter, 31 F.3d 783 (9th Cir. 1994), cert. denied, 513 U.S. 1048 (1994); CERCLA § 107(j), 42 U.S.C. § 9607(j), states:

Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of Title 33.

⁷⁶ CERCLA § 101(10), 42 U.S.C. § 9601(10).

CERCLA also provides certain types of recycled material and recyclers with exclusions from the liability scheme of Section 107. First among these was the recycled oil exclusion in Section 114(c). That Section makes service station dealers who generate or transport recycled oil exempt from liability for hazardous substance releases under Section 107(a)(3) and (4), provided that RCRA's waste management and storage regulations have been met. However, service station owners may still be held liable as owners or operators under Section 107(a)(1) or (2).⁷⁷

Congress also recently enacted the Superfund Recycling Equity Act ("SREA"), which absolves from CERCLA "arranger" and "transporter" liability the sellers of traditional recyclable materials (such as metals, paper, glass, plastic, textiles and rubber).⁷⁸ The SREA applies retroactively (*i.e.*, to acts that occurred before the effective date of the SREA) and retrospectively (*i.e.*, to cases already begun before the SREA's enactment).⁷⁹ The SREA, however, has no effect on concluded cases or on ongoing cases brought by the federal government.⁸⁰

(9) **No Causation Of Response Costs**

In a typical tort case, a plaintiff must first prove that the defendant's conduct was a substantial factor in causing the harm; the defendant may then limit its liability by proving its contribution to the harm. But, as already discussed, CERCLA does not require the Section 107 plaintiff (typically the government) to prove that a specific defendant's waste caused it to incur response costs. CERCLA § 107(a) imposes joint liability without a plaintiff demonstrating that a particular PRPs release of hazardous substances was a "but for cause"—a *sine qua non*—of the incurrence of response costs.⁸¹

⁷⁷ See CERCLA § 114(c)(1).

⁷⁸ See P.L. 106-113 (November 29, 1999)

⁷⁹ See United States v. Mountain Metal Co., 2001 U.S. Dist. LEXIS 4610 (N.D. Ala. April 5, 2001) and Exide Corp. v. Aaron Scrap Metals Inc., 2001 U.S. Dist. LEXIS 4610 (N.D. Ala. April 5, 2001) (holding a plaintiff who filed an action that was consolidated, pre-SREA, with a government suit cannot proceed with that action, as can the United States).

⁸⁰ See Morton Int'l v. A.E. Staley Mfg. Co., 106 F.Supp. 2d 737 (D.C.N.J. 2000); United States v. Atlas Lederer Co., 85 F.Supp. 2d 828, 830 (S.D. Ohio 2000). Courts have applied the recycler exclusion retroactively to cases filed by private parties that were pending at the time of enactment. See Gould, Inc. v. A&M Battery & Tire Serv., 232 F.3d 162 (3d Cir. 2000).

⁸¹ See Boeing Co. v. Cascade Corp. ("Boeing"), 207 F.3d 1177, 1183 (9th Cir. 2000) The Court recites that "courts and scholars have long recognized that there is a limited class of cases in which conduct ought to be treated as a cause of damages even though the conduct was not a *sine qua non*." The Court gives as an "the case of two motorcyclists who pass a horse, one close to each side. The spooked horse gallops out of control and causes injury. Neither motorcyclist's conduct was a *sine qua non* of the injury, because the horse would have been spooked by the other motorcyclist. The rule that (...continued)

Nevertheless, Section 107's express terms make a PRP liable only for a release when that release actually "causes the incurrence of response costs."⁸² Thus, under Alcan II and its progeny, a defendant may still completely escape CERCLA liability if it can prove that its waste, even when mixed with other wastes at the site, did not "cause" the incurrence of response costs. However, causation of response costs in the joint-PRP context is not "but for" causation.⁸³ As the Ninth Circuit recently explained: "where either polluter's conduct would have caused the same response cost to be incurred in the same amount, and the conduct was of substantially equal blameworthiness, the proper construction of the causation requirement in [CERCLA § 107(a)] is that both polluters should be treated as having 'caused' the response costs even though it was not a sine qua non of the response cost."⁸⁴ The Court recognized that such "causal overdetermination of response costs may be less rare in CERCLA cases than in other kinds of cases" because contaminants may end up in a 'mixed plume' in which "the expense of cleanup may be only slightly responsive to quantity."⁸⁵ But this view of causation is consistent with CERCLA's remedial scheme; otherwise a "party that had discharged into a mixed plume could wait for another discharger to incur the costs of investigation, and have a fair chance of leaving the other polluter stuck with the entire bill."⁸⁶

(10) Naturally Occurring Substances

One means by which a PRP can prove that its waste did not "cause the incurrence of response costs" is to demonstrate that the waste it sent to a site had concentrations of hazardous substances below naturally occurring "background levels".⁸⁷ In such a case, the PRP's waste cannot be said to have resulted in any

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has evolved is that, at least where both causes involve comparable blameworthiness, both actors are liable, even though the conduct of either one was not a *sine qua non* of the injury because of the conduct of the other." Given the intent of CERCLA, "[t]here is no reason why a polluter should be insulated from responsibility in a case where a traditional tortfeasor would not be."

⁸² Id. at 1183.

⁸³ Id. at 1184-85.

⁸⁴ Id. at 1185.

⁸⁵ Id.

⁸⁶ Id.; see also Alcan II, 964 F.2d at 264 ("the fact that a single generator's waste would not in itself justify a response is irrelevant in the multi-generator context, as this would permit a generator to escape liability where the amount of harm it engendered to the environment was minimal, though it was significant when added to other generators' waste.")

⁸⁷ Alcan II, 990 F.2d at 722 (PRP could escape all liability for response costs under CERCLA "where its pollutants did not contribute more than background levels of contamination and also cannot concentrate".)

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contamination that could “cause” the incurrence of response costs.⁸⁸ But where a defendant’s waste contains hazardous substances that are not “naturally occurring”, and so have no naturally occurring background levels, this defense to liability is unlikely to meet with success.⁸⁹

(11) Divisibility Of Harm

A Section 107 defendant who cannot escape liability altogether using one of the above defenses, can still limit its liability by showing that the harm at a facility is “divisible” -- that is, that the defendant contributed, at most, to a divisible portion of the harm and that there is a reasonable basis to apportion liability for this harm.⁹⁰ As discussed above, after the Section 107 plaintiff makes its *prima facie* case, the burden shifts to the defendants to establish that joint and several liability under Section 107 should not apply by proving that “the harm [at a site] is divisible and that the damages are capable of some reasonable apportionment”.⁹¹ A PRP that proves this affirmative defense will “be held liable only for the response costs relating to that portion of the harm to which it contributed.”⁹²

This could occur, for example, in an instance where a PRP disposed of a particular type of waste that no other PRP disposed of and that did not interact with any other waste, or where a particular PRP’s waste was only disposed in a particular part of a site and did not migrate. However, “given the nature of hazardous waste disposal, rarely if ever will a PRP be able to demonstrate divisibility of harm....”⁹³

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⁸⁸ See Acushnet Co. v. Mohasco Corp. (“Acushnet”), 191 F.3d 69, 77 n. 7 (1st Cir. 1999)(“It might...make sense to say that...a generator or transporter of waste did not cause a plaintiff to incur remediation costs when that person did not actually cause any alleged contamination....”).

⁸⁹ See United States v. Alcan Aluminum Corp., (“Alcan III”) 315 F. 3d 179, 186 (2nd Cir. 2003) (“Because Alcan’s emulsion was contaminated with PCB’s, which are man-made substances without natural background levels, Alcan cannot escape liability under the special exception this court articulated.”)

⁹⁰ See, e.g., Alcan I, 964 F.2d at 270-71 (PRP is entitled to establish “that the harm [at a site] is divisible” and that there is “a reasonable basis for apportionment”; if it does so it “should be held liable only for the response costs relating to that portion of the harm to which it contributed”).

⁹¹ Id.

⁹² Id.

⁹³ Centerior, 153 F.3d at 348; see Alcan III, 315 F. 3d at 187; U.S. v. Alcan Aluminum Corp. (“Alcan Trial”), 97 F.Supp. 2d 248, 271 (although Alcan’s “emulsion alone may have caused a specific harm and the waste deposited by other PRPs may have caused specific harms, the extent of the release at [the facility] is due to the combination of Alcan’s waste with other wastes at the site. Accordingly, Alcan failed to prove that the harm at PAS is divisible”) (emphasis added).

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(12) Reasonable Basis For Apportionment

Even where a defendant fails to prove that it did not “cause” the incurrence of clean-up costs, or that it contributed only to a “divisible” segment of those costs, a defendant can still limit its liability “by providing a reasonable basis for apportioning liability.”⁹⁴ While a court's findings that a defendant's waste contributed to an indivisible harm at a facility may “limit the potential ‘reasonable basis’ of apportionment of harm,” it does not eliminate it.⁹⁵ Though certainly rare, at least one defendant in such circumstances has successfully met this burden.⁹⁶

(13) Necessary Costs Of Response

The costs a plaintiff is seeking to recoup under CERCLA must be “necessary costs of response”-- e.g. costs incurred to address a threat to human health or the environment⁹⁷; plaintiff's incurrence of costs that do not qualify as “response costs,” e.g. economic damages;⁹⁸ certain types of government “oversight costs”⁹⁹ or response costs that are inconsistent with the NCP (e.g., unnecessary or grossly unreasonable). Moreover, unlike the EPA or a state government, a private party must prove its actions were consistent with the National Consistency Plan (“NCP”).¹⁰⁰ One of the troubling

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⁹⁴ Alcan II, 990 F.2d at 722.

⁹⁵ Alcan Trial, 97 F.Supp. 2d at 271 (although the court's findings that Alcan's “emulsion contained PCBs and nickel and facilitated the transport of hazardous substances limit[ed] the potential ‘reasonable basis’ of apportionment of harm,” the Court allowed Alcan to attempt to demonstrate (ultimately without success) that such a “reasonable basis” for apportionment existed).

⁹⁶ See Bell Petroleum, 3 F.3d at 902-04 (where chromium entered the groundwater as the result of similar operations by three parties who operated at mutually exclusive times, court found that it was reasonable to assume that the respective harm done by each of the defendants was proportionate to the volume of chromium-contaminated water each discharged into the environment, and rejected lower court holding of joint liability against one company).

⁹⁷ Southfund Partners III v. Sears, Roebuck & Co., 57 F.Supp. 2d 1369 (N.D. Ga. 1999).

⁹⁸ See Artesian Water, 659 F. Supp. at 1285-86.

⁹⁹ See Rohm & Haas, 2 F.3d at 1273-78.

¹⁰⁰ Cf. United States v. Hardage, 982 F.2d 1436 (10th Cir. 1992). “[P]rivate party response action[s] will be considered ‘consistent with the NCP’ if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements...and results in a CERCLA-quality clean-up.” 40 C.F.R. §300.700(c)(3)(i). Consequently, a private party's response action will not be considered inconsistent with the NCP “based on immaterial or insubstantial deviations” from these requirements. §300.700(c)(4).

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issues for a private litigant is the NCP requirement for public participation in the remedial development and selection process.¹⁰¹

(14) **Statute of Limitations**

CERCLA § 113(g) contains three distinct statutes of limitation that apply to actions to recover response costs under Section 107 and under Section 113.¹⁰² The first of these, Section 113(g)(2)(A), provides that an action under Section 107 to recover the costs of a “removal action” must be commenced within three years “after completion of the removal action [or] within 6 years after the determination to grant a waiver...” Next, Section 113(g)(2)(B) provides that an action to recover the costs of a remedial action must be commenced within six years “after the initiation of physical on-site construction of the remedial action...”¹⁰³ Whether an action is a “removal” or “remedial” action will therefore have a significant effect on when the statute of limitations runs.¹⁰⁴

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To demonstrate substantial compliance with the NCP, the party must abide by the regulations that outline requirements for response action procedures and public comment concerning the selection of the response action. Public Service Co. of Colorado v. Gates Rubber Co., 22 F.Supp. 2d 1180, 1187 (D.Colo. 1997) (citations omitted.)

¹⁰¹ Pursuant to Section 300.700(c)(6) of the NCP, “[p]rivate parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action...” The EPA imposes this requirement on landowners who voluntarily undertake a cleanup “to ensure that these cleanups—which are performed without government supervision—are carried out in an environmentally sound manner.” Bedford Affiliates v. Sills, 156 F.3d 416, 428 (2nd Cir. 1998) (quoting 55 Fed. Reg. At 8795 (emphasis added)). Courts are divided as to whether state government participation alone may satisfy the CERCLA public participation requirement. American Color & Chemical Corp. v. Tenneco Polymers, 918 F.Supp. 945, 957 (D.S.C. 1995). See also, Bedford Affiliates, 156 F.3d at 428 (concluding public participation requirement is satisfied if “a state environmental agency is substantially involved in the formulation and execution of a preliminary remediation plan.”); see also, Carson Harbor Village v. Unocal Corp., 287 F.Supp. 2d 1118, 1162-72 (C.D.Cal.2003) (state government participation only satisfies CERCLA’s public participation requirement if the state agency (i) follows procedures consistent with the NCP, and (ii) solicits or provides an opportunity for public comment) but see Union Pacific Railroad Co., v. Reilly Industries Inc., 215 F.3d 830 (8th Cir. 2000) (holding a city’s involvement in devising a plan to clean up a contaminated site was not an adequate substitute for compliance with NCP requirements where there was insufficient opportunity for public comment).

¹⁰² See CERCLA § 113(g)(2)(A) and (B), and §113(g)(3). CERCLA also provides a statute of limitations for the government to seek recovery of natural resource damages, within 3 years after the date when the loss was discovered and connected with the release in question. CERCLA § 113(g)(1)(A).

¹⁰³ The 9th Circuit recently confronted the issue of when the statute of limitations begins to run in a remediation action. California v. Neville Chemical Company, 358 F. 3d 661 (9th Cir.2004) (Beginning clean-up before the remediation plan is approved will not disturb the statute of limitations, which only begins to run upon final government approval of the remediation plan).

¹⁰⁴ Removal actions are short-term, immediate response actions, and are typically limited to situations which pass the “threshold” for removal actions as determined by an examination of the factors in 40 C.F.R. § 300.65(b)(2). Actions taken in a proper removal action are limited in scope to address the

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Finally, Section 113(g)(3) requires that an action for contribution must be commenced within three years after the date of judgment for recovery of response costs or damages (or within three years after the date of an administrative order or settlement).

(15) De-Listing From The NPL

Because the EPA does not bring enforcement actions against non-NPL sites, the deletion or “de-listing” of a site from the NPL effectively insulates a party from EPA enforcement actions. A site may be de-listed (or prevented from being listed in the first instance) when no further response is appropriate, i.e. if all the appropriate required response actions have already been implemented or if a remedial investigation shows “there is no significant threat to public health or the environment from the release.”¹⁰⁵

EPA has established procedures for de-listing sites from the NPL. These include approving a “close-out report” establishing that all appropriate response actions have been taken or that no action is required; obtaining concurrence from the State; and going through a notice and comment process. Since 1999, the EPA has streamlined the notice and comment process, publishing both a Notice of Intention to Delete and the Notice of Direct Final Action to Delete on the same date in the Federal Register. Subsequently, the deletion becomes effective without further EPA action unless the EPA receives “significant adverse or critical comments” within thirty days of publication of the Notice.¹⁰⁶

Court actions can also result in the de-listing of a site from the NPL. In Tex Tin Corp. v. United States EPA, the Court ordered EPA to de-list the PRP’s facility from the NPL because it found that EPA had repeatedly failed to support with specific scientific evidence its conclusory statement that a tin slag pile was reasonably likely to release arsenic-laden dust.¹⁰⁷ (Id. at 355-56.)

(16) Voluntary Cleanups

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immediate threat, and include those designed to abate, minimize, stabilize mitigate, or eliminate the release or threat of release. 40 C.F.R. § 300.65(b)(1). In contrast, remedial actions are “those responses . . . consistent with permanent remedy to prevent or mitigate the migration of a release of hazardous substances into the environment.” 40 C.F.R. § 300.68(a). Of course, to make matters more confusing, “a cleanup operation can be both a removal and a remedial action. It is clear from the notes accompanying the promulgation of the [NCP regulations] that remedial and removal actions are not mutually exclusive.” Massachusetts v. Blackstone Valley Elec. Co., 867 F. Supp. 78, 82 (D. Mass. 1994).

¹⁰⁵ http://www.epa.gov/superfund/programs/npl_hrs/nploff.htm.

¹⁰⁶ Id.

¹⁰⁷ 922 F.2d 353, 355-56 (D.C. Cir. 1993).

Voluntary cleanups have increasingly become a means by which PRPs and prospective purchaser clean up contaminated properties that have not yet become the subject of governmental enforcement, and many states now have EPA-approved voluntary cleanup programs.¹⁰⁸ These voluntary cleanup programs—whether or not approved under a Memorandum of Agreement—may offer Superfund “contribution protection” that satisfies the requirements of Section 113(f) (discussed in § 2(e), below) as well as protection against state and common law causes of action for damages related to hazardous substances.¹⁰⁹

The decision of the United States Supreme Court in Cooper Industries, Inc. v. Aviall Services, Inc. (discussed in § 2(a)(2), above) raises several strategic issues for any PRP involved in or contemplating a voluntary cleanup—i.e., a cleanup where the government has not yet brought any administrative or judicial action. If such a PRP incurs voluntary CERCLA response costs (without first being sued by, or entering into a settlement with, the federal or state government) that party will be precluded from recovering contribution costs from other PRPs under §113(f)(1).

In deciding whether a private party is best served by not incurring response costs until after being sued by or settling with the government, several considerations come into play. By way of example, settlement will likely render the party responsible for certain government-related oversight costs (such as reimbursing an agency for its employment of an environmental monitor to oversee the remediation), whereas such costs may not have been incurred via alternative remedial scenarios. In addition, to the extent such an issue is within a PRP’s control, the cost of any remediation could be impacted by which governmental entity commences the enforcement action against, or signs the order on consent with, the PRP.

Accordingly, Aviall should be a factor in a PRP’s evaluation of whether to participate in a voluntary cleanup program. Aviall may preclude a PRP who enters into a voluntary cleanup program (such as New York State’s new Brownfield Cleanup Program) from bringing a § 113(f)(1) contribution action to recover costs expended for the cleanup. The benefits and disadvantages of entering such a program will be case specific: while the potential recovery from other PRPs may be so significant that a party opts not to voluntarily clean up a site in order to preserve its §113(f)(1) rights, another private party might elect, notwithstanding Aviall, to enter a voluntary cleanup program if any potential tax credits and other incentives associated with that program would

¹⁰⁸ <http://www.epa.gov/brownfields/html-doc/statemoa.htm>

¹⁰⁹ See, e.g., New York’s “Brownfields Cleanup Act”, NY Environmental Conservation Law Article 14 (the “BCA”). The BCA provides that upon completion of a cleanup in accordance with the BCA’s provisions, a non-PRP “Volunteer” or a PRP “Participant” shall be fully released from all State liability for hazardous substance cleanup costs, and shall also receive federal Superfund “contribution protection” as a settlor with the State under § 113(f)(2). See ECL § 27-1421.

outweigh the potential risk of losing its CERCLA contribution rights (especially since common-law contribution claims are still preserved).

d. Equitable Allocation Under Section 113

Unlike a Section 107 PRP defendant, a Section 113 PRP defendant has no burden of proving that the harm at a site is divisible. Rather, under Section 113, even if a PRP defendant cannot prove a reasonable basis for "apportioning" harm (within the meaning of Alcan or Bell Petroleum) as a defense to liability, it may still escape with a zero share of costs if the plaintiff PRP cannot establish a reasonable basis for allocating cleanup costs.¹¹⁰ This is because, in a contribution action under CERCLA, a defendant cannot be "allocated" more than its "equitable share" of liability for the harm at a site.¹¹¹

CERCLA Section 113(f)(1) provides that "in resolving contribution claims, the court may allocate response costs among the liable parties using such equitable factors as the court determines are appropriate."¹¹² However, Section 113 provides courts and PRPs with little practical guidance on the criteria to use to reach a just result.¹¹³

The most common allocation criteria are the so-called "Gore Factors"--six factors contained in an amendment to CERCLA proposed by then-Congressman Gore, but not incorporated into the final text.¹¹⁴ These six "Gore Factors" are:

- (1) the ability of the parties to demonstrate that their contribution to

¹¹⁰ See, e.g., Acushnet, 191 F.3d at 81 (apportionment of a zero share to a Section 113 PRP was not clearly erroneous where plaintiff PRP's own testimony demonstrated that hazardous substances attributed to defendant PRP "would not persist in the environment."). See also Foster v. United States, 130 F.Supp.2d 68 (D.D.C. 2001) (holding although owner was denied innocent landowner status he was nevertheless entitled to 100 percent contribution for response costs because he received no windfall by paying full market price for the property and incurred unrecoverable investigation costs).

¹¹¹ See David Montgomery Moore, "The Divisibility of Harm Defense to Joint and Several Liability Under CERCLA," 23 *Env'tl. L. Rep., News & Analysis*, No. 9 at 10529, 10532 (stressing the importance of distinguishing the apportionment of harm prong of a Section 107 divisibility defense from the allocation of response costs in a Section 113 contribution action); see also United States v. Western Processing Co. ("Western Processing"), 734 F. Supp. 930, 938 (W.D. Wash. 1990) ("the Court's discretion in allocating damages among the defendants during the contribution phase does not affect the defendant's liability").

¹¹² See Bedford, 156 F.3d at 429; United States v. R.W. Meyer, Inc. ("R.W. Meyer"), 932 F.2d 568, 572-73 (6th Cir. 1991); Environmental Transportation Systems v. Ensco, Inc. ("Ensco"), 969 F.2d 503, 509 (7th Cir. 1992).

¹¹³ See Laurie Burt and Robert S. Sanoff, Allocating Contribution Shares in Superfund Cases, 20 *Chem. Waste Litig. Rep.* 1046, 1052-53 (1989).

¹¹⁴ See H.R. Rep. No. 253 (II), 99th Cong., 1st Sess. 1, 19 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 3042.

a discharge, release or disposal of a hazardous waste can be distinguished;

- (2) the amount of the hazardous waste involved;
- (3) the degree of toxicity of the hazardous waste involved;
- (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (6) the degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment.¹¹⁵

While the Gore Factors provide a general framework for allocation, it has been often repeated that "[i]n any given [allocation] case, a court may consider several factors, a few factors, or only one determining factor...depending on the totality of circumstances presented to the court."¹¹⁶ Indeed, courts have used an array of factors, in addition to (or instead of) any Gore Factors that they have found to be relevant.¹¹⁷

For example, in Atlas Minerals, the court focused on two of the most frequently used Gore Factors -- waste volume and toxicity -- in its "overall assessment of equitable factors" for allocating liability among PRPs at a co-disposal (i.e., mixed municipal solid waste and industrial waste) landfill.¹¹⁸ However, the court found that the Gore Factors were not an

¹¹⁵ See Enesco, 969 F.2d at 507.

¹¹⁶ Enesco, 969 F.2d at 509; United States v. Consolidated Coal Co. ("Consolidated Coal"), 345 F.3d 409, 413-14 (6th Cir. 2003); Gould, Inc. v. A&M Battery & Tire Service, 1997 U.S. Dist. LEXIS 15728, *48 (M.D. Pa. 1997); see also Butler, Schneider, Hall and Burton, Allocating Superfund Costs: Cleaning Up The Controversy, 23 Env'tl. L. Rep. 10133, 10135 (1993) ("Butler") ("[m]any courts have recognized that, despite the Gore factors, they may consider any factor they deem to be in the interests of justice").

¹¹⁷ See, e.g., Boeing, 50 ERC 1327 ("The trial Court is...not limited to the Gore factors"); Colorado & Eastern R.R. Co., 50 F.3d at 1534 (causation); Enesco, 969 F.2d at 509 (relative fault of parties); R.W. Meyer, 932 F.2d at 572-73 (same); Atlas Minerals, 41 Env't Rep. Cas. (BNA) at 1479, 1496-97 ("waste strength" scoring system); CPC Int'l, Inc. v. Aerojet-General Corp, 777 F. Supp. 549 (W.D. Mich. 1991), rev'd on other grounds sub nom. United States v. Cordova Chemical Co., 59 F.3d 584 (6th Cir. 1995) (parties' degree of involvement in waste disposal practices); Weyerhaeuser v. Koppers Co. ("Weyerhaeuser"), 771 F. Supp. 1420, 1426 (D. Md. 1991) (court focused on the relative benefits parties received from their knowledge of, or acquiescence in, contaminating activities).

¹¹⁸ 41 Env't Rep. Cas. (BNA) at 1479.

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"exhaustive list of the criteria" which it could consider, and because of the complexities of the site contamination, adopted a hybrid approach. First, the court divided the PRPs into two classes: those with high waste volume (the "volume PRPs") and those with high waste toxicity (the "toxicity PRPs"). Next, the court divided response costs 50/50 between the two classes. Finally, the court applied a "waste strength score" to each PRP's volume and to each PRP's toxicity, in order to arrive at a "fair" allocation.¹¹⁹

Using a similar analysis, the court in Goodrich v. Town of Middlebury rejected the report and recommendations of a Fed R. Civ. P. 53(e) Special Master who had allocated a "zero share" to a group of municipal PRPs who disposed of municipal solid waste ("MSW") at two landfills.¹²⁰ The court found that the sheer volume of MSW disposed by these defendants, which undeniably contained some hazardous substances, led to a "concentration of the Municipal Defendants' MSW of 0.1 percent to 0.4 percent."¹²¹ The court then applied many of the Gore factors in arriving at its own allocation, including the total volume of municipal versus non-municipal PRPs waste, the amount of hazardous substances that waste contained; its form (liquid or solid); its "releaseability"; and its mobility. To determine the Municipal Defendants' allocable share, the court combined the total volume of waste deposited by the municipal and non-municipal PRPs at the respective landfills; the volume of MSW that each municipality dumped; and a toxicity factor for each non-municipal PRP's "liquid and industrial waste" as contrasted with their, and each municipal PRP's, MSW. Applying this formula, each municipality was allocated a share ranging from 0.27 to 6.51 percent.¹²²

However, a court need not make a technical analysis in determining an equitable allocation. In R.W. Meyer, the lower court allocated 2/3 of the clean-up costs at a site to generators and 1/3 to the site owner primarily because the owner neither assisted nor cooperated with EPA during its site investigation and remediation.¹²³ The Sixth Circuit affirmed the lower court's allocation, holding that it "quite properly considered...not only the [owner's] contribution to the toxic slough...in a technical causative sense, but also in its moral contribution as the owner of the site."¹²⁴ In other words, in addition to the traditional Gore Factors, the court considered the relative "state of mind of the parties...to balance the

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¹¹⁹ Id.

¹²⁰ Goodrich Corp. v. Town of Middlebury ("Middlebury"), 311 F.3d 154 (2d Cir. 2002).

¹²¹ Id. at 166.

¹²² Id. 166-67.

¹²³ 932 F.2d at 571-73.

¹²⁴ Id. at 573.

equities in the totality of the circumstances."¹²⁵

In the years since R.W. Meyer, several cases have picked up on this theme, considering PRPs' level of cooperation with the government, truthfulness in answering requests for information, and other general "culpability" factors when determining a reasonable cost allocation among parties. For instance, in Consolidated Coal,¹²⁶ the Sixth Circuit affirmed the lower court's finding that the culpability factor provided "significant guidance" in its equitable allocation of response costs, though it also considered the amount of waste contributed by each PRP and their cooperation with the government.¹²⁷

Using a culpability analysis, the trial court determined that the industrial generators and transporters were by far the most culpable of any group of PRPs, and were liable for 60% of past and future response costs.¹²⁸ The owners and operators of the landfill site were culpable to a somewhat lesser extent and were allocated 25% of the past and future response costs.¹²⁹ The court found that the sole generator of "Gob"¹³⁰ had somewhat lower culpability, allocating 10% of response costs to it.¹³¹ The remaining generators and transporters were the least culpable, and were allocated 5% of the past and future response costs.¹³²

In addition to allocating liability among groups primarily by levels of culpability, the Coal Trial court also allocated response costs to a third-party generator defendant that totaled twice its percentage contribution by weight due to a "persistent, pervasive and unjustified" lack of cooperation.¹³³ This included: failing to cooperate in any phase

¹²⁵ Id. at 572-73.

¹²⁶ 345 F. 3d at 415

¹²⁷ 184 F.Supp.2d 723, 745 (S.D. Ohio 2002); see also Middlebury, 311 F.3d at 166. (in rejecting Special Masters "zero share" allocation recommendation to municipal PRPs, the lower court was "impressed by each [non-municipal PRP's] decision to enter into [] Consent Decrees" with the EPA, and "to remediate their respective landfills". The lower court "believed that their cooperation entitled them 'to some benefit of the doubt as to the equitable factors and factual uncertainty in allocating response costs'").

¹²⁸ Id. at 746.

¹²⁹ Id. at 729.

¹³⁰ "Gob" is waste generated by a coal preparation plant. Id. at 747.

¹³¹ Id. at 749.

¹³² Id.

¹³³ Id. at 752.

of the CERCLA process; failing to provide complete and accurate information to the government; and refusing to participate in clean-up negotiations.¹³⁴

By contrast, the court in Allied Signal, Inc. v. Amcast Int'l Corp.,¹³⁵ allocated response costs based on the parties' percentage contribution of contaminants to the site, finding that the circumstances of the case did not merit consideration of cooperation with the government (the sixth Gore Factor) because the court could not find that the defendant knowingly misled any regulatory agency about the contents of its waste.¹³⁶

These cases demonstrate the flexibility afforded courts in allocating response costs among PRPs. Indeed, CERCLA's authorization allowing district courts to consider any "equitable factors" in allocating response costs is so broad that it permits a district court to make a liability determination against a PRP without obligating it to allocate any response costs to that PRP. This is precisely what occurred in PMC, Inc. v. Sherwin-Williams Co.¹³⁷

In that case, the Seventh Circuit held that the district court did not abuse its discretion in declining to allocate response costs to a PRP who admitted to dumping toxic wastes. The Court explained that even if a PRP is liable within the meaning of CERCLA § 107, where its "spills may have been too inconsequential to affect the cost of cleaning up significantly... a zero allocation [to the PRP] would be appropriate."¹³⁸ In essence, the court looked to whether the PRP's release of hazardous material was so inconsequential compared to that of other polluters that it could not significantly affect cleanup costs.

The Sixth Circuit followed this same course in upholding a district court decision to allocate a zero share to a company that admittedly released some PCBs into the heavily PCB-contaminated Kalamazoo River.¹³⁹ The district court found that the PRP, Rockwell, "had likely released less than 20 pounds of PCBs into the Kalamazoo River. In contrast, the district court determined that the [other PRPs] had released several hundred thousand pounds of PCBs into the River."¹⁴⁰ Under these circumstances, the Sixth Circuit held, the district court did not abuse its discretion in allocating a zero share of cleanup costs to Rockwell because, in comparison to the other responsible parties' release of "vast

¹³⁴ Id. at 749-52.

¹³⁵ 177 F.Supp.2d 713 (S.D. Ohio 2001).

¹³⁶ See id. at 754-56.

¹³⁷ 151 F.3d 610 (7th Cir. 1998).

¹³⁸ Id. at 616.

¹³⁹ Kalamazoo River Study Group v. Rockwell Int'l Corp., 274 F.3d 1043 (6th Cir. 2001).

¹⁴⁰ Id. at 1050.

quantities” of hazardous material, Rockwell’s release “will have essentially no effect on the as-yet-undetermined clean-up costs.”¹⁴¹ The district court’s determination not to weigh the cooperation factor in favor of the plaintiff, because it found a lack of full cooperation by both parties, was also not in error.¹⁴²

Following the broad statutory language of Section 113(f)(1), the Ninth Circuit, too, recognizes that CERCLA requires that district courts be given wide latitude when allocating response costs among PRPs. Accordingly, in Western Properties Svc. Corp. v. Shell Oil Co.,¹⁴³ the Court held that while laches is not a defense to liability under § 107(a), “delay may be relevant to the extent that the district court considers it to be an appropriate equitable factor.”¹⁴⁴ In remanding the case to the district court for CERCLA allocation proceedings, the Ninth Circuit observed that the lower court may, if it determines it appropriate, consider the plaintiff’s (or its predecessor’s) delay in bringing the suit unreasonable and, if so, whether and to what extent such delay prejudiced the PRPs’ ability to defend themselves.¹⁴⁵

In sum, these cases show that no one factor or set of factors is appropriate in determining an equitable allocation of liability at every site. While some courts have attempted to develop mathematical formulas for allocation, many others have moved away from precise, causative, and scientific allocations toward relative culpability or benefit based allocations that “feel right.”¹⁴⁶

e. Contribution Protection

Equitable allocations under Section 113(f)(1) become more complicated when PRP plaintiffs have already settled with the government or other PRPs. In such circumstances, courts must decide how to account for such settlements in making their allocations. Prior to 1986, the common law of CERCLA had drawn on two different Uniform Rule approaches in determining the effect of a settlement in calculating the amount due from non-settling PRPs. Under the Uniform Contribution Among Tortfeasors Act (“UCATA”), or “pro tanto” approach, the liability of non-settling PRPs is reduced only by the settlement amount. Under the Uniform Comparative Fault Act (“UCFA”) approach, the liability of non-settling PRPs is reduced by the amount of the

¹⁴¹ Id. at 1048.

¹⁴² Id. at 1052.

¹⁴³ 358 F.3d 678, 693 (9th Cir. 2004).

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ See Butler, 23 *Env'tl. L. Rep.* at 10134, 10137.

settling party's proportionate or "pro rata" share.

The choice among these two approaches produced considerable debate among the courts, since it determined whether the settling PRP plaintiffs (under the pro rata approach) or non-settling PRP defendants (under the pro tanto approach) would bear the risk (and pay the difference) in the event that the settlement amount was different than the settlor's fair share.

Congress partly resolved this debate when it enacted CERCLA Section 113(f)(2), which provides that:

[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 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.¹⁴⁷

Section 113(f)(2) thus completely immunizes parties settling with the government from any further liability for contribution. Section 113(f)(2) also explicitly adopts to pro tanto approach to settlement by requiring the court to subtract from the liability of non-settlers only the amount of the settlement -- not the pro rata share attributable to the settling party.

By adopting the pro tanto approach together with contribution protection, Congress hoped to significantly encourage PRPs to settle with the government. Indeed, Section 113(f)(2) can be a substantial benefit to PRPs that settle with the government for less than their proportionate share -- and a corresponding detriment to their non-settling counterparts.

However, Section 113(f)(2) did not completely resolve the debate between the pro rata and pro tanto approaches because Section 113(f)(2) applies only to settlements with the government--not with other PRPs.

Some courts, when dealing with private party settlements, have adhered to the UCFA/pro rata approach and have reduced the recoverable amount by the settling parties' equitable share.¹⁴⁸ These courts have reasoned that section 113(f)(1) requires

¹⁴⁷ Private parties should insure that settlement is with the EPA or a State since courts do not recognize settlements with municipalities as being covered under the CERCLA Section 113(f)(2) immunization provision. See Detroit v. Simon, 247 F.3d 619 (6th Cir. 2001) (the court refused to apply CERCLA's broader contribution protection standard for a state or federal settlement, reasoning that the city does not fall under the definition of state).

¹⁴⁸ See, e.g., Comerica Bank-Detroit v. Allen Industries, Inc., 769 F. Supp. 1408, 1414-15 (E.D. Mich. 1991); Lyncott Corp. v. Chemical Waste Management, Inc. ("Lyncott"), 690 F. Supp. 1409, 1416-19 (E.D. Pa.

(...continued)

courts to consider “equitable factors” and so dictates application of the pro rata approach in actions between private parties.¹⁴⁹

Other courts, however, have focused on CERCLA’s goal of promoting early settlement, and have applied the pro tanto approach of Section 113(f)(2) to private party settlements.¹⁵⁰

An alternative approach to the two Uniform approaches is a "hybrid" approach, in which recovery would be reduced by the greater of the settlor's equitable share or the settlement amount.¹⁵¹ This approach may appeal to non-settling PRPs because it combines the best of the UCFA and the UCATA approaches. Under a hybrid approach, a non-settlor will in no event be responsible for more than its equitable share. If the settlement amount is less than the amount of the settling party's equitable share, the non-settlers will pay their equitable share. And in the event that the settlement amount is greater than the settling party's equitable share, the non-settlers will in effect receive a "discount" and only pay the amount due the plaintiff. Thus under this approach, not only is the risk of a low settlement amount placed on the plaintiff, but the plaintiff is prevented from excessive recovery. Moreover, 42 U.S.C. §9614(b) would seem to mandate this result as it provides a party that receives compensation under CERCLA is “precluded from recovering compensation for the same removal costs or damages or claims” pursuant to other state or federal law. Boeing, 50 ERC 1329.

Regardless of the methodology that is used to determine non-settlers' liability, it is clear that CERCLA's contribution protection provisions create a strong incentive to settle (with the government or with private parties). Contribution protection is a "double-whammy" for non-settling PRPs: they can be sued by settling parties who paid more than their fair share, and they can be sued by the government under §107 to "jointly and severally" account for any difference in the event that the settling parties paid less than their fair share.

f. The Orphan Share Problem

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1988); Western Processing, *supra*; Edward Hines Lumber Co. v. Vulcan Materials Co., 1987 U.S. Dist. Lexis 11961, *aff'd*, 861 F. 2d 155 (7th Cir. 1988) (N.D. Ill. 1987).

¹⁴⁹ State of New York v. Solvent Chemical Co., Inc., (“Solvent Chemical”) 984 F. Supp. 160,168 (S.D.N.Y. 1997).

¹⁵⁰ See, e.g., Allied Corp. v. Frola, 730 F. Supp. 626, 638 (D.N.J. 1990) (applying pro tanto approach in private party settlement). See also In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1026-27 n.10 (D. Mass. 1989) (noting inconsistency of cases applying UCFA after enactment of CERCLA §113(f)(2)).

¹⁵¹ Such an approach has been adopted in New York State Law. See N.Y. General Obligations Law §15-108(a).

Perhaps the most difficult allocation issue arises when PRPs who are held jointly and severally liable to the government in a Section 107 action are left having to shoulder "orphan shares"-- i.e. the share of response costs apportioned to insolvent or defunct parties who have no ability to pay and who are not otherwise affiliated with any PRP at the site.¹⁵² At least one Circuit Court required findings that "the absent parties (orphan shares) were insolvent, or otherwise judgment proof."¹⁵³ The determination of who ultimately absorbs liability for orphan shares can have significant consequences for PRPs, since the unattributable amount of liability for cleanup costs at any given Superfund site can be quite substantial.

Most courts that have directly addressed the issue of orphan share liability in Section 113 contribution actions have held that "notions of fairness and common sense" require that any orphan share amount should be reallocated among all liable PRPs, "without limitation to some subset of liable parties."¹⁵⁴ However, not all courts have followed this course.

In Gould, Inc. v. A & M Battery and Tire Services,¹⁵⁵ the court held that defendant-PRPs could not be responsible for any part of the orphan shares at the site, and that the Section 113 plaintiff would be responsible for the entire amount. The court reasoned that "[s]ince liability under a §113 contribution action is several, Defendants are only liable for their share of the harm caused."¹⁵⁶ The court rejected plaintiff's argument that it is inequitable to hold plaintiff solely accountable for the orphan shares, and instead found that "it would be inequitable for us to hold Defendants liable for any harm related to the 'orphan shares' when this harm was clearly caused by entities other than Defendants."¹⁵⁷

However, the Court in Kramer II found that holdings like these "conflate[] the

¹⁵² See EPA Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time-Critical Removals. See also Charter Township of Oshtemo v. American Cyanamid Co. ("Charter Township"), 898 F. Supp. 506, 508 (W.D. Mich. 1995) (quoting City and County of Denver v. Adolph Coors Co., 829 F. Supp. 340, 343 (D. Colo. 1993)).

¹⁵³ Boeing Co. v. North West Steel Rolling Mills, 2004 WL 540706, 3 (9th Cir.2004)

¹⁵⁴ United States v. Kramer, 953 F. Supp. 592, 598 (D.N.J. 1997) ("Kramer II") (holding that Section 113(f) does not preclude a court from apportioning the orphan share between primary defendant-PRPs and third-party defendant-PRPs); see also Town of New Windsor v. Tesa Tuck, Inc., 919 F. Supp. 662, 681; General Electric Co. v. Buzby Bros. Materials Corp., Civ. No. 87-4263, slip op. at p.5 (D.N.J. August 12, 1996) (citing Caldwell Trucking PRP Group v. Spaulding Composites Co., 1996 U.S. Dist. Lexis 8994 (D.N.J. 1996)); City of Fresno v. NL Industries, 25 Env'tl. L. Rep. 21465 (E.D. Cal. 1995).

¹⁵⁵ 901 F. Supp. 906 (M.D. Pa. 1995).

¹⁵⁶ Id. at 908, 913.

¹⁵⁷ Id.

concept of equitable apportionment of responsibility among PRPs in establishing each party's share of liability, with the concept that a judgment against a party which is only 'severally' liable limits that party's ultimate liability to the amount of its own judgment."¹⁵⁸ Section 113(f)(1) permits a court to consider any appropriate "equitable factors" in arriving at the appropriate liability of a severally liable party, including assignment of the orphan share.¹⁵⁹ This does not convert "several" liability into "joint and several" liability because, once the court's "equitable apportionment" is made, "the severally liable party will not be responsible for satisfying the judgment entered against any other party."¹⁶⁰

The "Orphan Share" problem remains a major point of contention—and costly litigation—among PRPs in contribution actions because neither Section 113 nor the case law provides a universal formula for allocating costs fairly among responsible parties.¹⁶¹ To remedy this situation, some PRPs have turned to Alternative Dispute Resolution procedures ("ADR"). The ultimate success of ADR is still open to question.

g. Litigation And Alternative Dispute Resolution

Litigating a contribution action presents several problems often not present in government litigation. The first problem that usually confronts the plaintiff is the proof of each defendant's equitable share of the response costs. In contrast to Alternate Dispute Resolution ("ADR") methodologies, where a third-party neutral attempts to put the data together in some equitable form, proponents of an allocation must develop proof that fits within the rules of evidence and their experts must overcome the barriers presented by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and its progeny.¹⁶² While the ADR process may allow and encourage an "Allocation Expert" to consider all of the available data as sort of a combined expert and judge, the litigants in a District Court must produce qualified experts who will use reliable factual predicates and theories.

However, the major problem that litigants have faced in recent contribution actions is the number of PRPs in any particular litigation. It is the large number of the litigants that

¹⁵⁸ 953 F. Supp. at 600 (emphasis supplied).

¹⁵⁹ Id. at 601.

¹⁶⁰ Id.

¹⁶¹ See, Jerry L. Anderson, The Hazardous Waste Land, 13 Va. Envtl. L.J. 1 41 (1993) ("Anderson"). In a 1992 study, the Rand Institute for Civil Justice found that 19 of the 73 sites where five large industrial companies spent more than \$100,000 produced transaction costs equal to or greater than the costs of site study and remediation. Id.

¹⁶² Litigants should also be cognizant of changes to Rule 703 (expert testimony) of the Federal Rules of Evidence effective December 1, 2000. Rule 703 has been amended to stress that inadmissible underlying information reasonably relied on by an expert to form an opinion or inference is not admissible simply because the opinion or inference is admitted.

has made contribution trials costly and difficult. One solution has been to stay the litigation while the parties, or at least the “Opt-In” parties, participate in an ADR proceeding.

Private party ADR is in vogue with numerous promoters who credibly extol its efficiency and economy.¹⁶³ In these ADR allocations, the parties are free to devise their own procedures that will enable them to reach a fair apportionment of liability. ADR allocations may be binding or nonbinding. Generally, the process calls for the appointment of a qualified "neutral" or "neutral panel" to serve as both mediator and a decision maker.¹⁶⁴ Following the appointment, the typical phases of the ADR process include: (1) investigation and fact finding; (2) position statements by the PRPs; (3) neutral attempts to achieve agreement through mediation or, if the allocation will be binding, arbitration or a "mini-trial"; (4) the neutral's proposed allocation; (5) comments on that allocation by the PRPs, and (5) acceptance or rejection of the final allocation.¹⁶⁵

However, ADR is not a panacea.¹⁶⁶ In any given case, there may be several reasons for keeping a contribution action in court, including: (1) strong legal defenses which third party neutrals (who are not "bound" by precedent) may tend to discount¹⁶⁷; (2) the need for full discovery (e.g. non-party or numerous oral examinations) to ferret out the truth, since ADR typically provides less than the full range of discovery devices available under the Federal Rules of Civil Procedure; and (3) the potential in multi-party cases for elaborate PRP-driven procedures which could waste vast amounts of time if the proceedings are not binding upon the participants.

3. PRIVATE PARTY LITIGATION UNDER RCRA

RCRA is commonly described as governing the management of solid and hazardous wastes “from cradle to grave.”¹⁶⁸ Under the Act, an elaborate regulatory

¹⁶³ See Markell, Esterman and Rosenberg, "Alternate Dispute Resolution", Environmental Law Practice Guide Ch. 11c, Mathew Bender (1999). The authors of this chapter have provided an excellent guide to the use of ADR in environmental disputes.

¹⁶⁴ See Patrick E. Donovan, Serving Multiple Masters: Confronting The Conflicting Interests That Arise In Superfund Disputes, 17 B.C. Env'tl. Aff. L. Rev. 371, 401 (Winter 1990).

¹⁶⁵ Id.

¹⁶⁶ For a good example of how ADR can fail see United States v. Kramer, 19 F. Supp.2d 273 (D.N.J. 1998), where a group of some 300 PRPs failed to adopt the Neutral's recommended allocation despite a very lengthy (and clearly expensive) ADR process.

¹⁶⁷ Neutrals will often discount legal defenses or claims based upon "litigation risk."

¹⁶⁸ 42 U.S.C. § 6901 et seq. RCRA defines “solid waste” as “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material....” 42 U.S.C. § 6903(27). “Hazardous waste” is defined as “a solid waste, or combination of solid wastes, which because of its

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system for tracking hazardous waste through its generation, treatment, storage, and ultimate disposal has been created.

RCRA is used by parties in private hazardous waste actions pursuant to its citizen suit provision, which provides in relevant part:

any person may commence a civil action on his own behalf...against any person..., and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment....

42 U.S.C. § 6972(a)(1)(B). Courts are authorized “to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both....” 42 U.S.C. § 6972(a).

Parties have utilized RCRA’s citizen suit provision to resolve private hazardous waste contamination disputes primarily in two contexts. First, where hazardous waste emanating from an off-site source affects private property, the landowner may seek to hold the owner or operator of the off-site source responsible for remediating its property by bringing a RCRA citizen suit alleging that the off-site owner or operator’s activities are creating an “imminent and substantial endangerment.”¹⁶⁹ For example, in Interfaith Community Org. v. Honeywell Int’l, Inc.,¹⁷⁰ citizens living near a hazardous waste site

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quantity, concentration, or physical, chemical, or infectious characteristics may – (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.” 42 U.S.C. § 6903(5). RCRA instructs EPA to “develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste...taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics.” 42 U.S.C. § 6921(a). Pursuant to EPA’s regulations under this directive, hazardous wastes are solid wastes that are either listed as such, 40 C.F.R. Part 261; or which exhibit one of four characteristics: ignitability, corrosivity, reactivity, or toxicity. 40 C.F.R. §§ 261.21-261.24.

¹⁶⁹ Interfaith Cmty. Org. v. Honeywell Int’l, Inc., 399 F.3d 248 (3rd Cir. 2005) (“Interfaith”); but see 87th St. Owners Corp. v. Carnegie Hill 87th St. Corp., 251 F.Supp.2d 1215 (S.D.N.Y. 2002).

¹⁷⁰ Interfaith, 399 F.3d at 258.

sought injunctive relief requiring the site owner to remediate the waste. The district court granted the injunction after finding ample evidence of imminent and substantial endangerment.¹⁷¹ The Third Circuit affirmed, observing that contaminant levels at the site and its surrounding environment ranged from between 30 and 8,000 times over state standards, that there were millions of holes in the existing plastic liner intended to prevent exposure pathways, and that mortality rates for various organisms living on or near the site ranged between 50 and 100 percent, a fact attributed to the site's contamination.¹⁷²

The second context in which the RCRA citizen suit provision is implicated is where a landowner attempts to hold a past owner or operator liable for cleaning up hazardous waste contamination believed to have occurred prior to the landowner's acquisition of the property, but not discovered until afterwards.

The RCRA citizen suit is considered to be a particularly efficacious means of pursuing cleanup due to the availability of attorney's fees for successful litigants. Moreover, the threshold demonstration in RCRA citizen suits may not be particularly high. Unlike under CERCLA, for example, there is no requirement that the plaintiff show that it incurred response costs.¹⁷³ Nor does RCRA's citizen suit provision contain any statute of limitations. *Id.*

On the other hand, there are several limitations on a party's ability to seek private response costs under RCRA. One such limitation is the requirement that any party initiating a RCRA citizen suit alleging imminent and substantial endangerment provide ninety days notice of the endangerment to: (1) the Administrator of EPA; (2) "the State in which the alleged endangerment may occur;" and (3) "any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section...." 42 U.S.C. § 6972(b)(2)(A).

Most significant is the Supreme Court's holding in Meghrig, that response costs for past cleanup activities are not recoverable in a RCRA citizen suit claiming "imminent and substantial endangerment" to human health or the environment pursuant to 42 U.S.C. § 6972(a)(1)(B). *Id.* Rather, private parties are permitted only to bring suit for response costs where hazardous wastes present a continuing danger. *Id.*

The Supreme Court in Meghrig left open, however, the issue of whether a party could obtain an injunction requiring the payment of cleanup costs that arise after a RCRA citizen suit has been commenced. The courts have split in resolving this open question. Several courts, relying on Meghrig, have held that such response costs are not available

¹⁷¹ Interfaith Cmty. Org. v. Honeywell Int'l., Inc., 263 F. Supp.2d 796 (D.N.J. 2003).

¹⁷² Interfaith, 399 F.3d at 261-62.

¹⁷³ Meghrig v. KFC Western, Inc. ("Meghrig"), 516 U.S. 479 (1996).

under RCRA's citizen suit provision.¹⁷⁴

For example, relying heavily on Meghrig, the majority in Avondale, found that Congress had deliberately limited RCRA's remedies to injunctive relief--more specifically, to injunctive relief obtained before the property is cleaned up, "while the danger to health or the environment is 'imminent and substantial.'"¹⁷⁵ The Court affirmed that RCRA cannot be read to allow a party to recover cleanup costs, unlike CERCLA, which was enacted after RCRA, and expressly provides for the recovery of cleanup costs.¹⁷⁶

Other courts, however, have found the opposite, holding that cleanup costs incurred to remediate an imminent and substantial endangerment following the initiation of a RCRA citizen suit may be recovered.¹⁷⁷ Notwithstanding this split and the Supreme Court's holding in Meghrig, the RCRA citizen suit remains a powerful tool for recovering even wholly past response costs, as parties may be willing to pay for some such costs in settling what otherwise promises to be costly and complex litigation over liability and the appropriate remedial response.

One final unresolved question is whether RCRA citizen suits may be brought in state court, as corollaries to common law toxic tort claims, or whether Congress conferred exclusive jurisdiction over RCRA citizen suits in the federal courts. The Sixth Circuit, in the first Court of Appeals decision to squarely address the issue, recently held that there is concurrent federal and state jurisdiction over RCRA citizen suits.¹⁷⁸ Other courts have held, however, mainly in the contexts of abstention and preclusion that RCRA provides for exclusive federal jurisdiction over citizen suits.¹⁷⁹

¹⁷⁴ See, e.g., Avondale Fed. Savings Bank v. Amoco Oil Co. ("Avondale"), 997 F. Supp. 1073, 1076 (N.D. Ill. 1998), aff'd, 170 F.3d 692 (7th Cir. 1999) (petition for cert. filed July 19, 1999); Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609, 618 (M.D. Pa. 1997). Cf. Orange Env't, Inc. v. County of Orange, 923 F. Supp. 529, 539 (S.D.N.Y. 1996) (while the issue of whether private parties could obtain restitution under RCRA while the damages still existed was not decided, "the opinion [in Meghrig] suggests that the Court would be reluctant to read into the RCRA remedies not clearly provided by Congress").

¹⁷⁵ Avondale, 170 F.3d at 694.

¹⁷⁶ Id. (affirming Avondale, 997 F.Supp. at 1067).

¹⁷⁷ See, e.g., Gilroy Canning Co. v. California Cannery and Growers, 15 F. Supp.2d 943 (N.D. Cal. 1998).

¹⁷⁸ Davis v. Sun Oil Co., 148 F.3d 606 (6th Cir.), cert. denied, 525 U.S. 1018, 119 S.Ct. 543 (1998).

¹⁷⁹ See Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1098 (8th Cir. 1989); Mutual Life Insurance Co. of New York v. Mobil Corp., 1998 U.S. Dist. LEXIS 4513, *14-*16 (N.D.N.Y. 1998); White & Brewer Trucking, Inc. v. Donley, 952 F. Supp. 1306, 1312 (C.D. Ill. 1997); Seats v. Hooper, 1997 U.S. Dist. LEXIS 14919, *7 (E.D. Pa. 1997); Space Age Fuels, Inc. v. Standard Oil Co. of California, 1996 U.S. Dist. LEXIS 3654, *13 (D. Or. 1996); Prisco v. State of New York, 1992 U.S. Dist. LEXIS 5273, *9-*10 (S.D.N.Y. 1992); Middlesex County Board of Chosen Freeholders v. State of New Jersey, Department of Environmental Protection, 645 F. Supp. 715, 719-20 (D.N.J. 1986).

4. PRIVATE PARTY CONTRACT AND TOXIC TORT LITIGATION

a. Contract Litigation

Because of the uncertainties caused by environmental problems, especially the presence of hazardous materials, the environmental conditions of assets involved in business and real estate transactions have a marked propensity to generate litigation. This tendency, despite the best efforts of contract drafters, is due to several factors that are inherent in environmentally laden transactions.

Environmental conditions are often unquantifiable in that their ultimate impact cannot be ascertained at the time of the transaction. Attempts to allocate liability for these problems are handicapped by diametrically opposed interests of the seller and buyer. Thus, the seller seeks to have the buyer retain liability for all existing conditions. The buyer approaches the transaction with an attempt to leave all liability, except such liability as can be clearly quantified and accounted for in the selling price, at the sellers' doorstep. The drafting compromises that ensue are often inadequate to deal with the various exigencies that may arise.

Typically, buyers are responsible for environmental conditions discovered after closing. However, courts are hesitant to allocate environmental liability to a buyer whose liabilities have not been clearly defined in a contract. Thus, in Allied Princess Bay Co. #2 v. Atochem North America, Inc. ("Allied Princess Bay"), 855 F. Supp. 595 (E.D.N.Y. 1993), the Court held that the following assumption provision was not broad enough to shift liability for all future environmental conditions to the buyer:

Buyer agrees to take title to the premises under and subject to (i) any notices of violations of law or municipal ordinances, orders or requirements issued as or after the date [of the Contract] by any state or municipal department having jurisdiction over or affecting the Premises.

Id. at 598 (footnote omitted; brackets in original).

However, courts have shifted liability when contract provisions have been broadly drafted. Thus a contract for the sale of a manufacturing plant was held to require the buyer to indemnify the seller for cleanup costs incurred where the agreement at issue provided that the buyer:

shall ... indemnify [the seller] against all debts, liabilities, and obligations, without any limitation, related to [the seller's] York Division, its operations, and products, whether known or unknown, ... and whether existing as the date of the agreement

or coming into existence hereafter.¹⁸⁰

Such broadly drafted language is even sufficient to overcome federal statutory defenses that would seemingly protect the government from such liability shifting.¹⁸¹ The Federal Circuit has recently held that neither the Anti-Deficiency Act (31 U.S.C. § 1341) nor the Contract Settlement Act (41 U.S.C. § 101) shields the government from Superfund liability based on a broadly worded World War II-era indemnity provision. During World War II, the government agreed to hold numerous military contractors (such as DuPont, General Motors, General Electric and Lockheed Martin) “harmless against any loss, expense, or damage (including damage to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind whatsoever” arising out of its operation of factories that produced chemicals and munitions for the War effort. More than 60-years later, that “sweeping” indemnity provision required the military to reimburse DuPont (and presumably others) for its cost of environmental investigations and remediation even though such costs could not possibly have been contemplated at the time.¹⁸²

(1) **“As-Is” Clauses**

Parties can contractually transfer liability under CERCLA through the use of “as is” clauses.¹⁸³ The Court must look to applicable state law to determine whether a contractual release is valid to transfer liability.¹⁸⁴

When property or assets are purchased subject to an “as-is” clause, the purchaser accepts the property with all of its existing hidden defects. See Dartron Corp. v. Uniroyal Chemical Co., Inc., 917 F. Supp. 1173, 1178 (N.D. Ohio 1996). While such clauses preclude claims by the purchaser against the seller based on breach of warranty, they do not bar causes of action against a seller for contribution for environmental cleanup costs imposed upon a purchaser by statute. Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1055 (D. Ariz. 1984), aff’d, 804 F.2d 1454 (9th Cir. 1986); Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1001 (D.N.J. 1988).

However, an “as-is” clause coupled with additional language contemplating a release from liability against third parties may enable a seller to escape liability for

¹⁸⁰ See Harley-Davidson, Inc. v. Ministar, Inc. (“Harley-Davidson”), 41 F.3d 341, 342 (7th Cir. 1994), cert. denied, 514 U.S. 1036 (1995).

¹⁸¹ See E.I. du Pont de Nemours & Co. v. United States, 365 F.3d 1367 (Fed. Cir. 2004).

¹⁸² Id. at 1373.

¹⁸³ See, e.g., AM Int’l, Inc. v. Int’l Forging Equip. Co., 982 F.2d 989, 995-96 (6th Cir. 1993); Velsicol Chem. Corp. v. Reilly Indus., 67 F. Supp. 2d 893, 905 (E.D. Tenn. 1999).

¹⁸⁴ Id.

reimbursement of statutory cleanup costs.¹⁸⁵

(2) Representations And Warranties

Representations and warranties provide the purchaser with some assurance that the assets are in compliance with environmental laws, except as provided in the contract, and also provide the basis for claims for relief sounding in breach of contract and fraud. Depending on the solvency of the seller, representations and warranties are useful additions to the performance of due diligence because the seller should have more knowledge of the assets than a buyer. The seller, however, may seek some degree of protection by demanding that the representations be "to its knowledge" or "to the knowledge of its officers and managers..."¹⁸⁶ All of these common exceptions provide ample fact intensive defenses to an allegation of a breach of contract or fraud. See, e.g., Hercules Inc. v. United States, 24 F.3d 188 (Fed. Cir. 1994), aff'd, 516 U.S. 417 (1996); Arkansas Rice Growers Cooperative Ass'n v. Alchemy Industries, Inc., 797 F.2d 565 (8th Cir. 1986); Pantry, Inc. v. Stop-N-Go Foods, Inc., 777 F. Supp. 713 (S.D. Ind. 1991). Finally, it should be noted the "standard" reps and warranties seldom relate to off-site conditions such as the shipment of waste to a permitted but leaky dump.

(3) Assumptions And Indemnifications

Parties to environmentally laden transactions have attempted to apportion liabilities by indemnifications and assumptions of existing and future liability. Frequently, cross indemnifications are utilized to distribute risks amongst the parties. Nevertheless, broad well-drafted indemnifications have been sufficient to protect the indemnee in unforeseen circumstances.¹⁸⁷ See Harley Davidson, supra. These contractual clauses have also generated litigation.¹⁸⁸ Critical issues that most often arise in the context of a deal gone

¹⁸⁵ Cf. Southfund Partners III v. Sears Roebuck & Co., 57 F.Supp. 2d 1369 (N.D. Ga. 1999); Niecko v. Emro Marketing Co., 769 F. Supp. 973 (E.D. Mich. 1991), aff'd, 973 F.2d 1296 (6th Cir. 1992)(provisions in a contract were held to bar a purchaser's claims against the seller for contribution for cleanup costs assessed post-closing under the Michigan Leaking Underground Storage Act where Buyer acknowledged that it had inspected the conditions of the property; seller made no warranties or representations as to the condition of the property and that buyer is purchased property "as-is").

¹⁸⁶ For example: "there are no past, pending or threatened Environmental Claims against Seller or the Company ... and, to the best of Seller's and the Company's knowledge after due inquiry, there are no facts or circumstances which reasonably could be expected to form the basis of one or more Environmental Claims against Seller or the Company...."

¹⁸⁷ White Consol. Indus. v. Westinghouse Elec. Corp., 179 F.3d 403,409 (6th Cir. 1999)("an assumption agreement, 'which contains broad language sufficient to indicate that the parties intended to include all liabilities, will include environmental liabilities as well even without specific reference to an environmental statute such as CERCLA');

¹⁸⁸ The problems may be readily seen in this apparent broad form of indemnification:

(...continued)

bad involve the scope of the indemnification, the requisite "trigger" for coverage, and who is covered.

Indemnifications come in many sizes; they may protect a party for the breach of representations and warranties, or against claims asserted by third parties. The problem that may be most troublesome is what action triggers the indemnification agreement. Is it the discovery of an unremediated environmental condition, or the commencement of some form of governmental pressure to abate the problem? A second issue, frequently encountered, is the nature of the response or remediation. Whether a remediation is undertaken voluntarily, for example, may dictate whether a claim to recover response costs is permitted under a contract.¹⁸⁹

(4) Holdbacks

A basic problem in the indemnification/assumption process is the continued willingness and/or viability of the indemnitor to pick up the tab at some future date. One of the contractual methods of dealing with this aspect of indemnities is to provide for the commitment of funds sufficient to insure performance in the form of "holdbacks", retainages, escrow accounts, and letters of credit. These provisions have also led to disputes in the absence of clear provisions for how these funds are to be expended, and when they must be returned. The inadequacy of such contractual indemnifications has left parties scurrying for deep and liable pockets under CERCLA Section 113.

b. Nuisance And Trespass Actions

The common law torts of public and private nuisance, as well as trespass, are

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Purchaser shall indemnify, hold harmless and defend seller, its directors, officers and employees after the closing date against and in respect of any and all claims, judgments, damages (including punitive damages, except those attributable to Seller's conduct), losses, penalties, fines, liabilities (including strict liability), ... of whatever kind or nature, contingent or otherwise, matured or unmatured, or the costs and expenses of a Required Remedial Action including but not limited to:

* * *

(ii) the release of any hazardous or toxic substance, waste or constituent into, onto or from the property after the closing date, except for a release caused by, or resulting from the negligence of seller, its affiliates, agents, occupants, lessees and/or sub-lessees occurring before or after the closing date...

¹⁸⁹ What constitutes actions "attributable to Seller's Conduct" or "the negligence of the Seller"? See, e.g., *Allied Princess Bay*, 855 F. Supp. at 606 (where the plaintiff buyer agreed to buy premises subject to "any notices of violations of law or municipal ordinances, orders or requirements issued on or after the date [of the contract] by any state or municipal department having jurisdiction or affecting the Premises," court held that plaintiff could nevertheless seek contribution for environmental cleanup costs where duty to remediate was not an order, but rather a condition placed on the development by the approving agencies [footnote omitted; brackets in original]).

additional non-statutory devices still used by the government -- as well as private parties -- to obtain injunctive relief and damages for alleged environmental wrongs that are not otherwise available in CERCLA actions.¹⁹⁰

A private nuisance "threatens one person or a relatively few," with "an essential feature being an interference with the use or enjoyment of land."¹⁹¹ It is actionable by the person or persons whose rights have been disturbed.¹⁹² A public nuisance, on the other hand, "is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency" and "consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all . . . in a manner such as to . . . endanger or injure the property, health, safety or comfort of a considerable number of persons."¹⁹³

Claims for trespass often accompany claims for private nuisance.¹⁹⁴ A trespass is the intentional invasion of another's property.¹⁹⁵ To be liable, the trespasser "need not intend or expect the damaging consequences of his intrusion" rather, he need only "intend the act which amounts to or produces the unlawful invasion."¹⁹⁶ However, the intrusion itself "must at least be the immediate or inevitable consequence of what the trespasser willfully does, or which he does so negligently as to amount to willfulness."¹⁹⁷ Thus, in cases involving the movement of contaminated groundwater, even when the polluting material has been deliberately put onto, or into, defendant's land, a defendant is not liable for trespass, unless the plaintiff establishes that the defendant "had good reason to know or expect that subterranean and other conditions were such that there would be passage from defendant's to plaintiff's land."¹⁹⁸ While plaintiffs have succeeded in meeting this

¹⁹⁰ See New York v. Shore Realty Corp., ("Shore Realty") 759 F.2d 1032 (2nd Cir. 1985) (State obtained injunction under state's public nuisance law against property owner responsible for CERCLA cleanup costs); Scribner v. Summers, ("Scribner") 84 F.3d 554 (2d Cir. 1998)(private parties established claims for private nuisance and trespass, as well as for CERCLA response costs.); but see Boomer v. Atlantic Cement Co., 26 N.Y.2d 219 (1970)(injunction for a private nuisance denied where defendant established that the plaintiff could be adequately compensated in damages and large disparity in economic consequences between the damage caused by its nuisance and the cost of granting the injunction).

¹⁹¹ Scribner, 84 F.3d at 559 (citations omitted).

¹⁹² Id.

¹⁹³ Shore Realty, 759 F.2d at 1050 (citations omitted).

¹⁹⁴ See, e.g., Jensen v. General Electric Co. ("Jensen"), 82 N.Y.2d 77, 603 N.Y.S.2d 420 (1993).

¹⁹⁵ See Scribner, 84 F.3d at 557 (citations omitted).

¹⁹⁶ Id.

¹⁹⁷ Id.

¹⁹⁸ Id.

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burden, it may be difficult to overcome in cases of accidental spillage by a defendant.¹⁹⁹

c. Toxic Tort Actions

Since CERCLA allows plaintiffs to recover only a narrowly circumscribed set of “response costs,” CERCLA litigation is often coupled with a common-law “toxic tort” component. Common law tort actions are often linked to District Court CERCLA claims by invoking the District Court’s “supplemental jurisdiction,” pursuant to 28 U.S.C. §1367. Whether brought in the federal forum or in state courts, claims of “stigma damage” to property are becoming increasingly popular in these litigations.²⁰⁰

Claims for personal injury based on the latent effects of chronic exposure to toxic substances have been difficult to prove. See e.g. Mancuso v. Consolidated Edison Co. of N.Y., 56 F.Supp.2d 391 (S.D.N.Y. 1999). This is primarily because the “causal link” between exposure and injury must be established through expert testimony. Id. But, see Hancock v. 330 Hull Realty Corp., 225 A.D.2d 365, 638 N.Y.S.2d 654 (1st Dept. 1996). Moreover, there have been several variations on the personal injury theme which have grown out of environmental exposure to toxic substances which may meet with greater success: Ayers v. Jackson Township, 525 A.D.2d 787 (N.J. 1987) (Loss of quality of life); Dangler v. Town of Whitestown, 241 A.D.2d 290, 672 N.Y.S.2d 188 (4th Dept. 1998) (Emotional distress or “cancerphobia”),²⁰¹

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¹⁹⁹ See id. (plaintiff established claim for trespass by showing that defendants disposal of barium was intentional and that defendant had good reason to know that contamination would flow to plaintiff’s downhill property); but see Snyder v. Jessie, 164 A.D.2d 405, 565 N.Y.S.2d 924, 925, 929 (4th Dep’t 1990) (insufficient allegations to show trespass where defendant inadvertently overfilled a customer’s underground oil tank which then leaked onto plaintiffs’ property), appeal dismissed, 77 N.Y.2d 940, 569 N.Y.S.2d 613, 572 N.E.2d 54 (1991); Theofilatos v. Koleci, 105 A.D.2d 514, 481 N.Y.S.2d 782, 783-84 (3d Dep’t 1984) (no liability for intentional trespass where natural surface water seeped through defendant’s deteriorating retaining wall onto plaintiff’s property); Chartrand v. State, 46 A.D.2d 942, 362 N.Y.S.2d 237 (3d Dep’t 1974) (no liability for intentional trespass where gas inadvertently leaked from defendant’s storage tanks into plaintiffs’ basement).

²⁰⁰ “Stigma” is “defined loosely as the public’s perhaps unwarranted fears concerning a property...” Nashua Corp. v. Norton Co. (“Nashua”), 1997 U.S. Dist. LEXIS 5173, *17 (W.D.N.Y. 1997); see generally Lewandrowski, Toxic Balckacre: Appraisal Techniques & Current Trends In Valuation, 5 Alb. L.J. Sci. & Tech 55, 65 (even where a cleanup of an environmental condition satisfies governmental standards, some courts recognize that “a lingering perception of risk may “stigmatize” a property, rendering it unmarketable or unfinanceable).

²⁰¹ A “fear of cancer” or other purely emotional distress cause of action based on a toxic exposure requires more than just showing of a psychic injury. A plaintiff must establish (i) that he or she was exposed to the toxic substance; and (ii) that there is a reasonable fear of contracting the disease, in that there is a clinically demonstrable presence of the contaminants in the plaintiff’s body or some indication of a toxin-induced disease. Prato v. Vigliotta, 253 A.D.2d 746, 677 N.Y.S.2d 386, 388 (2d Dept. 1998) (citations omitted). See also Abusio v. Consolidated Edison Co. of New York, Inc., 238 A.D.2d 454, 656

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The admissibility of expert testimony needed to make this critical causal link has, in recent years, come under increased scrutiny in the federal court system. In Daubert v. Merrell Dow Pharmaceuticals, Inc. (“Daubert”), 509 U.S. 579 (1993), the United States Supreme Court firmly established that Federal Rule of Evidence 702 imposes on trial judges--not juries--the duty to exclude "junk science" opinions by ensuring "that any and all scientific testimony...is not only relevant, but reliable...." On March 23, 1999, the Court in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), expanded this essential "gatekeeping" obligation, holding that Daubert's general principles apply to all "expert matters," not solely to "scientific testimony."

The court's "gatekeeping" obligation is "especially sensitive in [toxic tort] 'cases...[because a] jury may blindly accept an expert's opinion that conforms with their underlying fears of toxic substances without carefully understanding or examining the basis for that opinion.'"²⁰² Not only the federal courts have recognized this, but state courts as well.²⁰³

Toxic tort plaintiffs have met with somewhat better success when it comes to property damage cases, although not in all instances. States, such as New York, which had not previously done so, now recognize a cause of action for "stigma" damage to property.²⁰⁴ The measure of stigma injury remaining after cleanup is the plaintiffs' cost of

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N.Y.S.2d 371, 372 (2d Dept. 1997); Wolff v. A-One Oil, Inc., 216 A.D.2d 291, 627 N.Y.S.2d 788, 789 (2d Dept. 1995); Conway v. Brooklyn Union Gas Co., 189 A.D.2d 851, 592 N.Y.S.2d 782, 783 (2d Dept. 1993); Rittenhouse v. St. Regis Hotel Joint Venture, 149 Misc.2d 452, 565 N.Y.S.2d 365, 367-68 (Sup. Ct. N.Y. Cty. 1990), modified on other grounds, 180 A.D.2d 523, 579 N.Y.S.2d 100 (2d Dept. 1992).

²⁰² Whiting v. Boston Edison Co., 891 F. Supp. 12, 24 (D. Mass. 1995) (citation omitted).

²⁰³ Lofgren v. Motorola, Inc., 93 Civ. 05521, 18-19 (Superior Court Maricopa County AZ, June 1, 1998). This case provides an excellent and detailed analysis of expert testimony admissibility issues in toxic tort cases. See also Curtis v. M & S Petroleum, Inc., 174 F.3d 661, 668 (5th Cir. 1999)(court expressed importance of judge's gatekeeping role, but reversed court's exclusion of expert testimony on benzene exposure finding that expert had satisfied the Daubert two-prong test); In Re Ingram Barge Co., 187 F.R.D. 262, 266 (M.D. La. 1999)(excluding medical causation testimony where no support in scientific literature for opinion that claimants' alleging exposure have an increased risk of developing cancer; such testimony would likely be "of little assistance to the trier of fact in understanding the evidence or determining the issues to be resolved in this case"); State v. Coon, 974 P.2d 386, 395, 396 (Alaska 1999) (discussing importance of judge's gatekeeping role); Phillips v. Industrial Machine, 257 Neb. 256, 597 N.W.2d 377, 386 (1999); State v. Collins, 1999 WL 735863, *2 (La. App. 2d Cir. 1999). See also Curtis v. M & S Petroleum, Inc., 174 F.3d 661, 668 (5th Cir. 1999)(court expressed importance of judge's gatekeeping role, but reversed court's exclusion of expert testimony finding that expert had satisfied the Daubert two-prong test.)

²⁰⁴ See, e.g., Commerce Holding Corp. v. Board of Assessors of the Town of Babylon, 88 N.Y.2d 724, 649 N.Y.S.2d 932, 936 (1996); Criscuola v. Power Authority of the State of New York, 81 N.Y.2d 649, 602 N.Y.S.2d 588 (1993)

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remediation plus the "difference in market value immediately predating the [harmful act] and the value after remediation."²⁰⁵

Finally, even in the state common law toxic tort arena, CERCLA issues may be lurking. Unknown to many practitioners, CERCLA establishes a Federally Required Commencement Date ("FRCD") in the case of "any action brought under state law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility...." 42 U.S.C. § 9658.²⁰⁶ The "federally required commencement date" ("FRCD") is defined as "the date plaintiff knew (or reasonably should have known) that the personal injury or property damages" he has suffered "were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A).

The FRCD may have little or no impact in states that have already enacted a "discovery rule" for latent toxic tort injury cases.²⁰⁷ But, the Ninth Circuit has held that the FRCD preempted California's seemingly less generous "reasonable *suspicion*" formulation of the "discovery rule" and reinstated plaintiffs' personal injury claims because under the FRCD they did not accrue until "Plaintiffs *knew* or should have *known* of the[m]."²⁰⁸ Though

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²⁰⁵ Nashua, 1997 U.S. Dist. LEXIS 5173 at *16.

²⁰⁶ CERCLA provides:

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in the State statute....

42 U.S.C. § 9658(a)(1).

²⁰⁷ See, e.g., New York Civil Practice Law and Rules § 214-c; ABB Industrial Systems, Inc. v. Prime Technology, Inc. ("ABB"), 120 F.3d 351, 360-361 n. 6 (2d Cir. 1997); See also Electric Power Board of Chattanooga v. Monsanto Co., 879 F.2d 1368, 1378 (6th Cir. 1989), cert. denied, 493 U.S. 1022 (1990) (no preemption of state law where Tennessee statute of limitations contains discovery rule); Merry v. Westinghouse Electric Corp., 684 F. Supp. 852, 855 (M.D. Pa. 1988) (same re Pennsylvania law).

²⁰⁸ O'Connor v. Boeing North American, Inc., 311 F.3d 1139, 1148 (9th Cir. 2002)(Court reversed summary judgment dismissing personal injury claims on statute of limitations grounds, rejecting California's "suspicion standard" for triggering the statute of limitations period.) Notably, a California appellate Court has declined to follow this precedent, holding that the FRCD and the California standard for discovery are "substantially the same" and that therefore the California rule governs. Lockheed Martin Corporation v. The Superior Court Of The County Of San Bernardino, 134 Cal.Rptr.2d 304 (Cal.App. 4 Dist. 2003). In what may be shaping up to be a classic federalist battle, the Fourth District Court of Appeal

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apparently not raised with the Ninth Circuit, the Second Circuit has questioned the constitutionality of this provision, which purports to change state law.²⁰⁹

5. CONCLUSION

The unifying factors in these litigations are really twofold: the developing science of hazardous materials and the presence of the government, if not as a litigant, than as a regulator and standard setter.

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held “because we are not bound by the decisions of the lower federal courts even on federal questions...we will apply California authority based on our conclusion that CERCLA does not preempt our rule in that both standards are substantially similar.” Id. At *5.

²⁰⁹ ABB, 120 F.3d at 360 n.5.