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MAKING A CASE FOR STATUTORY AMENDMENT TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT ("CERCLA"): SOLVING THE SECTION 107/ SECTION 113 CAUSE OF ACTION CONTROVERSY

I. INTRODUCTION

Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")¹ section 107,² a "person"³ who incurs response costs in cleaning up a contaminated site may sue other parties responsible for the contamination for recovery of those costs.⁴ The definition of "person" under CERCLA does not exclude potentially responsible parties ("PRPs") who themselves may have contributed to the environmental damage.⁵ Therefore, under a literal reading of the statute, a PRP may bring a CERCLA section 107 cost recovery action against fellow PRPs.

1. 42 U.S.C. §§ 9601 - 9675 (1988 & Supp. V 1993).

2. 42 U.S.C. § 9607 (1988).

3. CERCLA defines a "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (1988).

4. 42 U.S.C. § 9607 (a) provides in part:

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

....

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence or response costs, of a hazardous substance, shall be liable for . . .

....

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

42 U.S.C. § 9607 (a) (4) (B) (1988).

Further, liability under § 9607 (a) (4) (B) is subject to certain enumerated defenses, such as acts beyond the control of the defendant. 42 U.S.C. § 9607 (b) (1-4).

5. See 42 U.S.C. § 9601 (21).

Likewise, under CERCLA section 113,⁶ a "person"⁷ may seek contribution from any other person who is liable or potentially liable for contaminating a site.⁸ Therefore, it would seem that a PRP who incurs response costs in remediating a contaminated site has recourse to either a CERCLA section 107 cost recovery action or a CERCLA section 113 contribution action against fellow PRPs who have not shouldered their burden in remediating a contaminated site. The history of CERCLA and evolving case law indicates, however, that depending upon the specific issue of the case, PRPs may be limited in what remedy is available. Despite the vague and open-ended language of the statute, PRPs are often limited in their remedy depending upon their motivation for seeking cost recovery under section 107.⁹

II. HYPOTHETICAL SITUATION

The administrative process of cleaning up a contaminated site under CERCLA is extremely complex. The following represents a typical, but by no means exclusive, scenario which leads to individual liability under CERCLA.

The President becomes aware of a potentially contaminated site.¹⁰ After conducting a preliminary investigation,¹¹ the President then places the site on its National Priorities List ("NPL") if it finds that the site poses serious risks to the health of the surrounding population.¹²

6. 42 U.S.C. § 9613 (1988).

7. See 42 U.S.C. § 9601 (21).

8. 42 U.S.C. § 9613 (f) (1) (1988) provides:

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

Id.

9. See Ann Alexander, *Standing Under Superfund §§ 107 And 113: Avoiding The Error Of The Blind Man And The Elephant*, 10 *Toxics L. Rep.* (BNA) 155 (July 12, 1995) [hereinafter *Standing Under Superfund*].

10. It is the duty of anyone "in charge of a vessel or . . . facility" to immediately notify the National Response Center of a release or threat of a release of hazardous substances. The National Response Center then notifies all appropriate state and federal agencies. 42 U.S.C. § 9603 (a) (1988).

11. The procedure for such an investigation is found in 42 U.S.C. § 9604 (b) (1988).

12. 42 U.S.C. § 9605 (g) (2) (1988).

In order to enforce these findings, the United States Environmental Protection Agency ("EPA"), acting on behalf of the President, can then do one of three things.¹³ It could undertake remedial action itself and then sue the responsible parties for recovery of costs under section 107, or it could sue in a district court for an injunction forcing responsible parties to stop polluting the site.¹⁴ Lastly, and most germane to the following discussion, the EPA could issue an administrative order under CERCLA section 106¹⁵ directing specified responsible parties to clean up the site at their own expense.¹⁶

When commanded to clean up a site pursuant to a CERCLA section 106 Order, a private party has two options. First, it can ignore the Order and face a penalty of \$25,000 per day for each day it fails to comply.¹⁷ On the other hand, it can shoulder the expense for remedying the site in order to avoid the penalty associated with non-compliance.

Because a party who complies with a section 106 Order often bears the cost of remedying what several hundred parties have done in the way of environmental harm, CERCLA provides legislative remedies in order to compensate those who undertake remedial measures. These are the cost recovery action allowed by section 107 and the contribution action allowed by section 113.¹⁸

13. *Transtech Indus., Inc. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1084 (D.N.J. 1992).

14. *Id.*

15. 42 U.S.C. § 9606 (a) (1988) provides:

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

Id.

16. *Transtech*, 798 F. Supp. at 1084.

17. 42 U.S.C. § 9606 (b) (1) reads:

Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than \$25,000 for each day in which such violation occurs or such failure to comply continues.

Id.

18. See 42 U.S.C. § 9607 (a) (4) (b) and 42 U.S.C. § 9613 (f) (1).

The EPA will usually send out notices to all known and suspected PRPs informing them of their potential liability.¹⁹ These parties may settle their liability with the EPA in an approved settlement.²⁰ CERCLA provides protection to PRPs who settle with the EPA by disallowing other private parties from seeking contribution from them in future litigation.²¹

III. THESIS

This commentary will note the unmistakable trend in case law which demonstrates that a PRP is always entitled to contribution from other PRPs who have not settled their liability with the United States government under CERCLA section 113. A PRP who seeks cost recovery under section 107 is entitled to cost recovery when it seeks to establish joint and several liability among defendant PRPs. Courts are evenly split on whether a PRP may maintain a CERCLA section 107 cost recovery action when seeking to invoke the longer statute of limitations available for cost recovery actions under CERCLA. Lastly, courts almost unanimously reject a PRP cost recovery action when a plaintiff PRP seeks to circumvent contribution protection afforded to

19. A notice sent to a PRP is usually in the form of service of process, and "process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process" under CERCLA's nationwide service of process provisions. 42 U.S.C. § 9613 (e) (1988).

20. 42 U.S.C. § 9622 (a) provides:

The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of a release emanates, or any other potentially responsible person), to perform any response action . . . if the President determines that such action will be done properly by such person. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation. If the President decides not to use the procedures in this section, the President shall notify in writing potentially responsible parties at the facility of such decision and the reasons why use of the procedures is inappropriate. A decision of the President to use or not to use the procedures in this section is not subject to judicial review.

Id.

21. 42 U.S.C. § 9622 (g) (4) (1988). "A settlement [between the EPA and a PRP] shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement." *Id.*

42 U.S.C. § 9622 (g) (5) reads:

A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Id. Further, CERCLA's contribution section contains a nearly identical provision. 42 U.S.C. § 9613 (f) (2).

defendant PRPs who have settled their liability with the United States government.²²

The only situation in which the majority of courts will allow a plaintiff PRP to bring a CERCLA section 107 cost recovery action is when the plaintiff PRP seeks to establish joint and several liability among the defendant PRPs. This commentary will urge an amendment to CERCLA repealing the amendments to CERCLA which provided for the expressed contribution action because this distinction is discordant with Congress' intent in enacting CERCLA. CERCLA should be restored to its original language with an extra provision permitting only the application of common law contribution principles to augment the original text. Further, a recently attempted amendment to CERCLA will be shown to be in complete accord with the drafters' intent while providing an equitable resolution to the hazards in applying joint and several liability.

IV. DISCUSSION

Courts which have addressed whether a PRP may bring a CERCLA section 107 cost recovery action or a CERCLA section 113 contribution action are almost evenly split.²³ Consistencies are apparent, however, when one examines the historical development of CERCLA in conjunction with the motivation of the plaintiff PRP in bringing a CERCLA section 107 action.

A. *Historical Development*

In 1980, Congress enacted CERCLA with two overriding objectives: to furnish the federal government with the tools necessary to promptly and effectively respond to national problems resulting from the disposal of hazardous waste; and to make those responsible for creating these problems "bear the costs and responsibility for remedying the harmful conditions they created."²⁴

22. Ann Alexander, *Toward A Comprehensive Understanding Of The Relationship Between CERCLA §§ 107 And 113*, 10 Toxics L. Rep. (BNA) 184 (July 19, 1995) [hereinafter *Comprehensive Understanding*].

23. See *Standing Under Superfund*, *supra* note 9, at 159. Alexander compares several cases which support a plaintiff PRP's right to bring a § 107 cost recovery action with a similar number denying the same.

24. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)).

The original CERCLA legislation did not provide for a contribution action.²⁵ Rather, under the original language, a person who incurred response costs found his sole remedy in a CERCLA section 107 cost recovery action.²⁶ The relevant text of section 107 has remained relatively unchanged since its initial enactment.²⁷

Prior to 1986, courts applied common law principles to controversies which arose under the statute to recognize an implied right of contribution among PRPs.²⁸ Courts generally handled the issue of contribution among joint tortfeasors by bifurcating trials into a liability phase and a subsequent cost allocation phase.²⁹ Courts applied common law principles regarding joint tortfeasors to hold PRPs jointly and severally liable unless the harm was shown to be divisible.³⁰ Therefore, in the early years of CERCLA litigation, plaintiff PRPs could sue for cost recovery under section 107 during the liability phase of the trial; during the cost allocation phase, courts would hold defendant PRPs to be jointly and severally liable unless they could show the total contamination at a site was divisible and each defendant's contribution to the damage could be assessed individually.³¹

25. See *Standing Under Superfund*, *supra* note 9, at 157.

26. *Id.* at 156.

27. Compare 42 U.S.C. § 9607 (a) (1994) with 42 U.S.C. § 9607 (a) (1980).

28. *Standing Under Superfund*, *supra* note 9, at 157.

29. *Id.*

30. *Id.* at 156.

31. *Id.* Prior to SARA, the federal courts' position on contribution can be best summed up by the following sections of the RESTATEMENT (SECOND) OF TORTS:

§ 886A. Contribution Among Tortfeasors

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

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

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

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

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

§ 433A. Apportionment of Harm to Causes

(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or

(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

RESTATEMENT (SECOND) OF TORTS § 433A (1965).

In 1986, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act ("SARA").³² In enacting SARA, Congress sought to "clarify and confirm" a judicially established right to contribution under CERCLA section 107.³³ Congress thus added an express right to contribution to the CERCLA legislation. In seeking to merely codify the development of CERCLA in the courts, Congress created a sharp division in federal courts over how the new language was to be interpreted.³⁴ This controversy exists to this day.

Following SARA, CERCLA contained two express causes of action for a "person" who incurs response costs: a section 107 cost recovery action and a section 113 contribution action. These actions differ in three primary respects. First, section 107 imposes joint and several liability upon defendant PRPs whereas section 113 imposes only several liability on defendant PRPs. Second, section 107 actions are governed by a six year statute of limitations whereas section 113 actions are governed by a three year statute of limitations. Finally, section 107 actions do not recognize the statutory contribution protection afforded defendant PRPs who settle their liability with the United States government, whereas section 113 contribution actions apply statutory contribution protection afforded similarly situated defendant PRPs.³⁵

B. *Joint and Several Liability*

Plaintiff PRPs often bring a CERCLA section 107 cost recovery action in order to achieve joint and several liability among the defendant PRPs. Joint and several liability among defendant PRPs inures certain benefits to the plaintiff.

§ 881. Distinct or Divisible Harms

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

RESTATEMENT (SECOND) OF TORTS § 881 (1979).

32. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

33. See *Standing Under Superfund*, *supra* note 9, at 157.

This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.

H.R. REP. NO. 253(1), 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 2861.

34. See *supra* note 23.

35. 42 U.S.C. § 9613 (f) (2) (1988).

A plaintiff PRP often sues several hundred defendant PRPs to recover the funds it expended in cleaning up a contaminated site. Each defendant PRP is assessed certain shares which correspond to its perceived liability.³⁶ In most cases, the cleanup comes several years after the contamination of the site. At the point of litigation, many of these defendant PRPs are either long since dissolved corporations, insolvent parties, or parties which cannot be located.³⁷

If a plaintiff PRP cannot bring an action against jointly and severally liable defendants, that plaintiff will have to absorb the shares and thus the liability of the defendants who, for whatever reason, cannot pay.³⁸ These so-called "orphan shares" often represent a substantial portion of the costs a plaintiff PRP will spend.³⁹ Making plaintiff PRPs pay for the orphan shares hardly comports with the CERCLA drafters' original intent of making responsible parties pay their share of the damages.⁴⁰

Most courts which have been faced with a plaintiff PRP who wishes to sue under CERCLA section 107 in order to make the defendants jointly and severally liable have allowed the plaintiff PRPs to maintain a section 107 action.⁴¹ The decision of the Eastern District of Virginia in *Chesapeake and Potomac Telephone Co. of Virginia v. Peck Iron & Metal Co.*⁴² is a typical example of these courts' reasoning.

In *Chesapeake*, the United States District Court for the Eastern District of Virginia issued a memorandum opinion in response to cross motions for summary judgment.⁴³ Peck Iron and Metal Company and its co-defendants ("Peck") raised the issue of Chesapeake and Potomac Telephone Company's ("C&P") standing to bring a section 107 cost recovery action.⁴⁴ Peck argued that because C&P was itself a PRP, C&P could only bring a contribution action under section 113.⁴⁵ Because C&P could only sue for contribution, "joint and several liability [was] not available."⁴⁶

36. See *Standing Under Superfund*, *supra* note 9, at 160.

37. *Id.*

38. *Id.*

39. *Id.*

40. See *Dedham Water*, 805 F.2d at 1081.

41. See *Comprehensive Understanding*, *supra* note 22.

42. 814 F. Supp. 1269 (E.D. Va. 1992).

43. *Id.* at 1271.

44. *Id.* at 1273, 1277.

45. *Id.* at 1273.

46. *Id.*

The Court ruled C&P was entitled to maintain its action under section 107, stating “[t]here is nothing in the language of the statute [] that precludes a party, like C&P, itself liable under CERCLA, to initiate cleanup and sue to recover its costs under Section 107.”⁴⁷ The Court thus recognized the absence of limiting language in the statute following SARA. The plain language of CERCLA does not preclude a person from maintaining a section 107 cost recovery action even though it may not be an “innocent” party.⁴⁸

The Court also recognized there were two phases to the upcoming trial. After ruling that liability could be imposed upon the defendant PRPs under section 107, the Court stated that “[a]t the contribution phase of this proceeding, the Court will, as a first cut at apportioning liability, determine a ‘Plaintiff’s share’ and a ‘Defendant’s share.’”⁴⁹

Further, the Court noted the imposition of joint and several liability upon defendant PRPs depended upon establishing that the harm done to the contaminated site was indivisible.⁵⁰ After adopting the Restatement standard for imposing joint and several liability,⁵¹ the Eastern District of Virginia then ruled that “the imposition of joint and several liability turns upon whether there is a reasonable basis for determining the contribution of each defendant to the harm at the Site.”⁵²

Thus, the Court remained true to the original text of CERCLA by allowing C&P to maintain its section 107 cost recovery action. In doing so, the Eastern District of Virginia did not do violence to Congress’ intent in amending CERCLA with SARA, which sought to clarify and confirm the existing law. C&P was therefore successful in maintaining its section 107 action because it did not seek to use SARA and its vague language to its advantage: C&P asked for no more than it would have received under the original text of the statute.

47. *Id.* at 1277.

48. *Id.* (“Nothing in the statute supports the assertion that only . . . an ‘innocent’ plaintiff can bring a cost recovery action under Section 107 (a).”).

49. *Id.* at 1277-78.

50. *Id.* at 1279.

51. *Id.* at 1278-79 (quoting RESTATEMENT (SECOND) OF TORTS § 433A (1965)).

52. *Id.* at 1279.

C. *Statute of Limitations*

Congress provides for a six year statute of limitations on private party section 107 cost recovery actions.⁵³ In contrast, Congress, in enacting the SARA amendments to CERCLA in 1986, provides for a three year statute of limitations for express contribution actions under CERCLA section 113.⁵⁴

Plaintiff PRPs often will sue under CERCLA section 107 in order to take advantage of the longer statute of limitations.⁵⁵ When presented with this motivation, courts are evenly split on whether the plaintiff PRP may maintain this cost recovery action.⁵⁶

In *United States v. SCA Services of Indiana, Inc.*,⁵⁷ the Northern District of Indiana issued an Order in response to the third party defendant PRPs' Motion to Dismiss.⁵⁸ These third party defendant PRPs ("Omnisource") argued that the third party plaintiff PRP ("SCA") was limited to a section 113 contribution claim and subject to the shorter three year statute of limitations.⁵⁹ If SCA could not maintain a section 107 cost recovery action, its claims against Omnisource would be time-barred.⁶⁰

The Northern District of Indiana relied upon the District of New Jersey's reasoning in *Transtech Industries, Inc. v. A & Z Septic Clean*⁶¹ to determine the issue of which statute of limitations applied.⁶² After

53. 42 U.S.C. § 9613 (g) (2) (B) (1988). "An initial action for the recovery of the costs referred to in section 9607 of this title must be commenced . . . for a remedial action, within 6 years after the initiation of physical on-site construction of the remedial action . . ." *Id.*

54. 42 U.S.C. § 9613 (g) (3) (1988) reads:

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

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

Id.

55. See *Standing Under Superfund*, *supra* note 9, at 156.

56. See *Comprehensive Understanding*, *supra* note 22, at 184.

57. 849 F. Supp. 1264 (N.D. Ind. 1994).

58. *Id.* at 1267.

59. *Id.* at 1269.

60. See *id.* at 1270.

61. 798 F. Supp. 1079 (D.N.J. 1992).

62. *SCA Services*, 849 F. Supp. at 1271-72.

concluding "that a potentially responsible party may bring a cost recovery action against other responsible parties under CERCLA section 107,"⁶³ the Court then turned to the facts of the case to justify the use of the longer statute of limitations.

SCA argued that "in a cost recovery action an accurate picture of the costs involved in a cleanup will not emerge until a cleanup is underway, which can be many years after entry of a consent decree."⁶⁴ The consent decree triggers the three year statute of limitations for contribution actions.⁶⁵

Further, the government entered into the consent decree with SCA in 1989.⁶⁶ The Court noted that there was a natural "time lag between the decision to cleanup a site and the incurrence of [response] costs," because the EPA "must approve the various work plans involved in a remedial action."⁶⁷ SCA did not have the opportunity to begin removing drums from the site until three years after the entry of the consent decree.⁶⁸ The Court used these facts to illustrate the potential inequity if SCA were denied standing to sue under section 107 based solely upon its status as a PRP.

The flipside of the reasoning in *SCA Services* is the reasoning of the First Circuit Court of Appeals in *United Technologies Corp. v. Browning-Ferris Industries, Inc.*⁶⁹ In 1982, the government ordered the Inmont Corporation to clean up a contaminated site.⁷⁰ Then in 1986, the government and Inmont entered into a consent decree.⁷¹ Sometime after 1982, United Technologies Corp. ("UTC") acquired Inmont and all of its respective liabilities.⁷² UTC then sued various defendants ("BFI") in 1992 before the expiration of the six-year statute of limitations governing cost recovery actions.⁷³

The First Circuit looked solely to the status of UTC as a PRP in ruling UTC could not maintain its section 107 cost recovery action:

63. *Id.* at 1281.

64. *Id.* at 1283.

65. *See* 42 U.S.C. § 9613 (g) (3).

66. *SCA Services*, 849 F. Supp. at 1268.

67. *Id.* at 1283.

68. *Id.*

69. 33 F.3d 96 (1st Cir. 1994).

70. *Id.* at 97.

71. *Id.*

72. *Id.*

73. *Id.*

The word "contribution" . . . should be given its plain meaning. Adapted to an environmental case, it refers to an action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its pro rata share of the aggregate response costs Applying this definition, the instant action clearly qualifies as an action for contribution And because CERCLA's text indicates that contribution and cost recovery are distinct, non-overlapping anodynes, the action had to be commenced within three years of its accrual.⁷⁴

The First Circuit worried applying section 107 to a case in which a PRP sues other PRPs "would completely swallow section 9613(g)(3)'s three year statute of limitations associated with actions for contribution."⁷⁵ The Court did not wish to nullify an entire subsection of SARA.⁷⁶

The *United Technologies* ruling was entirely consistent with the language of CERCLA following SARA in 1986 with regard to contribution actions. The application of either the six year statute of limitations or the three year statute of limitations turns entirely on whether a court wishes to allow the PRP to maintain a section 107 action.

The statute of limitations issue illuminates a tremendous shortcoming of CERCLA following SARA. Before SARA, Congress provided no statute of limitations for a private party cost recovery action.⁷⁷ Then Congress enacted SARA as merely a codification of the law as it had developed.⁷⁸ In creating the new cause of action for contribution, Congress muddied the waters of CERCLA litigation, and the end result is a decision such as *United Technologies*, which is wholly consistent with the amended statute, while destroying the law as it had existed prior to SARA. Thus, Congress achieved a result opposite to its intent in enacting SARA.⁷⁹

74. *Id.* at 103.

75. *Id.* at 101.

76. *Id.*

77. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980).

78. See *Standing Under Superfund*, *supra* note 9, at 157.

79. Ann Alexander offers an interesting analysis of the statute of limitations issue as it pertains to CERCLA § 107 and § 113 actions in *Comprehensive Understanding*, *supra* note 22, at 184 n.64:

One could argue that a longer statute of limitations would encourage settlement by reducing a potential obstacle to cost recovery or that a longer statute makes procedural sense where a PRP has initiated a cleanup rather than reimbursing someone else, since it takes longer in such a circumstance to determine the extent of the costs for which reimbursement will be sought. However, neither of these considerations constitutes anything approaching a genuine disincentive to settlement associated with the shorter statute. In any event, unlike . . . other . . . concerns associated with the §107/§113 controversy, the statute of limitations question cannot always be resolved merely by

D. Contribution Protection

When PRPs settle their liability for contaminating a site with the United States government, they receive statutory contribution protection which grants them immunity from future private party contribution actions, provided the claimant seeks contribution for "matters addressed" in the approved settlement agreement.⁸⁰ Thus, a plaintiff PRP may not bring a section 113 contribution action against settling defendant PRPs for matters addressed in the settlement. As a result, plaintiff PRPs often bring a section 107 cost recovery action in order to circumvent this statutory contribution protection.⁸¹

Courts have unanimously rejected claims for cost recovery under section 107 when a plaintiff PRP seeks cost recovery in order to circumvent contribution protection.⁸² In *Transtech Industries, Inc. v. A & Z Septic Clean*,⁸³ the plaintiff PRPs ("Transtech") sued the defendant PRPs ("A & Z") under CERCLA section 107 seeking cost recovery.⁸⁴ A group of defendants who had settled their liability with the EPA ("settlers") moved to dismiss the complaint against them by invoking the statutory contribution protection enacted by the 1986 SARA amendments.⁸⁵ Transtech, in filing its section 107 cost recovery action, sought to avoid the contribution protection by reaching the settlers through a different cause of action.⁸⁶

The court ultimately ruled A & Z's motion to dismiss must fail because it sought contribution protection for matters not addressed by their settlement agreements with the government.⁸⁷ The court, however, was careful to explain that Transtech's sole cause of action was

categorizing the action as either a § 107 cost recovery claim or a § 113 contribution claim. Section 113(g)(2) purports to define the limitations period for "Actions for recovery of costs," while § 113(g)(3) purports to define the limitations period for "contribution." However, the § 113(g)(3) 3-year period begins to run only upon entry of a judgment, administrative order, or judicially approved settlement. Thus, a court could categorize a liable party as a § 113 contribution plaintiff, but the § 113(g)(3) limitations period would not apply to that party's action if its costs were incurred voluntarily, without judicial or administrative intervention.

Id.

80. See 42 U.S.C. § 9622 (g) (4) (1988).

81. See *Standing Under Superfund*, *supra* note 9, at 156.

82. See *Comprehensive Understanding*, *supra* note 22, at 184.

83. 798 F. Supp. 1079 (D.N.J. 1992).

84. *Id.* at 1085.

85. *Id.* at 1084.

86. *Id.* at 1085.

87. *Id.* at 1090.

one for contribution.⁸⁸ The court reasoned section 107 merely authorized the section 113 contribution action.⁸⁹

The Seventh Circuit Court of Appeals also refused to recognize a plaintiff PRP's section 107 cost recovery action in *Akzo Coatings, Inc. v. Aigner Corp.*⁹⁰ Akzo sought cost recovery from Aigner, which had previously settled its liability with the EPA.⁹¹

The Seventh Circuit went even further than the New Jersey District Court had in *Transtech* in ruling Akzo could only pursue a section 113 contribution action:

Akzo has experienced no injury of the kind that would typically give rise to a direct claim under section 107(a)—it is not, for example, a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands. Instead, Akzo itself is a party liable in some measure for the contamination at the Fisher-Calo site, and the gist of Akzo's claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible That is a quintessential claim for contribution Whatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.⁹²

An analysis of cases in which a plaintiff PRP seeks to sue defendant PRPs under section 107 for cost recovery in order to circumvent the contribution protection afforded settling PRPs reveal that courts generally find the suit to be one for contribution alone.⁹³ Thus, contribution protection applies if the suit covers matters addressed in the settlement.

Courts likely rule this way for two reasons. First, in trying to escape contribution protection, plaintiff PRPs attempt to use a literal reading of CERCLA following SARA to circumvent the defendant PRPs' right to contribution protection, a right recognized by the courts prior to CERCLA. In doing so, courts try to preserve the judicially recognized contribution action which existed prior to SARA. If the intent of SARA was to clarify and confirm the existing law, allowing plaintiff PRPs to skirt this existing law because of a strained

88. *Id.* at 1086.

89. *Id.*

90. 30 F.3d 761 (7th Cir. 1994).

91. *Id.* at 762-63.

92. *Id.* at 764 (internal citations omitted).

93. See *Comprehensive Understanding*, *supra* note 22, at 184.

interpretation of the amendment would be directly contradictory to the intent of the drafters of the amendments.⁹⁴

Second, in attempting to use CERCLA to circumvent contribution protection as to matters addressed, the plaintiff PRPs bring the *nature* of the action into issue. Whereas the imposition of joint and several liability focuses on the liability among guilty parties and the choice of statute of limitations focuses on equitable factors, an avoidance of contribution protection causes the court to examine the exact nature of the suit. Since courts are guided by the SARA amendments to CERCLA, they logically determine that the plaintiff PRPs are, in essence, seeking contribution and not cost recovery. While this application may ignore the literal language of section 107, which provides cost recovery for all persons, including PRPs, it allows a court to prevent plaintiff PRPs from *using a defense to contribution protection which did not exist in the courts prior to SARA or in the language of the amendments.*

V. THE DANGEROUS TREND

Recently, courts have begun to deny a PRP the statutory right to bring a section 107 cost recovery action based solely upon its standing as a PRP. The Tenth Circuit has issued two recent decisions which exemplify this dangerous trend.

In *United States v. Colorado & Eastern Railroad Co.*,⁹⁵ the EPA filed suit in 1989 against all known PRPs seeking recovery of response costs incurred since a contaminated site had been placed on the National Priorities List in 1983.⁹⁶ As a result of the suit, two of the defendant PRPs, McKesson and Farmland, settled their liability with the EPA and “agreed to finance and perform all remediation of the site.”⁹⁷ In total, the two PRPs spent in excess of \$15 million to clean up the site.⁹⁸

In 1992, three other defendant PRPs, Colorado & Eastern Railroad Co., Great Northern Transportation Co., and Flanders (“the CERC parties”) settled their liability with the EPA.⁹⁹ Soon thereafter, the defendant PRPs filed cross claims against each other.¹⁰⁰ All of

94. See *Standing Under Superfund*, *supra* note 9, at 157.

95. 50 F.3d 1530 (10th Cir. 1995).

96. *Id.* at 1532-33.

97. *Id.* at 1533.

98. *Id.*

99. *Id.*

100. *Id.*

these claims were settled or dismissed prior to trial except Farmland's claim against the CERC parties.¹⁰¹ Farmland sued for cost recovery under CERCLA section 107 and alternatively, contribution under CERCLA section 113.¹⁰² The CERC parties moved for summary judgment, asserting that Farmland's contribution claims were barred by statutory contribution protection available to settling parties under CERCLA section 113.¹⁰³ The trial court denied the motion because the CERC parties had yet to pay the EPA the agreed amount.¹⁰⁴ The court also determined there was a "genuine issue of material fact [regarding] the scope of the contribution protection afforded by [the] consent decree" the CERC parties entered into with the government.¹⁰⁵

At trial, the District Court for the District of Colorado entered judgment for Farmland under CERCLA section 107.¹⁰⁶ The Court also ruled that liability could have been apportioned under section 113, but the CERC parties had failed to counterclaim for contribution.¹⁰⁷ Since Farmland's remedy was under section 107, the Court passed on the issue of contribution protection.¹⁰⁸

The Tenth Circuit reversed.¹⁰⁹ The court ruled "[w]hatever label Farmland may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make."¹¹⁰ The court also held that "Farmland's claim against the CERC parties must be classified as one for contribution."¹¹¹ In so ruling the court focused solely on the parties' status as PRPs: "There is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution."¹¹²

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1533-34.

106. *Id.* at 1534.

107. *Id.*

108. *Id.*

109. *Id.* at 1534, 1536.

110. *Id.* at 1536.

111. *Id.*

112. *Id.*

The United States District Court for the District of Utah followed the bright line test of *Colorado & Eastern in Ekotek Site PRP Committee v. Self*.¹¹³ In 1988, the EPA assumed control of a site to begin an "emergency removal to [halt] the release of hazardous substances."¹¹⁴

In 1988, the EPA notified a group of corporations who were potentially liable for the contamination at the site.¹¹⁵ Forty-nine of these corporations formed the plaintiff Ekotek Site Committee.¹¹⁶ This group formed in order to negotiate with the EPA and to undertake investigation and response action at the site.¹¹⁷ The defendants were a group of PRPs who allegedly contributed to the contamination at the site but were not part of the Committee.¹¹⁸

In response to joint motions for summary judgment, the District Court issued a Memorandum Opinion and Order.¹¹⁹ Addressing whether a PRP may bring a cost recovery action under CERCLA section 107,¹²⁰ the court withheld ruling on this issue until the Tenth Circuit issued its final disposition in *Colorado & Eastern*.¹²¹ The court followed the Tenth Circuit's reasoning and held the Ekotek Site Committee, by virtue of its status as a PRP, was precluded from bringing an action for cost recovery under section 107.¹²²

This approach is in direct conflict with a recent ruling of the United States Supreme Court. In *Key Tronic Corp. v. United States*,¹²³ the Court stated, albeit in dicta, that SARA did not abrogate the ability of a private party to bring a cost recovery action under section 107.¹²⁴ While one would expect this statement to be dispositive of

113. 881 F. Supp. 1516 (D. Utah 1995).

114. *Id.* at 1518.

115. *Id.* at 1519.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1518.

120. *Id.* at 1520.

121. *Id.* at 1521.

122. *Id.*

123. 114 S. Ct. 1960 (1994).

124. *Id.* at 1965-66. The Court stated:

The 1986 SARA amendments included a provision—CERCLA § 113(f)—that expressly created a cause of action for contribution. Other SARA provisions, moreover, appeared to endorse the judicial decisions recognizing a cause of action under § 107 by presupposing that such an action existed Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.

Id. (internal citations omitted).

the issue, subsequent lower federal courts continue to dissect the issue. The Tenth Circuit trend approach has elucidated that a PRP cannot bring a cost recovery action under section 107 based solely upon its status as a PRP, which is inconsistent with both *Key Tronic* and the plain language of the statute.

VI. STATUTORY AMENDMENT IS NECESSARY TO RESTORE CERCLA TO ITS ORIGINAL INTENT

Following the SARA amendments to CERCLA in 1986, a majority of courts have only been willing to allow a PRP to bring a cost recovery action under CERCLA section 107 when a plaintiff PRP wishes to establish joint and several liability between defendant PRPs. Congress must reexamine CERCLA as it currently stands, because this distinction is discordant with the legislative intent surrounding CERCLA¹²⁵ and the SARA amendments.¹²⁶

The original CERCLA legislation only provided for the section 107 cost recovery action, which was available to all persons under CERCLA, including PRPs.¹²⁷ An unbridled ability of PRPs to recover costs was tempered by the bifurcated trial mechanism; liability was assessed under section 107 in the liability phase and blame was assessed by applying common law principles in the cost allocation phase.¹²⁸ The cost allocation phase applied joint and several liability among defendant PRPs unless the harm was shown to be divisible, in which case, liability was several only.¹²⁹

Congress attempted to "clarify and confirm" the evolution of case law under CERCLA by codifying the judicial decisions handed down between 1980 and 1986.¹³⁰ In trying to codify judicial law, however, Congress, in using such limiting language, confused the issue. Following SARA, courts could no longer look to common law principles to supplement the statute; they were bound by the vague provisions of the statute and the similarly vague legislative history in ruling on whether a PRP may bring a cost recovery action under CERCLA section 107.

125. See *Comprehensive Understanding*, *supra* note 22.

126. See *Standing Under Superfund*, *supra* note 9, at 157.

127. See *Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, *supra* note 77.

128. See *Standing Under Superfund*, *supra* note 9, at 157.

129. *Id.* at 156.

130. *Id.*

An historical legal analogy will be helpful in recognizing the effect of the SARA amendments. The implementation of the Federal Rules of Evidence regarding privilege are instructive on the shortcomings of enacting law which attempts to cover all *minutia* of a given issue, leaving no room for the courts to apply the law.

Article V of the Federal Rules of Evidence covers privilege.¹³¹ As enacted, Article V contains only one rule, Rule 501.¹³² Rule 501 is extremely open ended, allowing federal courts to apply the law of privilege as "governed by the principles of the common law . . . in light of reason and experience."¹³³ Courts thus have the latitude to experiment and adapt while enjoying a long-standing body of common law to use as a point of reference and justification.

The drafters of the original version of Article V submitted thirteen rules to Congress in 1973.¹³⁴ Of these thirteen rules, nine defined specific non-constitutional privileges.¹³⁵ Three of the rules governed waiver of privilege.¹³⁶ The remaining rule was an exclusivity provision which mandated that federal courts could only apply the enumerated privileges of Article V or other privileges which were established by statute.¹³⁷

The House Committee on the Judiciary amended the proposed Article V to include only Rule 501.¹³⁸ The House sought to leave the law of privilege as it had developed in the courts while leaving open the possibility for future development.¹³⁹ The Conference Committee eventually adopted this version of Article V.¹⁴⁰

Clearly, the Congress, in promulgating the Federal Rules of Evidence governing privilege, was faced with a dilemma. It could either

131. FED. R. EVID. 501.

132. *Id.* The rule reads:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or a political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience . . .

Id.

133. *Id.*

134. House Comm. of Judiciary, FED. R. EVID., H.R. REP. NO. 650, 93d Cong., 1st Sess. 8 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7082.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* "[T]he Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States." *Id.*

140. H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 7 (1974).

accept an extensive and enumerated version of Article V as drafted by the Advisory Committee, or it could amend that proposal to accommodate the law of privilege as developed in the courts. In amending the proposal, Congress could also insert a provision which would allow the law of privilege to develop as it had previously, through court decision. Congress chose to amend the proposal, cutting Article V from thirteen rules to one rule.

Congress was faced with a similar dilemma in enacting the SARA amendments to CERCLA in 1986. Courts had developed the law surrounding section 107 cost recovery actions to the point where a PRP who incurred response costs could sue other PRPs under section 107 in the liability phase of trial. Under the bifurcated scheme, in the cost allocation phase of trial, liability among the parties could be determined. Courts applied joint and several liability unless the harm done to a site was shown to be divisible.

Congress thus had three potential choices when contemplating SARA: leave the law alone as it stood; amend CERCLA to include an expressed cause of action for contribution which, in theory, would clarify and confirm the existing law; or amend CERCLA to provide for the bifurcated trial mechanism and joint and several liability among defendant PRPs unless the harm done to the site was shown to be divisible. Congress chose to amend CERCLA to include an expressed contribution action under section 113.¹⁴¹

Following the analogy of the promulgation of the Federal Rules of Evidence regarding privilege, *Congress should have left CERCLA alone in 1986*. The only material difference between the codification of privilege law and the enactment of SARA was that there was no federal rule of privilege before the promulgation of Article V of the Federal Rules of Evidence. Therefore, the enactment of Rule 501 itself was merely an open-ended codification of the notion that the law of privilege should be made by the courts.

By 1986, CERCLA had been law for six years. As it stood, the law was composed of a relatively vague statutory section which granted any person the right to sue for the recovery of costs along with a fairly uniform body of case law defining the scope of this vague statutory provision. Then, by amending CERCLA to include the section 113 contribution action in an attempt to clarify and confirm the existing law, Congress did exactly what it sought to avoid when it had

141. See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

previously balked at the original thirteen rules regarding privilege. In terms of privilege law, Congress did not want to expressly enumerate each privilege because to do so would inherently limit the scope of privilege law as it had developed in the courts over the years. Likewise, the law of privilege had reached the point it was at the time of the implementation of the Federal Rules of Evidence through judicial decisions, and to pigeonhole the entire body of common law privilege into thirteen tidy rules would result in freezing the evolution of privilege law.

In enacting SARA, and specifically section 113, Congress both crippled and confused the existing law regarding cost recovery under CERCLA. Section 113 froze the courts' ability to apply general principles to factually distinct situations. Section 113 implicitly abrogated joint and several liability as it applies to actions between liable parties. Section 113 also imposed a new statute of limitations which could be used to bar actions which would have been timely prior to SARA.

Congress should not have amended CERCLA to include an expressed cause of action for contribution. An implied right of contribution existed beforehand when courts only had section 107 to apply.¹⁴² Under the bifurcated scheme, the courts could assess liability between the defendant PRP's in the cost allocation phase of trial.¹⁴³ Contribution was already available to defendant PRPs.¹⁴⁴

Congress should, therefore, amend CERCLA by repealing section 113 and all related provisions which apply to the expressed right of contribution. Congress should instead insert a provision in CERCLA similar to that used in Rule 501 of the Federal Rules of Evidence, allowing the courts to apply common law principles regarding contribution to section 107 cost recovery actions. Liability should be presumptively joint and several unless the harm is shown to be divisible. Only one statute of limitations should apply to these actions. Likewise, there should be no contribution protection afforded to defendant PRPs who settle their liability with the government. Settlement with the government is definitely within the interest of judicial economy and efficiency, but one must remember the overriding objectives of CERCLA - to promptly and efficiently address the hazardous

142. See *Standing Under Superfund*, *supra* note 9, at 157.

143. *Id.*

144. *Id.*

waste disposal problem and to make those guilty of contaminating a site pay their share of the costs.¹⁴⁵

Settlement with the EPA should thus be phased out of the procedural scheme of remedying a site. The EPA should simply issue a section 106 order compelling one or more parties to clean up a site. These parties can then sue under section 107 to recover costs from other PRPs. These costs should include investigation fees incurred in trying to locate all other potentially responsible parties. The Supreme Court has recognized that investigation fees are recoverable as costs by plaintiff PRPs under section 107.¹⁴⁶

The notion of joint and several liability among defendant PRPs in a cost recovery action allows the plaintiff to recover its total damage. This would include the orphan shares which represent the liability of dissolved or insolvent corporations or individuals as well as the costs of investigation to identify PRPs, the costs of locating PRPs, and the costs of serving PRPs.¹⁴⁷ This principle may seem inherently unfair to defendant PRPs who have to shoulder the burden of cleanup of fellow contaminators who cannot pay. To do away with joint and several liability, however, which is what would occur in CERCLA litigation in which a PRP could only bring a section 113 action, provides a tremendous disincentive for parties ordered under section 106 to clean up a site. If liability is several only, a party ordered under section 106 may not recover its total costs.¹⁴⁸

In 1994, the Second Session of the 103d Congress proposed various amendments to CERCLA,¹⁴⁹ one of which is relevant to the issue of joint and several liability.¹⁵⁰ In determining the allocation of respective shares among all PRPs, a designated allocator has the power to assign orphan shares.¹⁵¹

145. See *Comprehensive Understanding*, *supra* note 22.

146. *Key Tronic*, 114 S. Ct. at 1967. "[Investigating] significantly benefitted the entire cleanup effort and served a statutory purpose apart from the reallocation of costs. These kinds of activities are recoverable costs of response clearly distinguishable from litigation expenses." *Id.*

147. See *Standing Under Superfund*, *supra* note 9, at 180.

148. *Id.*

149. S. 1834, 103d Cong., 2d Sess. (1994).

150. *Id.* at § 409.

151. *Id.* at § 409 (d). The bill reads:

(4) Identification Of Orphan Shares.

The allocator may determine that a percentage share for the facility is specifically attributable to an "orphan share." The orphan share may only consist of the following:

(A) shares attributable to hazardous substances that the allocator determines, on the basis of information presented, to be specifically attributable to identified but insolvent or defunct responsible parties who are not affiliated with any allocation party;

Currently, if joint and several liability is imposed upon defendant PRPs, these PRPs must absorb the orphan shares into their total expense. If a *pro tanto* credit rule is applied, the last party to settle runs the risk of having to shoulder the entire remaining portion of the damage including all orphan shares.¹⁵²

The 103d Congress proposed a \$300 million maximum allocation to pay the orphan shares of each cleanup.¹⁵³ This proposal would have allowed plaintiff PRPs to take advantage of joint and several liability with respect to the total assessable liability among solvent defendant PRPs while still recovering the amount assigned to insolvent or dissolved defendant PRPs. This proposal would have adhered to the common law principles that courts applied prior to SARA and that SARA sought to protect while accommodating the underlying intent of Congress in enacting CERCLA. In addition, the proposed legislation would have shielded solvent defendant PRPs from the inherent unfairness of shouldering a burden in excess of their proportionate liability within a joint and several scheme. Unfortunately, the amendments covered a variety of subjects within CERCLA, and the entire proposal was rejected by Congress.

CERCLA should be amended to abolish the unnecessary and confusing expressed contribution action under section 113. Further, Congress should add a section which expressly mandates that courts apply the common law principles of contribution to a bifurcated trial scheme, and to establish a government fund to pay the orphan shares.

(B) the difference between the aggregate shares that the allocator determines, on the basis of the information presented, are specifically attributable to contributors of municipal solid waste subject to the limitations in section 107(a)(5)(D) of this title, and the share actually assumed by those parties in any settlements with the United States pursuant to subsection 122(g) of this title, including the fair market value of in-kind services provided by a municipality; and

(C) the difference between the aggregate share that the allocator determines, on the basis of information presented, is specifically attributable to parties with a limited ability to pay response costs and the share actually assumed by those parties in any settlements with the United States pursuant to subsection 122(b) of this title.

The orphan share shall not include shares attributable to hazardous substances that the allocator cannot attribute to any identified party. Such shares shall be distributed among the allocation parties.

Id.

152. See *Atlantic Richfield Co. v. American Airlines, Inc.*, 836 F. Supp. 763, 764 (N.D. Okla. 1993) ("The *pro tanto* approach is contained in the Uniform Contribution Among Tortfeasors Act (UCATA), which provides contribution protection to all settling parties and reduces the amount of the non-settling parties' liability by the dollar amount of the settlements.").

153. S. 1834, 103d Cong., 2d Sess. § 409 (e) (1994).

In doing so, the intent of Congress in enacting CERCLA and promulgating SARA would be realized. Additionally, Congress would establish the equitable considerations a court must apply if the damage to a site is indivisible, thus making liability joint and several.

VII. CONCLUSION

As CERCLA currently reads, a PRP who incurs response costs in remedying a contaminated site has two expressed causes of action to recover these costs: a cost recovery action under section 107, and a contribution action under section 113. A cost recovery action affords the PRP three distinct advantages: a greater scope of recovery due to the imposition of joint and several liability among defendant PRPs; a longer statute of limitations; and no statutory bar to cost recovery.

Courts usually interpret CERCLA to imply that a PRP is entitled to bring only one of the two expressed causes of action. The current trend is to disallow a PRP the right to bring a section 107 cost recovery solely upon its status as a non-innocent, potentially liable party. This interpretation contravenes not only the original text of CERCLA, which provided for only a section 107 cost recovery action, but also the SARA amendments, which merely sought to codify the development of CERCLA litigation from its enactment. The addition of a contribution action was meant to clarify and confirm the imposition of a bifurcated trial scheme in which liability was assessed under section 107 in the liability phase, then common law contribution was applied during the cost allocation phase.

SARA and its expressed contribution action have failed miserably. Instead of following the law as it had developed in the courts, courts have begun to deny a PRP the right to bring a section 107 cost recovery action solely based upon its standing as PRPs. To solve this judicial conundrum, Congress must amend CERCLA to eliminate the SARA amendments which apply to contribution completely. In doing so, Congress must insert a provision in CERCLA similar to the Federal Rule of Evidence regarding privilege allowing for the application of common law principles to augment the statute. The original text of CERCLA and a supplementary provision which recognizes the application of common law principles is the best way to restore CERCLA to a state in which the original intent of the drafters is respected.

Lastly, the 103d Congress proposed an amendment to CERCLA which tried to strike a balance between the application of joint and

several liability as an incentive to private parties and its inherent unfairness in imposing upon defendant PRPs greater liability by making them pay for the orphan shares. Setting up a fund to pay for the orphan shares is in the best interest of all parties. A plaintiff PRP is certainly no worse off, and a defendant PRP will not have to bear the liability of dissolved or insolvent corporations.

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