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SURVEYING THE SUPERFUND SETTLEMENT DILEMMA

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I. INTRODUCTION

You have just been contacted by a valued client—something about a "PRP Notice Letter" from the Environmental Protection Agency (EPA) notifying your client that he has been identified as a "Potentially Responsible Party"[1] (PRP) in a Superfund action.[2] At this point, you know little more than that this is an environmental law problem.

Minimal research reveals that "Superfund" is the popular name for the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[3] an Act providing for liability, compensation, cleanup, and emergency response when hazardous substances are released into the environment, and for the cleanup of inactive hazardous waste disposal sites.[4] CERCLA's underlying premise is that taxpayers should not bear the costs of protecting the public from hazards

1. " 'Potentially Responsible Party' means any individual(s) or company(ies) (such as owners, operators, transporters, or generators) potentially responsible under sections 106 or 107 of CERCLA for the contamination problems at a Superfund site." 40 C.F.R. § 35.4010 (1990).

2. The purpose of a *general* "PRP Notice Letter" (also known as a section 104(e) Information Letter) is to inform PRPs of their potential liability under CERCLA, to initiate information exchange with EPA and to begin "informal" negotiations. EPA Guidance on Notice Letters, Negotiations, and Information Exchange (Oct. 19, 1987), *reprinted in* ROBERT E. STEINBERG & RICHARD H. MAYS, 3 RCRA AND SUPERFUND 34-1, 34-9 (1990).

In contrast, *special* notice letters, which are sent after general notice letters pursuant to CERCLA section 122(e), 42 U.S.C. § 9622(e) (1988), trigger "formal" negotiations and an enforcement moratorium. Use of both general and special notice letters is at EPA's discretion. *Id. See also, infra* notes 34-35 and accompanying text.

3. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)) [hereinafter CERCLA]. The name "Superfund" derived from the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613-1782 (1986), a congressional overhaul of the original Act.

For a thorough discussion of the evolution of Superfund settlement policy and the 1986 amendments as they pertain specifically to settlement issues, *see* James N. Strock, *Settlement Policy Under the Superfund Amendments and Reauthorization Act of 1986*, 58 U. COLO. L. REV. 599 (1988).

4. CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

produced by a waste generator, transporter, consumer or dumpsite owner or operator who has profited from commerce involving these hazardous substances.[5] Not surprisingly then, CERCLA defines a broad class of "persons"[6] potentially liable for the cleanup[7] or costs of cleanup of a site where there has been a "release" or "threat of release" of a "hazardous substance."[8] Courts have consistently interpreted all relevant CERCLA terms broadly, making it extremely difficult to avoid liability.[9] Moreover, a majority of courts have held responsible parties to a standard of strict, joint and several liability.[10]

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5. *See, e.g.*, Congressional Research Service, Environment and Natural Resources Policy Division, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 96th Cong., 2d Sess., 405 (Comm. Print 1983).

6. "Person" includes "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." CERCLA § 101(21), 42 U.S.C. § 9601(21) (1988).

7. CERCLA § 106, 42 U.S.C. § 9606 (1988). *See infra* note 18 and accompanying text.

8. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988). This section lists four categories of potentially liable parties:

> 1) the owner and operator of a vessel or a facility,
> 2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> 3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by any such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
> 4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

Id. Therefore, under section 107(a), the following seven elements establish a prima facie case of CERCLA liability:

1) a release or substantial threat of release;
2) of a hazardous substance;
3) from a facility;
4) which has caused the occurrence of response costs;
5) the defendant is an "owner," "operator," "generator," or "transporter;"
6) the defendant "arranged for disposal or treatment" or arranged with a transporter for transport or treatment; and
7) the government's costs are incurred in a manner not inconsistent with the Superfund national contingency plan, which specifies both substantive and procedural requirements for cleanup actions. *See* 40 C.F.R. Part 300 (1990).

Kevin Gaynor, *Prosecution of a Superfund Action*, 20 Env't Rep. (BNA) 756 (Sept. 1, 1989). *See also* United States v. ACETO Agric. Chem. Corp., 872 F.2d 1373, 1378-79 (8th Cir. 1989).

9. *ACETO*, 872 F.2d at 1380 ("courts have concluded that a liberal judicial interpretation is consistent with CERCLA's 'overwhelmingly remedial' statutory scheme"). *See also* Carroll E.Dubuc & William D. Evans, *Recent Developments Under CERCLA: Toward a More Equitable Distribution of Liability*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,197, 10,199 (June 1987); Comment, *Superfund Settlements: The EPA's Role*, 20 CONN. L. REV. 923, 926 (1988).

10. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 S. Ct. 1106 (1989); O'Neil v. Picillo, 682 F. Supp. 706 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989).

Additional research discloses that Superfund actions typically involve complex, multi-party litigation. Often a Superfund action at a single site involves hundreds of parties.[11] In addition, it is not uncommon for a Superfund site to have been abandoned, or to be in limbo in the aftermath of a bankrupt business venture. Frequently, records identifying the potentially responsible parties and the composition of the waste(s) at the site are lost or not readily available. Even more sobering is the fact that the average cost of a Superfund site cleanup may exceed $40 million.[12] This complexity and potential liability render the myriad of CERCLA settlement issues vitally important.

This article provides the CERCLA novice a survey of settlement issues from the perspectives of both settlers and nonsettlers. An early understanding of CERCLA settlement issues may save valuable time and the client's money during actual negotiations with other PRPs and the EPA. Part II of the article sets forth an overview of the CERCLA enforcement/settlement process. Part III discusses the advantages and disadvantages of settlement from the settlers' perspective. Finally, Part IV presents issues faced by CERCLA nonsettlers.

II. CERCLA ENFORCEMENT ACTIONS AND THE SETTLEMENT PROCESS

CERCLA's goal of shifting cleanup responsibilities and costs from the government to responsible parties may be met in a number of ways. Consequently, settlement issues may arise in a variety of contexts.[13] The government,[14] for example, has two means by which to accomplish CERCLA's ends. First, EPA may use the Superfund[15] to initiate its own site cleanup pursuant to CERCLA section 104.[16] Superfund money expended by the government may then be recovered by bringing a section 107(a)(4)(A) cost recovery action against PRPs.[17] Second, under section 106, EPA may issue administrative or-

11. The *Hardage* site, *infra* note 138, for example, has involved approximately 280 identified PRPs in litigation and/or settlement. Telephone conversation with Kerry E. Russell, environmental attorney, Lloyd, Gosselink, Fowler & Blevins, Austin, Texas (November 4, 1991).

12. Gaynor, *supra* note 8, at 756.

13. *E.g.*, EPA cleanup; PRP voluntary cleanup; forced PRP cleanup; private party cleanup; state mandated cleanup.

14. While the statute itself speaks in terms of the President's authority, the authority to implement CERCLA was delegated to the Administrator of EPA. Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

15. Although "Superfund" is used synonymously with "CERCLA," more accurately "Superfund" refers to the Hazardous Substance Superfund, 26 U.S.C. § 9507 (1988), a fund of approximately $8.5 billion collected from a tax imposed largely on petrochemical companies. This money is used to pay for cleanups performed by EPA. Francis E. Phillips & Jeffrey M. Gaba, *Negotiating Settlements Under CERCLA*, 1990 MINERAL LAW SERIES: ROCKY MTN. MIN. L. FOUND. 12-1, 12-5 n.9 (July 1990) [hereinafter Phillips & Gaba].

16. CERCLA § 104, 42 U.S.C. § 9604 (1988). By regulation, long-term "remedial" actions are generally limited to those sites placed on the National Priorities List. 40 C.F.R. § 300.68(a)(1) (1990). *See generally* Phillips & Gaba, *supra* note 15, at 12-5.

17. Elements of liability are outlined *supra* at note 8. Cost recovery suits are offi-

ders or seek injunctive relief mandating that the identified PRPs clean up the site themselves.[18]

CERCLA also provides for private causes of action against PRPs. Most significantly, section 107(a)(4)(B) allows "other persons" (private parties) to recover their cleanup costs from PRPs on the condition that costs incurred are "consistent with the national contingency plan."[19] In addition, however, CERCLA authorizes "any person" to "commence a civil action on his own behalf" for injunctive relief and civil penalties "against any person," including the federal government, "alleged to be in violation of any standard, regulation, conditions, requirement, or order" under CERCLA.[20]

In light of these various enforcement/litigation schemes, the stringent liability standard,[21] and limited statutory defenses,[22] attorneys representing PRPs should have a thorough working knowledge of CERCLA settlement provisions. CERCLA settlement agreements typically fall into one of three categories:[23] (1) settlements in which PRPs agree to undertake cleanup work,[24] (2) cost recovery settlements,[25] and (3) de minimis cash-out settlements.[26] Sections 122[27] and 113(f),[28]

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cially filed by the Department of Justice on behalf of the EPA. It should be noted that cost recovery is possible at any site so long as EPA's cleanup was "not inconsistent with the national contingency plan." CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (1988).

18. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988). United States district courts may impose daily penalties for noncompliance with EPA cleanup orders, not to exceed $25,000 per day. Treble damages are authorized under section 107(c)(3). Especially troublesome to the PRP is the fact that pre-enforcement judicial review of such orders is virtually nonexistent. *See* discussion *infra* notes 220-226 and accompanying text.

For a comprehensive discussion of the government's enforcement process, *see* Scott A. Cassel, *Negotiating Better Superfund Settlements: Prospects and Protocols*, 16 PEPPERDINE L. REV. S117, S121-29 (1989).

19. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988). "[O]ther persons" include plaintiffs who are themselves PRPs. The National Contingency Plan (NCP) specifies both substantive and procedural requirements for cleanup actions. *See* 40 C.F.R. Part 300 (1990). PRPs frequently assert the "other parties'" noncompliance with the NCP as a defense.

20. CERCLA, § 310, 42 U.S.C. § 9659 (1988).

21. As previously mentioned, PRPs in any CERCLA action are subject to strict, joint and several liability. *See supra* note 10 and accompanying text.

22. Section 107(b) outlines three affirmative defenses: acts of God, acts of war, and acts or omissions of third parties. CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988). The "innocent landowner" defense is the most commonly asserted. CERCLA § 101(35), 42 U.S.C. § 9601(35) (1988). *See* Phillips & Gaba, *supra* note 15, at 12-9.

23. City of New York v. Exxon Corp., 697 F. Supp. 677, 691 (S.D.N.Y. 1988).

24. CERCLA § 122(d), 42 U.S.C. § 9622(d) (1988). This is the only type of settlement subject to mandatory judicial review. *Exxon*, 697 F. Supp. at 691. *See infra* note 26.

25. CERCLA § 122(h), 42 U.S.C. § 9622(h) (1988).

26. CERCLA § 122(g), 42 U.S.C. § 9622(g) (1988). The special provisions authorizing cash-out settlements are especially important to PRPs only marginally associated with a cleanup site, because this type of settlement avoids litigation costs and keeps transaction costs to a minimum.

De minimis settlements are unique in that they may be in the form of either administrative settlements or judicially approved consent decrees. CERCLA § 122(g)(4), 42 U.S.C. § 9622(g)(4) (1988). If the settlement is embodied as an administrative order

which were added by SARA in 1986,[29] represent Congress' recognition of the importance of these settlement agreements and its earnest attempt to encourage such settlements.

Section 122 expressly authorizes EPA to enter into agreements which "are in the public interest . . . in order to expedite effective remedial actions and minimize litigation."[30] In addition to this general grant of authority, section 122 authorizes EPA to provide certain substantive elements in a settlement agreement. For example, EPA is authorized to enter into "mixed funding" or partial agreements with PRPs under which certain costs of the prospective cleanup will be financed by the government from the Superfund.[31] EPA also has authority to grant releases from liability by issuing covenants not to sue.[32] In addition, contribution protection against nonsettlers is ex-

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and if total response costs exceed $500,000, the order may be issued only with prior written approval of the Attorney General. *Id.* Likewise, section 107 cost recovery actions may be settled only with prior written approval of the Attorney General where total response costs exceed $500,000. Where the total response costs do not exceed $500,000, EPA may use arbitration as a method of settling cost recovery claims. CERCLA § 122(h)(1), (h)(2), 42 U.S.C. § 9622(h)(1), (h)(2) (1988); 40 C.F.R. Part 304 (1990). In contrast, cleanup settlements must be entered as a consent decree in the appropriate United States district court. CERCLA § 122(d)(1)(A), 42 U.S.C. § 9622(d)(1)(A) (1988).

De minimis settlements may be initiated with a PRP named in either a section 106 or a section 107 action, *see supra* notes 17-18 and accompanying text, "if such settlement involves only a minor portion of the response costs at the facility concerned," CERCLA § 122(g)(1), 42 U.S.C. § 9622(g)(1) (1988), *and* if the amount or toxicity of the hazardous substances contributed by the PRP "[is] minimal in comparison to other hazardous substances at the facility," CERCLA § 122(g)(1)(A), 42 U.S.C. § 9622(g)(1)(A) (1988), *or* the PRP purchased the site without actual or constructive knowledge of the hazardous substances and did not contribute to the generation or release of the hazardous substances, CERCLA § 122(g)(1)(B), 42 U.S.C. § 9622(g)(1)(B) (1988). *See also* EPA, Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA, 52 Fed. Reg. 24,333 (1987); EPA, Interim Model CERCLA Section 122(g)(4) De Minimis Waste Contributor Consent Decree and Administrative Order on Consent, 52 Fed. Reg. 43,393 (1987); EPA, EPA Guidance on Landowner Liability Under Section 107(a)(1) and De Minimis Settlements Under Section 122(g)(1)(B) of CERCLA and Settlements with Prospective Purchasers of Contaminated Property, 54 Fed. Reg. 34,235 (1989).

27. CERCLA § 122, 42 U.S.C. § 9622 (1988).

28. CERCLA § 113(f), 42 U.S.C. § 9613(f) (1988). Section 113(f) sets forth the rights of settlers and nonsettlers to contribution. Most significant in the settlement context is the contribution protection afforded the CERCLA settler and the exposure of the nonsettling party to subsequent contribution actions. For contribution issues *see* discussion *infra* text accompanying notes 75-76, 127-151.

29. The original act did not specifically address settlement. Pre-SARA settlements were governed by EPA guidelines, and, in 1985, a formal settlement policy. EPA, EPA Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5038 (1985).

30. CERCLA § 122(a), 42 U.S.C. § 9622(a) (1988). *See also* H.R. REP. No. 253, 99th Cong., 2d Sess., pt. 1, at 100, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2882 (the committee acknowledged that settlements would hasten cleanup and reduce its expense by tapping private sector resources). The decision to enter into such agreements is entirely within EPA's discretion, however, and is not subject to judicial review. CERCLA § 122(a), 42 U.S.C. § 9622(a) (1988).

31. CERCLA § 122(b), 42 U.S.C. § 9622(b) (1988).

32. CERCLA § 122(f), (g)(2), 42 U.S.C. § 9622(f), (g)(2) (1988). For the scope of these covenants, *see* discussion *infra* text accompanying notes 116-126.

tended to settling parties under section 122(g)(5) and (h)(4).[33]

As part of Congress' attempt to guide and expedite the CERCLA settlement process, SARA also established new procedures by which EPA initiates and conducts settlement negotiations. Formal negotiation is initiated when EPA sends Special Notice Letters to PRPs. These letters must provide notified parties with 1) the names and addresses of other PRPs, 2) the volume and nature of substances contributed by each identified PRP, and 3) a ranking by volume of the substances at the site,[34] threshold information which is invaluable to PRPs.

The issuance of Special Notice Letters triggers an enforcement moratorium—a 120 day period during which EPA may not commence a section 104 or 106 cleanup action and a concurrent ninety day period during which the EPA may not initiate a Remedial Investigation/Feasibility Study (RI/FS).[35] Notwithstanding this 120 day moratorium, within sixty days PRPs must organize themselves[36] and submit a good faith proposal showing their qualifications and willingness to conduct and finance the RI/FS.[37]

Under SARA, if the EPA and a "substantial portion"[38] of the PRPs reach an agreement, EPA must provide public notice of the settlement agreement by publishing the proposed settlement in the Federal Register.[39] The public then has thirty days in which to comment. The Attorney General or the EPA must consider any public comments received and may withdraw or withhold consent if the agreement is "inappropriate, improper, or inadequate."[40]

This brief overview of the CERCLA enforcement and settlement process illustrates the perplexity of the issues faced by each identified

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33. CERCLA § 122(g)(5), (h)(4), 42 U.S.C. § 9622(g)(5), (h)(4) (1988); *see also* CERCLA § 113(f), 42 U.S.C. § 9613(f) (1988). *See* discussion *infra* text accompanying notes 127-151.

34. CERCLA § 122(e)(1)(A), (B), (C), 42 U.S.C. § 9622(e)(1)(A), (B), (C) (1988).

35. CERCLA § 122(e)(2)(A), 42 U.S.C. § 9622(e)(2)(A) (1988). The RI/FS document characterizes site conditions and develops cleanup alternatives consistent with the substantive requirements outlined in section 121. *See* CERCLA §§ 104, 121; 42 U.S.C. §§ 9604, 9621 (1988).

36. PRPs commonly organize a "Steering Committee" as the representative body to negotiate with EPA on behalf of all PRPs. James W. Moorman, *The Superfund Steering Committee: A Primer*, 4 ENVT'L F. 13 (Feb. 1986).

37. CERCLA § 122(e)(2)(B), 42 U.S.C. § 9622(e)(2)(B) (1988). One recent development may prove to speed up negotiations at this point. On June 21, 1991, EPA issued a model consent decree intended to " 'reduce transaction time and costs for the government and industry by standardizing certain language involved in negotiating superfund settlement agreements.' " Copies of the model consent decree are available from BNA Plus. 22 Env't. Rep. (BNA) 523 (June 28, 1991).

38. EPA, EPA Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5036 (1985).

39. CERCLA § 122(i)(1), 42 U.S.C. § 9622(i)(1) (1988). In addition to publication, cleanup consent decrees must also be filed in federal district court at least 30 days before final judgment. CERCLA § 122(d)(2)(A), 42 U.S.C. § 9622(d)(2)(A) (1988).

40. CERCLA § 122(d)(2)(B), (i)(3), 42 U.S.C. § 9622(d)(2)(B), (i)(3) (1988). Inadequacy is a frequent basis for attacking a consent decree.

PRP. A seemingly infinite array of circumstances and issues must be addressed at each Superfund site. Nonetheless, most PRPs must ultimately address one universal issue: settle or litigate?

III. THE SETTLER'S PERSPECTIVE

A. *Settlement Incentives*

EPA, PRPs, congressmen and commentators all agree that due to limited governmental resources (human and financial), CERCLA's success is largely dependent upon voluntary settlement.[41] Consequently, statutory law, administrative policy, and judicial interpretation have evolved in such a way as to encourage settlement.

Two types of PRPs have the strongest incentive to participate fully in the settlement process at the earliest opportunity: the large volume PRP with clear liability, and the PRP who qualifies under section 122(g) as a de minimis contributor.[42] Other PRPs must more carefully analyze the strength of their litigation position, their human and financial resources, and the following incentives while developing their settlement strategies.

1. Enforcement Philosophy

The primary impetus to settle derives from the EPA's enforcement philosophy. It is no secret that Superfund enforcement is a top priority of the EPA.[43] It is also no secret that settlement is at the hub of the Agency's enforcement scheme. Since 1988, EPA officials have consistently warned nonsettling PRPs that EPA will sue to collect for cleanups at hazardous waste sites.[44] EPA wants to make clear that a PRP gains nothing by staying away from the negotiating table.[45] Among the Agency's initiatives to induce PRPs to settle are: 1) a general effort by EPA to identify PRPs earlier, 2) use of administrative subpoenas to collect information from uncooperative PRPs, 3) use of skilled "civil investigators" to dig into site records, and 4) issuance of more section 106 administrative orders which carry stiff penalties and the threat of treble damages for noncompliance.[46]

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41. *See generally* Barry S. Neuman, *No Way Out? The Plight of the Superfund Nonsettlor*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10,295 (1990); Kit R. Krickenberger & Pamela Rekar, *Superfund Settlements: Breaking the Logjam*, 19 ENV'T. REP. (BNA) 2384 (1989) [hereinafter Krickenberger & Rekar].

42. *See supra* note 26.

43. Current Developments: Reilly Says Assurance of Enforcement Key to Effective Cleanups Under Superfund, 19 ENV'T REP. (BNA) 2337 (Mar. 3, 1989).

44. Current Developments: EPA Official Says Agency to Mount More Aggressive Superfund Cleanup Program, 19 ENV'T. REP. (BNA) 8 (May 6, 1988).

45. Current Developments: Reilly Says Assurance of Enforcement Key to Effective Cleanups Under Superfund, 19 ENV'T. REP. (BNA) 2337 (Mar. 3, 1989). With regard to large corporate PRPs, some may disagree since a large corporation might effectively play the attrition game with EPA.

46. Current Developments: EPA Official Says Agency To Mount More Aggressive

2. Financial and Temporal Benefits

The general financial and temporal benefits gained by settling versus litigating a dispute are magnified in the context of CERCLA settlements due to the unique nature of CERCLA actions themselves. Often taking years to complete, complex multi-staged, multi-party CERCLA actions lead to astronomical transactional/litigation costs which drain both public and private sector resources.[47] While little information regarding transactional costs is publicly available, the governmental data compiled in *United States v. Otatti & Goss*[48] is illustrative. In that case alone, the Department of Justice expended $1.5 million for the liability portion of the bifurcated trial (exclusive of litigation-support contractor costs), and EPA paid salaries of over $600,000.[49] The private sector's legal fees for the defense of multiple PRPs were undoubtedly much higher. Likewise, in *United States v. Conservation Chem. Co.*,[50] the government's pretrial costs were $2 million, and defending PRPs spent $5 to $12 million.[51]

One practitioner recently estimated that the cost of assigning two attorneys to one Fortune 500 company involved in a CERCLA action may easily average $100,000 per year.[52] If engaged in "full-blown" CERCLA litigation, the transactional costs can easily reach $200,000-$300,000 every six months for small groups of mid-volume to de minimis PRPs.[53] Another attorney involved in a case with almost 400 PRPs estimated that over $500,000 was spent answering interrogatories alone.[54] Overall discovery costs can quickly become astronomical, but are critical to a successful defense. The incentive to settle in order to save this much time and money is strong, indeed.

As with most settlements, financial savings may also be realized in the form of a "settlement premium"—"forgiveness" of some portion of a PRP's financial liability in exchange for an expedited cleanup agreement. This premium reflects the price that EPA is will-

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Superfund Cleanup Program, 19 ENV'T. REP. (BNA) 8 (May 6, 1988); Current Developments: Superfund Enforcement Chief Heralds Figures Indicating More Settlements, Improved Records, 19 ENV'T. REP. (BNA) 1238 (Oct. 28, 1988).

During 1989, EPA effectuated 218 CERCLA settlements valued at over $1 billion. This value figure nearly doubles that obtained in 1988. Neuman, *supra* note 41, at 10,295 (citing EPA, Enforcement Accomplishments Report: FY 1989, Feb. 1990 at 64).

47. *See generally* Neuman, *supra* note 41; Krickenberger & Rekar, *supra* note 41.

48. 694 F. Supp. 977 (D.N.H. 1988).

49. Krickenberger & Rekar, *supra* note 41, at 2386.

50. 619 F. Supp. 162 (W.D. Mo. 1985).

51. William W. Balcke, Comment, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 131 n.46 (1988).

52. Telephone interview with Kerry E. Russell, environmental law attorney, Lloyd, Gosselink, Fowler & Blevins, Austin, Texas (April 3, 1991). Legal costs for a "common counsel" hired by a group of mid-volume PRPs will normally run $25,000-$50,000 during an active month. *Id.*

53. *Id.*

54. William W. Balcke, Comment, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 131 n.6 (1988).

ing to pay in order to avoid the risks and costs of litigation.[55] Because the stakes are higher in CERCLA actions, the relative value of these settlement premiums is enhanced. As the court in *Acushnet River* noted, "defendants will generally settle for substantially less—indeed, often for far less given the inherent problems of proof in [CERCLA] cases—than the asserted damages."[56]

3. Control/Flexibility

Another of the more important post-SARA settlement incentives is the settler's advantage of having a greater degree of control/flexibility in the negotiated settlement process and the development of the cleanup plan. This control/flexibility is manifest in a number of ways. For example, section 122 now authorizes EPA to enter into "mixed funding" settlements.[57] Pre-1986, EPA rarely allowed mixed funding settlements and would rarely accept settlement offers unless they covered 80 percent or more of a site's total cleanup cost.[58] In other words, EPA attempted to recover "orphan shares" (liability allocable to undiscovered or insolvent PRPs) from identified, settling PRPs. The identified PRPs were therefore "forced" to assume more than their fair share of cleanup costs. To alleviate this disincentive, CERCLA now allows EPA to use the Fund to finance "orphan shares," thus leaving the door open for more palatable settlement agreements.[59]

A mixed funding agreement may be in one of three forms: 1) preauthorization—a settlement in which EPA pre-approves the PRP's claim against the Fund for costs beyond the settler's share of liability; 2) cash-out—a settlement in which the PRP agrees to fund a portion of the cleanup work to be performed by EPA; and 3) mixed-work—a settlement in which the actual cleanup is a cooperative effort between the EPA and the PRPs.[60] EPA has total discretion whether to enter a mixed funding settlement.[61] Factors which the EPA considers when making this decision include:[62] the strength of the case against both

55. *See, e.g.*, United States v. Cannons, 720 F. Supp. 1027 (D. Mass. 1989) (EPA offered de minimis parties a settlement at a premium equal to 60% of their volumetric share).

56. *In re* Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 712 F. Supp. 1019, 1032 (D. Mass. 1989).

57. CERCLA § 122(b)(1), 42 U.S.C. § 9622(b)(1) (1988). "Mixed funding" settlements are those in which settling PRPs fund part of the cleanup, and EPA funds the remainder using Superfund money. Phillips &.Gaba, *supra* note 15, at 12-21.

58. *See* Phillips & Gaba, *supra* note 15, at 12-21; William W. Balcke, Comment, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 136 (1988).

59. CERCLA § 122(b)(1), 42 U.S.C. § 9622(b)(1) (1988).

60. EPA Memorandum, Evaluating Mixed Funding Settlements Under CERCLA, 53 Fed. Reg. 8279, 8280 (1988); *see also* Phillips & Gaba, *supra* note 15, at 12-22.

61. CERCLA § 122(b)(2), 42 U.S.C. § 9622(b)(2) (1988).

62. EPA Memorandum, Evaluating Mixed Funding Settlements Under CERCLA, 53 Fed. Reg. 8279, 8281-82 (1988).

settling and nonsettling PRPs;[63] the amount offered by, and the good faith of the PRPs; whether the mixed funding agreement will achieve the goal of expedited cleanup; and, EPA's options if negotiations fail.[64]

Settlers (primarily the large-volume PRPs) normally have greater control over the Remedial Investigation/Feasibility Study. EPA used to dictate the preparation of this important document which identifies site conditions and develops cleanup alternatives.[65] Under section 122(d)(1)(A), EPA can now issue an administrative consent order authorizing PRPs to prepare the RI/FS.[66] Control at this stage is critical, because the costs of various cleanup alternatives (immobilization, incineration, chemical and biological treatment, and offsite disposal) can vary greatly depending on the remedy chosen. Typically, the superior technical and management capabilities of the private sector operate to minimize cleanup costs. In fact, EPA site assessment and cleanup costs may average 30 percent to 40 percent more than equivalent private cleanup costs, largely due to costly and time consuming contract award procedures and contract skimming.[67] The opportunity to influence selection of the remedy cannot be underestimated in terms of cost reduction to the PRP.

In addition, early settlement allows PRPs to avoid the joint and several liability standard imposed in the litigation process, and instead work toward a fair share allocation of responsibility with other settling PRPs. Although it is never easy for PRPs to agree as to an appropriate settlement offer,[68] those PRPs engaged in the settlement

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63. The Agency is more likely to approve a mixed funding agreement when the case against the settlers is weak and the case against the nonsettlers is strong. Under those circumstances, Fund monies are more likely to be recouped from the nonsettlers. *See* CERCLA § 122(b)(1), 42 U.S.C. § 9622(b)(1) (1988) ("[EPA] shall make all reasonable efforts to recover the amount of such reimbursement under section 9607 of this title or under other relevant authorities").

64. EPA is more likely to approve a mixed funding agreement if the Agency alone cannot fund or carry out a cleanup plan at a particular site.

65. *See supra* note 35 and accompanying text.

66. CERCLA § 122(d)(1)(A), 42 U.S.C. § 9622 (d)(1)(A) (1988). Section 104(a) sanctions agreements where the PRPs perform the RI/FS provided that EPA arranges for oversight of the RI/FS. CERCLA § 104(a), 42 U.S.C. § 9604(a) (1988).

67. Frederick R. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 301-02 (1985).

68. Each PRP enters into settlement negotiations with his own perception regarding the other PRPs' shares of liability. In general, small companies think that large companies with greater financial resources should assume more of the cost; large volume contributors push for consideration of the waste toxicity factor rather than a straight volumetric allocation; and so on. All settlers use factors such as degree of involvement or of care, and degree of cooperation in posturing for negotiation.

SARA provided a mechanism intended to facilitate the allocation of response costs among PRPs. Section 122(e)(3) permits EPA to issue preliminary "nonbinding allocations of responsibility" (NBARs), after completion of the RI/FS. Although the statute provides for issuance "after" RI/FS completion, EPA guidelines suggest that NBARs may be issued "as soon as practical, but not later than" RI/FS completion. Interim Guidelines for Preparing Nonbinding Preliminary Allocations of Responsibility, 52 Fed. Reg. 19,919 (1987).

process have a distinct advantage over nonsettlers. Nonsettlers have little say in the settlement process,[69] and almost no opportunity exists for pre-enforcement/pre-implementation judicial review of the government's cleanup order.[70] Furthermore, courts are largely deferential when reviewing proposed consent decrees, limiting their review to the administrative record,[71] and applying an arbitrary and capricious standard of review.[72] Courts view their role as limited, and approve those consent decrees deemed "fair and reasonable."[73] Settlements resulting from extensive arm's-length negotiations and approved by all counsel and the EPA are given a strong presumption of validity.[74]

4. Release from Liability/Contribution Protection

Probably the strongest incentive to settle is the potential release from liability provided by provisions providing for contribution protection and covenants not to sue. Settling parties vulnerable to subsequent contribution actions by nonsettling parties would have little incentive to settle. Consequently, in 1986, Congress added section 113(f)(2) to provide broad protection for those parties who have resolved their "liability to the United States or a State in an administrative or judicially approved settlement" against contribution claims brought by nonsettlers.[75] Additional incentive results from the fact that settlers are not only protected from subsequent contribution actions, but they also maintain their own right of contribution against nonsettlers.[76]

SARA lists the following factors for EPA's consideration: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest, precedential value, and inequities and aggravating factors. Notwithstanding the issuance of an NBAR, however, EPA has full discretion to reject a subsequent settlement offer if a written explanation is given. CERCLA § 122(e)(3)(E), 42 U.S.C. § 9622(e)(3)(E) (1988). The NBAR process has not been widely employed by EPA. Krickenberger & Rekar, *supra* note 41, at 2387 n.31.

69. Nonsettlers' rights to intervention are limited; *see* discussion *infra* notes 194-219 and accompanying text, leaving them to respond solely through the 30 day public comment process. *See* CERCLA § 122(d)(2)(B), 42 U.S.C. § 9622(d)(2)(B) (1988).

70. *See* discussion *infra* notes 220-226 and accompanying text.

71. CERCLA § 113(j)(1), 42 U.S.C. § 9613(j)(1) (1988).

72. CERCLA § 113(j)(2), 42 U.S.C. § 9613(j)(2) (1988).

73. United States v. Rohm & Haas Co., 721 F. Supp. 666, 680-81 (D.N.J 1989); *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1029 (D. Mass. 1989); City of New York v. Exxon Corp, 697 F. Supp. 677, 692 (S.D.N.Y. 1988); United States v. Seymour Recycling Corp., 554 F. Supp. 1334, 1337-38 (S.D. Ind. 1982).

74. *Exxon*, 697 F. Supp. at 692.

75. CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) (1988). Section 122(h)(4) reinforces the settlers' contribution protection in the context of cost recovery settlements. It is important to note, however, that contribution protection in each case is limited to the subject matter of the consent decree. *See infra* notes 131-132 and accompanying text. The contribution protection provision was upheld by the court in *Exxon*, where the court stated that "[t]o the extent that non-settling parties are disadvantaged in any concrete way by the application of section 113(f)(2) to the overall settlement, their dispute is with Congress." 697 F. Supp. at 694.

76. CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (1988); H.R. REP. No. 99-253(III), 99th Cong., 2d Sess. 19, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS

Congress also authorized EPA to grant covenants not to sue in order to protect PRPs from future liability. Along with contribution protection against nonsettlers, PRPs seek to avoid uncertain future liability to the government. If EPA were unwilling to release settling PRPs from future liability concerning matters in the consent decree,[77] PRPs might as well take the litigation risk and at least be assured of res judicata protection. Thus to encourage settlement, section 122(f) authorizes EPA to provide covenants not to sue when the following four conditions are met: 1) the covenant is in the public interest,[78] 2) the covenant will expedite the response action, 3) the PRP is in full compliance with the consent decree, and 4) EPA has approved the response action.[79] The use of these covenants is generally at EPA's discretion.[80] When a covenant not to sue is drafted as part of a consent decree, it will not take effect until the remedial action has been completed in accordance with CERCLA.[81]

B. Settlement Concerns

Notwithstanding the numerous settlement incentives now provided by CERCLA and EPA settlement policies, a prudent attorney will carefully examine the following issues prior to rushing his PRP-client to the negotiating table: 1) the practical limitations of the settlement scheme, 2) the potential for collateral attack of a consent decree, and 3) the scope of liability and contribution protection. Each of these issues is examined below.

1. Practical Limitations of the Settlement Scheme

Despite the general policy favoring voluntary settlement, the fact of the matter is that all CERCLA settlements are effectuated only at

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77. The scope of the covenants not to sue is discussed *infra* notes 118-126 and accompanying text.

78. Factors to consider when evaluating the public interest are outlined at section 122(f)(4), 42 U.S.C. § 9622(f)(4) (1988). EPA has also issued proposed guidance for implementing section 122(f). EPA, Interim Guidelines for Covenants Not to Sue under SARA, 52 Fed. Reg. 28,038 (1987).

79. CERCLA § 122(f)(1), 42 U.S.C. § 9622(f)(1) (1988).

80. CERCLA *requires* EPA to provide PRPs with a covenant not to sue with respect to future liability in two limited circumstances: 1) when the waste is moved to an offsite RCRA-permitted treatment facility or 2) when the waste is treated so as to "destroy, eliminate, or permanently immobilize" its hazardous characteristics. CERCLA § 122(f)(2)(A), (B), 42 U.S.C. § 9622(f)(2)(A), (B) (1988). In other words, the government is willing to provide a more complete release of liability in exchange for a more complete remediation of the waste.

81. CERCLA § 122(f)(3), 42 U.S.C. § 9622(f)(3) (1988). The exact point at which EPA will certify that a particular remedial action is complete depends upon the specific requirements of that cleanup plan. Settling PRPs should include in each consent decree a detailed list of cleanup activities which must be completed before certification. EPA, Interim Guidelines for Covenants Not to Sue under SARA, 52 Fed. Reg. 28,038, 28,041-42 (1987).

EPA's discretion.[82] "So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it chooses."[83] The structure and pace of settlement negotiations are an agency prerogative. Moreover, EPA need not publicly disclose its settlement offers nor its negotiating strategy.[84] For all practical purposes, therefore, PRPs are at EPA's mercy when it comes to the initiation and ultimate success of CERCLA settlement negotiations.

Assuming, however, that EPA, in the interest of expediting cleanup efforts and avoiding the risks and costs of litigation, will initiate settlement proceedings in the majority of cases, PRPs desirous of settlement still have a variety of practical barriers to overcome. For example, within sixty days of receiving a Special Notice Letter from the EPA,[85] PRPs must organize themselves, evaluate their respective positions, and submit a good faith proposal to undertake or finance the cleanup operation.[86] Remember, at this point there are typically a large number of PRPs with little information upon which to assess their situation.[87] Furthermore, EPA only negotiates with groups representing a "substantial portion" of the responsible parties, yet does nothing to bring these groups together.[88]

Formation of a "Steering Committee" may alleviate this problem; however, at sites with numerous PRPs, the steering committee may not be representative of the group as a whole. In order to present itself to the EPA as representing a high percentage of total waste contributors at a given site, a steering committee is most often composed of the large volume generators and transporters.[89] Because EPA rarely involves itself in the internal business of the steering committee, that group of ten to twenty-five companies wields substantial power over participation in and the substantive development of a consent agreement.[90] This is a precarious position for the smaller volume PRP—the PRP caught between inadequate representation in the settlement pro-

82. CERCLA § 122(a), 42 U.S.C. § 9622(a) (1988).

83. United States v. Cannons Engineering Corp., 899 F.2d 79, 93 (1st Cir. 1990).

84. *Id.*

85. Special Notice Letters trigger the beginning of formal negotiations. CERCLA § 122(e)(1), 42 U.S.C. 9622(e)(1) (1988). *See supra* notes 34-35 and accompanying text.

86. CERCLA § 122(e)(2)(B), 42 U.S.C. § 9622(e)(2)(B) (1988). *See supra* notes 36-37 and accompanying text.

87. While the Special Notice Letter must provide PRPs the names and addresses of other PRPs, the volume and nature of the hazardous substances, and a ranking by volume of the hazardous substances, this mandate applies only "to the extent such information is available." CERCLA § 122(e)(1)(A), (B), (C), 42 U.S.C. § 9622(e)(1)(A), (B), (C) (1988). In reality, there typically is little scientific or technical data available at this point upon which a PRP can adequately evaluate his liability or negotiating position. *See* Peter F. Sexton, Comment, *Superfund Settlements: The EPA's Role*, 20 CONN. L. REV. 923, 944 (1988); Moorman, *supra* note 36, at 16.

88. EPA, EPA Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5036 (1985). *See also* Phillips & Gaba, *supra* note 15, at 12-11.

89. *See* Moorman, *supra* note 36, at 13-14.

90. *Id.*; Lorelei Joy Borland, *Collateral Challenges to CERCLA Consent Decrees*, 19 CHEMICAL WASTE LITIGATION REPORTER 258 (1990).

cess and the perils of recalcitrance.[91]

Once formed, the steering committee's task of resolving issues of relative responsibility and cleanup cost allocation within the statutory time constraint is onerous. Not only must each individual PRP decide whether or not to assume the significant financial liabilities of settlement, but the group as a "whole" must allocate those liabilities among themselves, resolving substantive technical issues (i.e., the condition of the site and feasible cleanup alternatives) on the basis of minimal, incomplete, or biased information.[92] While Congress and EPA have made some effort to alleviate this situation in the form of information sharing[93] and NBARs,[94] those efforts have, for the most part, fallen short.[95]

Statutory efforts to enhance the settlers' control over remediation[96] may, too, have fallen short. As discussed, in order to fully realize the benefits of settlement, it is necessary for PRPs to have *early* control over the development of the cleanup plan.[97] Unfortunately, however, partial settlements allowing PRPs to perform the RI/FS without admitting liability must comply with the same formalities (public review and court approval) as full consent agreements.[98] These formalities not only cause delay and potentially reduce the degree of PRP control, but they also result in procedural costs which may deter EPA from pursuing partial settlements altogether.[99] In light of the high cost of cleanups due to stringent cleanup standards[100] and Congress' explicit preference for permanent remedies,[101] practical restraints on PRP control might be the determinative factor, tipping the balance in favor of efforts to contest or limit liability rather than efforts to pursue prompt settlement.

Finally, even for those PRPs who conquer the organizational barriers, statutory time constraints, and liability allocation and remedy control issues, EPA will generally only accept settlement offers

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91. *See infra* notes 168-170.

92. *See supra* note 87 and accompanying text; Krickenberger & Rekar, *supra* note 41, at 2387.

93. *See supra* note 34 and accompanying text.

94. *See supra* note 68.

95. *See, e.g.*, William G. Balcke, Comment, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 152-53 (1988); Peter F. Sexton, Comment, *Superfund Settlements: The EPA's Role*, 20 CONN. L. REV. 923, 946-47 (1988); Phillips & Gaba, *supra* note 15, at 12-13 (The NBAR process is rarely used; but when it is used it has been criticized as being too little, too late.). This dilemma has prompted more than one commentator to advocate the application of ADR (alternative dispute resolution) principles to the CERCLA settlement process. *See generally* Krickenberger & Rekar, *supra* note 41; Cassel, *supra* note 18.

96. *See supra* notes 66-67 and accompanying text.

97. *See supra* note 66 and accompanying text.

98. CERCLA § 122(d)(1)-(2), 42 U.S.C. § 9622(d)(1)-(2) (1988).

99. William G. Balcke, Comment, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 155 (1988).

100. CERCLA § 121, 42 U.S.C. § 9621 (1988).

101. CERCLA § 121(b)(1), 42 U.S.C. § 9621(b)(1) (1988).

deemed to represent a substantial portion of the total response costs.[102] This policy creates a significant settlement barrier at those sites with a large number of "orphan shares,"[103] because a "substantial" offer under these circumstances requires allocating the "orphan shares" among the few identified PRPs. Unless EPA demonstrates increased willingness to aggressively utilize the mixed funding provisions, named PRPs in this type situation may be well advised to postpone settlement and expend additional resources locating additional PRPs.[104]

2. Potential for Collateral Attack

Litigation ancillary to CERCLA consent decrees is on the rise. Consequently, one commentator suggests that PRPs should not expect CERCLA settlements to provide desired finality.[105] In fact, she stresses that negotiators must recognize and take into account the likelihood of collateral attacks to a consent decree before developing their strategies.[106]

Collateral attacks fall into seven categories:[107] 1) contribution actions brought by settlers against nonsettlers,[108] 2) fair-share and cost

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102. EPA, Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5036 (1985) ("Entering into discussion for less than a substantial proportion of cleanup costs or remedial action needed at the site, would not be an effective use of government resource.").

Despite SARA's mixed funding provisions, discussed *supra* notes 57-64 and accompanying text, Congress seems to have ratified the Agency policy in a conference report setting forth three criteria an offer must meet in order to be "substantial": 1) the offer must constitute a "predominant portion of the total remedial action;" 2) the offer must meet or exceed the cumulative liability as set forth in the NBAR for the parties making the offer; and 3) all terms of the offer must be accepted by the Agency. H.R. CONF. REP. No. 962, 99th Cong., 2d Sess., 252, 254 (1986) *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3347.

103. "Orphan shares" of liability are created when PRPs are either insolvent or unidentifiable.

104. The following hypothetical is illustrative:

> Consider . . . a . . . site with two potentially responsible parties. Each is potentially liable for half of the *traceable* wastes at the site; only one-third of the site's waste, however, are traceable. These two parties must, therefore, allocate between themselves an orphan share of approximately 66% of the total wastes at the site. If the total cleanup will cost $12 million, each party will thus bear an orphan share of $4 million (one half of the $8 million attributable to the orphan wastes). If the identifiable parties could locate one additional significant responsible party, each party's orphan share could drop to $2.7 million (one-third of $8 million). Assuming 100% certainty that a third responsible party could be located, it would be economically efficient for each party to expend up to $1.3 million attempting to locate and bring cross-claims against an additional responsible party. Even if the probability of location—and successfully suing—an additional party were only 33%, each identified party could rationally expend over $400,000 in the effort.

William G. Balcke, Comment, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 150 (1988).

105. Borland, *supra* note 90, at 258.

106. *Id.*

107. *Id.*

108. The settler's right to contribution is protected under CERCLA §

estimate challenges brought by nonsettlers,[109] 3) challenges to remedy selection brought by state or local governmental entities,[110] 4) challenges to remedy selection brought by private parties,[111] 5) private toxic tort suits,[112] 6) suits between buyers and sellers of real property for recovery of response costs,[113] and 7) bankruptcy related actions.[114] While some discrete issues relating to collateral actions will be discussed below in the context of scope of liability protection, the potential for ancillary litigation is addressed at this point merely to illustrate the likelihood of detours on the road to CERCLA settlement.

The practical effect of this ancillary activity is three-fold. First, collateral attacks aimed at a CERCLA consent decree delay the ultimate cleanup of hazardous substances. Second, PRPs must spend additional time and money representing their interests against the various attacks.[115] Finally, and perhaps most importantly, a PRP's signature on the consent decree is not likely to be the *final* word. This risk of collateral challenge might impact a PRP's negotiation strategy or decision to settle, and should be carefully considered at all stages of PRP representation. In addition, some collateral challenges may be avoided, and resources conserved, if the PRP (Steering Committee) addresses, to the extent practicable, the concerns of those outside the settlement process and drafts a consent decree which is fair to all parties.

3. Scope of Liability and Contribution Protection

The most important attribute of settlement is a release from fu-

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113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (1988). *See supra* note 76 and accompanying text.

109. Although nonsettlers have no right to pre-enforcement or pre-implementation review of a cleanup order, they have had limited success intervening in the consent decree approval process. *See* discussion *infra* notes 194-219 and accompanying text. In addition, nonsettlers may comment on the proposed consent decree in accordance with the public participation provisions in section 122. CERCLA § 122(d)(2)(B), (i)(2), 42 U.S.C. § 9622(d)(2)(B), (i)(2) (1988). All comments must be considered and may become the basis upon which the consent decree is withdrawn or withheld. *Id.*; *see also supra* notes 39-40 and accompanying text; Borland, *supra* note 90, at 258-61.

110. *See infra* notes 152-166 and accompanying text; Borland, *supra* note 90, at 261-62.

111. *See* CERCLA § 310, 42 U.S.C. § 9659 (1988); *supra* note 20 and accompanying text.

112. Private toxic tort suits are beyond the scope of this article; however, it is important to note that toxic tort litigation involves recovery for personal injury as well as cleanup costs. *See* Borland, *supra* note 90, at 258 (citing Coburn v. Sun Chemical Corp., 28 ERC 1665 (E.D. Pa. 1988)).

113. *See* Borland, *supra* note 90, at 258 (citing Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988); Amland Properties Corp. v. Alcoa, 29 ERC 1539 (D.N.J. 1989)). Suits involving real property transactions are also beyond the scope of this article.

114. CERCLA suits related to bankruptcy litigation are also beyond the scope of this article.

115. This type of ongoing litigation may also breed mistrust and concerns regarding confidentiality among the PRPs balancing multiple representation and settlement.

ture liability. Consequently, the scope and terms of the release are critical considerations when developing a negotiation strategy or when deciding whether to settle at all. It is worthwhile, then, to examine the scope of liability and contribution protection probable under a CERCLA settlement agreement. Scope of protection issues arise most often in the following two contexts: 1) protection against future federal government actions and 2) protection against future nonsettler actions. Occasionally, however, similar protection issues may arise in the context of subsequent citizen or state and local government actions.

a. The Scope of Protection Against the Federal Government. PRPs who choose to litigate are protected from future liability under the doctrine of res judicata. Settling PRPs, on the other hand, are protected only to the extent of the *express terms* of the consent decree.[116] This difference creates a tension between the EPA and PRPs. While EPA acknowledges the importance of facilitating settlements, it also wants to create as many exceptions to releases from liability as possible to assure payment and/or cleanup in the event of remedy failure. The Agency has, therefore, traditionally taken a conservative approach to releases of liability.[117] In opposition to this approach, PRPs are generally unwilling to settle unless they benefit from a promise not to be sued in the future for additional liability at the same site.

In 1986, in an effort to reduce this tension and encourage settlements, Congress expressly authorized EPA to issue covenants not to sue.[118] The PRP contemplating settlement must recognize, however, that these covenants have limits. First and foremost, the statutory language suggests that the section 122(f) covenant not to sue provisions are the only means by which EPA can release PRPs from future liability.[119] Any release provision other than that specified in CERCLA may, therefore, be ultra vires and invalid.[120]

The liability protection derived from covenants not to sue is also limited by the reopener requirement. In all but three limited situations,[121] CERCLA mandates that a reopener provision be included in consent decrees to preserve the right of the government to bring sub-

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116. *See, e.g.*, CERCLA §§ 122(g)(5), (h)(4), 42 U.S.C. §§ 9622(g)(5), (h)(4) (1988).

117. EPA, Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5039 (1985).

118. CERCLA § 122(f), 42 U.S.C. § 9622(f) (1988); *see supra* note 32 and accompanying text.

119. CERCLA § 122(c)(1), 42 U.S.C. § 9622(c)(1) (1988) ("the liability to the United States . . . including any future liability . . . arising from the release or threatened release that is the subject of the agreement shall be limited as provided in the agreement pursuant to a covenant not to sue in accordance with subsection (f) . . .").

120. Phillips & Gaba, *supra* note 15, at 12-17.

121. Reopener provisions are not required under de minimis settlements, CERCLA § 122(g)(2); under settlements which require permanent removal of the hazardous substances, CERCLA § 122(f)(2); or under "extraordinary circumstances," CERCLA § 122(f)(6)(B). *See* EPA, Interim Guidelines for Covenants Not to Sue under SARA, 52 Fed. Reg. 28,042 (1987).

sequent actions against settling PRPs "where . . . liability arises out of conditions which were unknown at the time that [EPA] certifies . . . that remedial action has been completed at the facility concerned."[122] It is important to note, however, that even if a PRP is exposed to future liability by virtue of a reopener provision, CERCLA provides some protection by limiting future liability of a settling PRP "to the same proportion as that established in the original settlement agreement," *if so provided in a covenant not to sue in the original agreement.*[123] Also, one court has held that this reopener requirement appears "to apply only in the context of a cleanup settlement," possibly opening the door to more complete releases in the context of cost recovery or natural resource damage recovery settlements.[124]

The scope of liability protection against the federal government is limited by yet a third factor—the scope of the matters covered by a covenant not to sue. Although the terms of the covenant not to sue are negotiable, EPA has discretion to determine their scope in the event of new or changing conditions at the site.[125] As a result, when covenants not to sue fail to clearly define the remedial action to be taken, or the composition and character of the hazardous substances covered, settling PRPs are particularly vulnerable to additional, future liability. Attorneys representing settling PRPs should, therefore, secure covenants not to sue for all settlement agreements, partial and otherwise; negotiate the broadest possible terms; and, finally, insist upon careful, detailed draftsmanship of these covenants.[126]

b. The Scope of Protection Against the Nonsettler. One of the major objectives of SARA was to codify contribution protection for settlers to encourage early settlement.[127] The contribution protection provisions have been described as a carrot and stick scheme,[128] and have been liberally interpreted by the courts.[129] However, these provi-

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122. CERCLA § 122(f)(6)(A), 42 U.S.C. § 9622(f)(6)(A) (1988). A second reopener provision may be included to allow for future enforcement actions where additional information demonstrates that the remedy no longer protects human health or the environment. CERCLA § 122(f)(6)(C), 42 U.S.C. § 9622(f)(6)(C) (1988). *See also* EPA, Interim Guidelines for Covenants Not to Sue under SARA, 52 Fed. Reg. 28,038 (1987).

123. CERCLA § 122(c)(1), 42 U.S.C. § 9622(c)(1) (1988) (emphasis added).

124. *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1035 (D. Mass. 1989).

125. Kimberly Ann Leue, Comment, *Private Party Settlements in the Superfund Amendment and Reauthorization Act of 1986 (SARA)*, 8 STAN. ENVTL. L.J. 131, 166-67 (1989).

126. *See id.*

127. *In re* Acushnet River& New Bedford Harbor, 712 F. Supp. 1019, 1026 (D. Mass. 1989).

128. *Id.* at 1027 (The carrot the EPA can offer potential settlers is that they need no longer fear that a later contribution action by a nonsettler will compel them to pay still more money to extinguish their liability. In addition to this protection, settlers themselves are enabled to seek contribution against nonsettlers. As for the stick, if the settler pays less than its proportionate share of liability, the nonsettlers, being jointly and severally liable, must make good the differences).

129. *Id.* at 1026-27; United States v. Cannons Engineering Corp., 899 F.2d 79, 91 (1st Cir. 1990); United States v. Union Gas Co., 743 F. Supp. 1144, 1152-53 (E.D. Pa.

sions do "not provide a blanket exemption from further liability under CERCLA or state law."[130] It is therefore important for the PRP considering settlement to be aware of those instances when a nonsettling PRP might raise a legitimate claim.

First, the scope of contribution protection granted by section 113(f)(2) is limited to "claims for contribution regarding matters addressed in the settlement."[131] This language has been interpreted to incorporate the following four parameters: 1) the identity of the hazardous substance(s) at issue in the settlement; 2) the location or site described in the settlement; 3) the time frame set forth in the settlement; and 4) the cost of the cleanup.[132] To the extent, then, that nonsettlers can fashion contribution claims for liability outside the scope of the consent decree (as defined by the listed parameters), those claims will survive.[133]

A second, related limitation to contribution protection is the well-established rule that although CERCLA forecloses most contribution claims, it does not preempt state law remedies, including the right to common law indemnification.[134] The statute itself states that "[n]othing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."[135] Furthermore, "[n]othing in [CERCLA] . . . shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have by reason of subrogation or otherwise against any person."[136]

Consequently, despite the seemingly broad contribution protection provided in section 113(f)(2), settling PRPs remain vulnerable to nonsettlers' state law claims which fall outside CERCLA matters covered by the consent decree. PRPs who have contractually entered into an indemnification agreement or who by virtue of a special legal rela-

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1990); City of New York v. Exxon Corp., 697 F. Supp. at 685. The scope of liability for contribution is to be determined as a matter of federal common law, by superseding or supplementing existing state remedies. United States v. Conservation Chemical Co., 619 F. Supp. 162, 229 (W.D. Mo. 1985).

130. *Union Gas*, 743 F. Supp. at 1153.

131. CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) (1988); *see also* CERCLA § 122(g)(5), 42 U.S.C. § 9622(g)(5) (1988) (extending similar protection in de minimis settlements).

132. *Union Gas*, 743 F. Supp. at 1154.

133. The most recent cases addressing this issue involved motions for summary disposition. Consequently, the parameters and issues regarding the subject matter of a consent decree have not yet been fully litigated. *See, e.g., Union Gas*, 743 F. Supp. at 1153; Allied Corp. v. Frola, 730 F. Supp. 626, 638 (D.N.J. 1990).

134. *Union Gas*, 743 F. Supp. at 1155; *Allied Corp.*, 730 F. Supp. at 639; Lyncott Corp. v. Chemical Waste Management, Inc., 690 F. Supp. 1409, 1419 (E.D. Pa. 1988). *Cf.* United States v. Alexander, 771 F. Supp. 830 (S.D. Tex. 1991).

135. CERCLA § 302(d), 42 U.S.C. § 9652(d) (1988).

136. CERCLA § 107(e)(2), 42 U.S.C. § 9607(e)(2) (1988).

tionship are impliedly obligated to indemnify another party, should, therefore, carefully consider this residual liability when developing their negotiation strategies.[137]

A third potential devastating limitation to contribution protection against nonsettling PRPs has recently come to light. In *United States v. Hardage*,[138] the Hardage Steering Committee, as "other persons," filed "independent response cost" cross-claims against de minimis defendants under CERCLA section 107(a)(4)(B).[139] The Steering Committee asserted that the United States could grant protection from contribution claims, but could not grant protection from separate response claims since those claims were not the Government's to give away.[140] The United States responded that the Steering Committee was arguing form over effect, and that the Committee's claim was in effect a claim for contribution. To allow such claims, argued the United States, would be contrary to Congress' intent to encourage de minimis parties to resolve their liability at an early stage.[141]

The United States District Court for the Western District of Oklahoma held in favor of the Steering Committee, finding that it had no statutory authority to protect settling de minimis PRPs from "independent response costs claims" brought by nonsettling PRPs under section 107(a)(4)(B).[142] Accordingly, the court held that the consent decree as approved did not discharge the independent response cost claims asserted by the nonsettlers.[143] This was the first time a court had suggested that nonsettling PRPs might circumvent the contribution protection provisions by framing their claim as one for response

137. While courts have recognized express and implied indemnity by virtue of contractual relationships between parties, they have largely rejected the notion of noncontractual, "equitable" indemnity. "Equitable indemnity would be inconsistent with the letter and intent of CERCLA," contrary to the goals to be preserved by the express contribution protection provisions. Central Ill. Public Serv. v. Industrial Oil Tank & Line Cleaning Service, 730 F. Supp. 1498, 1506-07 (W.D. Mo. 1990) (citing United States v. Cannons Engineering Corp., 720 F. Supp. 1498, 1051 (W.D. Mo. 1990), *See also* Light, *Antidote or Asymptote to Contribution: Non-Contractual Indemnity Under CERCLA*, 21 ENVTL. L. 321 (1991).

138. United States v. Royal N. Hardage, No. Civ 86-1401-P (W.D. Okla. 1989) (transcript of Proceedings, Sept. 22, 1989).

139. Nonsettling PRPs typically sought contribution for a share of their assessed liability from other alleged PRPs by asserting a *contribution* claim under section 113(f)(1). This is the accepted avenue for claims between PRPs in a Superfund action in which the EPA is playing an active role.

On the other side of the coin, section 107(a)(4)(B) has typically provided private parties (not necessarily identified PRPs) with a cause of action to recover cleanup costs. This avenue is frequently used by a purchaser to recover against the seller of a contaminated site in the absence of government (EPA) involvement. Some PRPs, however, are framing their claims as section 107 actions rather than section 113 actions to avoid CERCLA's contribution protection provisions.

140. *Hardage*, No. Civ. 86-1401-P at 67-68.

141. *Id.* at 68-69.

142. *Id.* at 70.

143. *Id.*

costs under section 107, rather than one for contribution under section 113(f)(1). Unfortunately, the court did not analyze the distinction nor did it discuss the negative impact of such a distinction on CERCLA's goal to encourage settlement by providing broad contribution protection.

This same contribution action/cost recovery action distinction was subsequently addressed and upheld in *Burlington Northern R.R. v. Time Oil Co.*[144] In that case, however, the United States District Court for the Western District of Washington was presented with the issue of whether contribution protection under section 113(f)(2) precluded cost recovery suits filed under section 107(a)(4)(B) *for remedial actions conducted prior to the enactment of SARA in 1986.*[145] The court allowed a nonsettling PRP's cost recovery claims since its cleanup costs were incurred in 1985, pre-SARA, and since at the time cleanup operations were implemented it had "every right to anticipate it could pursue a cost recovery action against Time Oil."[146] The court found "no evidence that [the nonsettling plaintiff] could have anticipated the creation of § 9613(f), or that the new section was intended to retroactively apply to litigation and settlements occuring before 1986."[147] On the basis of this rationale, the application of this precedent seems limited to cases involving response costs incurred and litigation initiated prior to the 1986 SARA amendments.

However, the *Burlington Northern* court did not confine its analysis to the pre-SARA issue. The court went further and cited support for the contribution action/cost recovery action distinction in other CERCLA provisions. For example, the court pointed out that section 113(g) treats cost recovery actions and contribution actions differently with regard to the applicable statute of limitations.[148] In addition, section 113(h)(1) provides for judicial review of an action "to recover response costs *or* damages *or* for contribution."[149] Finally, the court relied on the fact that Congress did not include settlement agreements as one of the limited defenses available to direct cost recovery actions under section 107(b), nor did it amend that section as part of SARA.[150] Although the court's discussion of statutory language is arguably dicta, it may be enough to dissuade PRPs from future settlements.

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144. Burlington Northern R.R. v. Time Oil Co., 738 F. Supp. 1339 (W.D. Wash. 1990).

145. *Id.* at 1341.

146. *Id.* at 1342.

147. *Id.*; *cf.* United States v. Alexander, 771 F. Supp. 830 (S.D. Tex. 1991) (court found no need to apply SARA retroactively where the settlement agreement contained protections against claims for pre-SARA response costs).

148. *Burlington Northern R.R.*, at 1343 (section 113(g)(2) addresses cost recovery actions, and section 113(g)(3) addresses contribution actions).

149. *Id.*

150. *Id.* ("Parties liable under CERCLA, are liable for another party's response costs 'notwithstanding any other provision or rule of law and *subject only to the defenses set forth in subsection (b)*' ").

This potential limitation of the contribution protection afforded to settling PRPs is serious, indeed. The issue regarding the legal distinction, if any, between a nonsettler's contribution action under section 113(f)(1) and a nonsettler's cost recovery action under section 107(a)(4)(B) has not yet been squarely resolved. Nevertheless, nonsettlers will likely waste no time in testing the opportunity presented by *Hardage* and *Burlington Northern* to pierce the veil of contribution protection by characterizing their claims as seeking cost recovery rather than contribution. As long as this issue remains unresolved or is resolved in favor of nonsettlers,[151] prospective settlers should carefully balance the remaining benefits of settlement against this "new" exposure to subsequent liability.

c. The Scope of Protection Against Citizens or State/Local Governments. While the issues thus far have focused on the relationship among settlers, nonsettlers and the federal government (EPA), it is important to mention, at least briefly, the PRP's exposure to suit by citizens or state and local governments. Recall that citizens not identified as PRPs may bring cost recovery actions,[152] have an independent private cause of action under CERCLA,[153] may occasionally be allowed to challenge consent decrees as intervenors,[154] and may initiate toxic tort suits claiming response costs in addition to personal injury damages.[155] The issues regarding liability and contribution protection for settling PRPs in these contexts are largely unanswered;[156] however, a few observations can be made.

First, with regard to cost recovery actions, settling PRPs are likely to be completely vulnerable to actions brought by citizens not identified as PRPs. This is a situation where the claim is truly one for recovery of cleanup costs, not contribution, since by definition a non-PRP has no liability whatsoever. This situation can, therefore, be distinguished from a section 107 cost recovery action brought by a nonsettler in order to avoid the contribution protection granted to settlers under section 113(f).[157] For practical reasons, however, it is unlikely that this situation will often arise.[158]

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151. *See, e.g.*, Boeing Co. v. Northwest Teel, No. C89-214M, 6 Toxics L. Rep. 340 (W.D. Wash. July 24, 1991).

152. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988); *see supra* note 19 and accompanying text.

153. CERCLA § 310, 42 U.S.C. § 9659 (1988); *see supra* note 20 and accompanying text.

154. *See, e.g.*, United States v. J.B. Stringfellow, 783 F.2d 821 (9th Cir. 1986); Borland, *supra* note 90, at 262.

155. *See, e.g.*, Coburn v. Sun Chemical Corp., 28 ERC 1665 (E.D. Pa. 1988).

156. CERCLA litigation is in a stage of relative infancy. Consequently, case law at these third and fourth levels of liability is sparse.

157. *See supra* notes 139-151 and accompanying text.

158. It is not likely that a concerned citizen will expend the amount of money necessary to remediate a Superfund site. This situation is more likely to occur, however, in the context of a real property transaction in which the buyer incurred cleanup costs, and successfully asserts the "innocent landowner" defense. *See supra* note 22.

Insofar as the citizen suit provision and the ability to intervene in consent decree approval proceedings primarily enable the general public to monitor compliance with an EPA cleanup order or consent decree, future financial liability to private individuals will not likely be at issue.[159] Likewise, personal injury, toxic tort claims will not raise relevant issues regarding the scope of settlement liability protection since CERCLA settlement involves site remediation only and does not address personal injury damages.[160]

Because the environmental regulatory scheme and the CERCLA liability scheme both embody a complex interrelationship between federal and state government, issues regarding collateral actions brought by state and/or local government entities are equally complex. The relevant point to be made here is the importance of recognizing the state and local governments' role.[161] Failure to have all governmental entities reach accord and sign-off on the remedies outlined in a CERCLA consent decree almost insures future PRP liability.[162]

Once a state or local government signs off on a consent decree, res judicata bars those entities from filing subsequent suits involving the subject matter of the settlement. This is not to say, however, that the state might not be able to construct a future state law claim which would not be preempted by a CERCLA consent decree. For example, in *United States v. Union Gas Co.*, the Federal District Court for the Eastern District of Pennsylvania denied Union Gas Co.'s motion to dismiss the State of Pennsylvania's state law counterclaim.[163] While the court acknowledged that it would honor Union Gas Co.'s contribution protection under section 113(f)(2) if the subject matter of the state law counterclaim proves to be the same as that of the settlement,[164] the court and Union Gas Co. also acknowledged that CERCLA does not expressly preempt state law.[165] Consequently, if a state can prove that its claim or counterclaim is validly based on state laws outside the scope of a CERCLA consent decree, settling PRPs will not

159. While private parties and environmental interest groups take an interest in monitoring site remediation efforts, few actually invest money into the cleanup effort.

160. Not surprisingly, at least one court has held that a consent decree in a prior citizen suit does not preclude EPA from suing under CERCLA. United States v. Aluminum Co. of America, No. 89-7421, 1990 WL 171334 (E.D. Pa. Nov. 1, 1990) (Defendant's motion to dismiss on grounds of res judicata was denied in part because prior civil litigation regarding environmental hazards associated with the Moyer Landfill was based on theories of negligence and mismanagement. Pending CERCLA litigation, on the other hand, "is an action for specific relief or restitution regardless of any ex ante misconduct.").

161. *See, e.g.*, CERCLA § 121(f), 42 U.S.C. § 9621(f) (1988) ("The [EPA] shall promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State.").

162. Borland, *supra* note 90, at 261-62.

163. United States v. Union Gas Co., 743 F. Supp. 1144, 1155 (E.D. Pa. 1990).

164. *Id.* In this case the State of Pennsylvania is a PRP. However, the general principles discussed apply in cases where the state is not a PRP as well.

165. *Id.*

be protected. To avoid this uncertainty, settling PRPs should involve state and local government entities in the settlement process, negotiate remedies which will satisfy the broadest possible scope of interests, and finally, insure that all governmental entities are in accord and that all sign off on the consent decree.[166]

IV. THE NONSETTLER'S PERSPECTIVE

Parties who choose not to settle must initially recognize that they face a fundamental and irreconcilable dilemma. Congress, through CERCLA and more specifically SARA, has determined that the efficient and expedient cleanup of hazardous waste sites is incumbent upon PRPs settling with the EPA.[167] Thus, the decision to not settle puts PRPs in a position contrary to both congressional intent, as manifested in CERCLA and SARA, and the EPA, which must enforce the statute. Nonsettlers must appreciate this tension and realize that choosing not to settle may mean being treated inequitably.[168]

A. Fair Share

In the SARA amendments, Congress created a statutory scheme which forces nonsettling parties to assume the risk of paying more than their "fair share" of cleanup costs. The statute creates this disincentive for nonsettlers in two ways. First, under section 113(f)(2) nonsettlers lose their right of contribution against settlers who settle for less than their fair share.[169] Second, the nonsettlers' liability is only reduced by the amount of the settlement, not by the settlers' liability.[170] Thus, under joint and several liability, nonsettlers may be responsible for any damage caused by settlers which exceeds the settlement amount. This vulnerability has led many nonsettlers to seek a "fair share hearing" to determine fault prior to judicial approval of the settlement.

Despite the obvious importance of accurately attributing responsibility at an early stage in settlement proceedings, courts have cate-

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166. Procedures regarding state involvement in the negotiation and approval of a consent decree are found at section 121(f). CERCLA § 121(f), 42 U.S.C. § 9621(f) (1988).

167. *See supra* notes 27-29 and accompanying text.

168. In United States v. Rohm & Haas Co., 721 F. Supp. 666, 686 (D.N.J. 1989), the court stated, "[u]nfortunately for [the nonsettler], CERCLA, as we read it, is not a legislative scheme which places a high priority on fairness to generators of hazardous waste."

169. CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) (1988) provides:

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

170. *Id.*

gorically rejected any right to a fair share hearing prior to judicial approval of the settlement.[171] Lengthy evidentiary hearings on fault would directly contravene Congress' intent to reach rapid settlement and minimize transaction costs. So the nonsettler initially learns what soon becomes a familiar judicial response to his plight; his right to pay based on fault is of less importance than the congressional goal of expediting settlements.

Courts consistently find no right to an initial fair share hearing, yet they disagree over whether nonsettlers should be liable for more than their fair share. In *United States v. Conservation Chemical Co.*, the court discussed three possible remedies for situations involving PRPs who settle for less than the total cost of clean up.[172] Two of these remedies represent the polar positions of the EPA and nonsettling PRPs. The first solution precludes nonsettlers from obtaining contribution unless the settlement was not in good faith, thus forcing the nonsettler to absorb any shortfall in good faith settlements. This alternative was adopted in the Uniform Contribution Among Tortfeasors Act (UCATA).[173] In contrast, the Uniform Comparative Fault Act (UCFA) adopted a second solution which reduces nonset-

171. Comerica Bank-Detroit v. Allen Industries, Inc., 769 F. Supp. 1408, 1411 (E.D. Mich. 1991)("This court is uncertain what standards could be applied to determine whether the evidence shows fairness, reasonableness, and consistency with the goals of CERCLA. The preparation for such mini-trials, and the uncertainty of the outcomes, would discourage parties from settling, and this would be contrary to CERCLA's policy of encouraging early settlement."); United States v. Laskin, No. 84-2035Y, 1989 U.S. Dist. LEXIS 4900, at *13 (N.D. Ohio)("The court concludes that a prior hearing is not required on the settlement's fairness to each of the non-settling defendants. Nor does this court find such a hearing desirable for such a hearing would expose the parties to the same risks, expense and uncertainties that a settlement is intended to avoid."); Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 519 (W.D. Mich. 1989) (the court viewed a hearing on whether the settlement represents the percentage of responsibility as subverting the purpose of settlements); *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1031 n.21 (D. Mass. 1989); *Rohm & Haas*, 721 F. Supp. at 686-87 (the court reached a similar conclusion in the context of a de minimis settlement); City of New York v. Exxon Corp, 697 F. Supp. 677, 691 (S.D.N.Y 1988). *See also* Neuman, *supra* note 41, at 10,300 n.62.

The *Laskin* court pointed out that some courts have held prior hearings but they dealt not with apportioning liability, but in setting forth the parties who would actually undertake the cleanup and the methods they would employ. *Laskin*, 1989. LEXIS 4900, at *15.

172. United States v. Conservation Chemical Co., 628 F. Supp. 391, 401 (W.D. Mo. 1985), *modified*, 681 F. Supp 1394 (W.D. Mo 1988) (citing Comment to the Caveat to Section 886A of the Restatement of Torts (Second)).

173. Section 4 of the UCATA provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort for the same injury or the same wrongful death:
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
> (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4, 12 U.L.A. 98 (1975).

tlers' liability by the amount of the settlers' liability, not the settlement amount.[174] Under the UCFA approach, EPA is forced to absorb any difference between a settler's liability and the settlement amount. CERCLA itself does not specify which theory should apply.

1. Uniform Contribution Among Tortfeasors Act

Which theory will apply appears to depend on the identity of the parties litigating. The deciding factor will generally be whether the suit is a settlement with the United States or a state, or whether the action is between private parties.[175] A majority of courts have followed the UCATA's approach when EPA is a party to the action.[176] These courts universally rely on section 113(f)(2) as evidence that Congress intended to adopt the UCATA.[177] The language of section 113(f)(2) is unequivocal in reducing the potential liability of the nonsettlers by the amount of the settlement when the settlement is with the United States or a state. This language closely parallels section 4 of the UCATA.[178]

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174. Section 6 of the UCFA provides:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

UNIF. COMPARATIVE FAULT ACT § 6, 12 U.L.A. (Supp. 1991).

The third remedy, not discussed in the text, is that nonsettling parties are still able to obtain contribution against settlers despite the release. This remedy was adopted in the 1939 Uniform Contribution Act. *Id.* at 58. Courts have rejected this remedy because its lack of finality discourages settlements. *See* Lyncott Corp. v. Chemical Waste Management, Inc., 690 F. Supp. 1409, 1418 (E.D.Pa. 1988).

175. *Rohm & Haas*, 721 F. Supp. at 677 n.11 draws this public, private distinction. *See also* Neuman, supra note 41, at 10,301 n.80. This distinction stems from the differences between § 113(f)(1) and § 113(f)(2). Section 113(f)(2) reduces a nonsettler's liability by the amount of the settlement but is only applicable in a settlement with the United States or a state. Whereas § 113(f)(1) applies in private party actions and allows a court to use such equitable factors as it deems appropriate. *See infra* notes 189-191 and accompanying text.

176. United States v. Cannons Engineering Corp, 899 F.2d 79, 92 (1st Cir. 1990) ("This clear and unequivocal statutory mandate [§ 113(f)(2)] overrides appellants' quixotic imprecation that their liability should be reduced not by the amount of settlement but by the equitable shares of the settling parties."); *Rohm & Haas*, 721 F. Supp. at 677-78; *In re* Acushnet River & New Bedford harbor, 712 F. Supp. 1019, 1026 n.9 (1st Cir. 1990); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3rd Cir. 1988), *cert. denied*, 109 S. Ct. 837 (1989).

177. *See, e.g., Rohm & Haas*, 721 F. Supp. at 677-78 ("It would be puzzling indeed if CERCLA, post-SARA, permitted a court to credit a non-settling defendant with the 'equitable' share of the liability attributable to defendants who have resolved their liability to the United States or a State via a judicially approved settlement, since sections 113(f)(2) and 122(g)(5) seem much more closely modeled on the UC[A]TA than on the UCFA.")

178. Neuman, *supra* note 41, at 10,301 argues that had Congress intended to adopt the UCATA they would have used *exactly* the same language. *See supra* note 173 for the language of section 4.

A second argument for adopting the UCATA in settlement litigation with the government is the fundamental incompatibility between joint and several liability and the UCFA. Under the UCFA approach, nonsettlers are only required to pay their causal share; so when settlers settle for less than their fair share, the EPA must assume the difference. By limiting nonsettlers to their causal share, the UCFA compels courts to ignore CERCLA's requirement that PRPs be held jointly and severally liable for response costs.[179] Whereas the UCATA is compatible with joint and several liability. Also, unlike the UCFA, the UCATA has no proportional fault requirement to prevent the nonsettler from assuming any settlement shortfall. Given the UCATA's compatibility with joint and several liability and its preference that PRPs assume the cost of cleanup instead of the EPA, it is likely that Congress intended the UCATA to apply in government instigated CERCLA actions.

Finally, if nonsettlers knew they could only be liable for their fair share they would be more inclined to litigate since a loss at trial would, at worst, only mean paying their fair share and winning might result in paying substantially less.[180] Settlers' exact share of the total liability would also have to be litigated so that the remaining amount could be recovered from nonsettlers.[181] All this additional litigation would only mean increased transaction costs and delayed settlements, both of which contradict Congress' intention to reduce cleanup costs and promote settlement.

Despite the strength of the foregoing arguments, two courts have adopted the UCFA in settlement actions with the government. In *Conservation Chemical* (pre-SARA), the court found that the legislative history of CERCLA demanded that the judiciary apportion fault in a fair and equitable manner.[182] The court said it would "not tolerate either a 'windfall' or a 'wipeout' which results in an apportionment of responsibility which arbitrarily or unreasonably ignores the comparative fault of the parties."[183] Although cited frequently, *Conservation Chemical* probably has limited precedential value because it was decided before the SARA amendments.

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179. *Id.* (making the counter argument that this view assumes EPA must seek 100% of the remaining cleanup costs from the nonsettlers, when in reality there is no such requirement; for example, EPA could engage in a partial settlement and recover the balance from the Superfund). *See also supra* notes 60-64 and accompanying text.

180. *Id.* (Although a nonsettler would have to weigh into his decision to litigate additional transaction costs and loss of contribution protection).

181. *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 109, 1027 (D.Mass. 1989).

182. *Conservation Chemical*, 628 F. Supp. at 401-02. The court failed to mention what legislative history it was referring to. Also, the court was just advising the parties of what its views *would be* regarding the effect of settlement on nonsettling parties, hence the language is arguably dicta. *Id.* at 402.

183. *Id.*

However, the court in *United States of America v. Laskin*[184] reached the same conclusion as *Conservation Chemical*, and is a post-SARA case. According to *Laskin* the relative fault of liable parties depends on the particular circumstances. The court reasoned that if factors such as volume, toxicity and migratory potential are to be given effect, the apportionment must be on a comparative fault basis.[185] In addition to these equitable allocation factors, the *Laskin* court also read the legislative history of CERCLA to require allocation according to the UCFA.[186] The opinion is weakened by the fact that the court never mentions what legislative history it is referring to.[187] Other weaknesses in the opinion include the court's failure to address concerns that the UCFA conflicts with CERCLA's language and that the UCFA may increase transaction costs. However, the *Laskin* court did address the UCFA's incompatibility with joint and several liability, saying it would use its equitable powers to override any conflicts.[188]

Parties that choose not to settle with the EPA will most likely remain potentially liable for any difference between the settlers' liability and the amount of the settlement. Although *Conservation Chemical* and *Laskin* are to the contrary, one is pre-SARA, and the other fails to satisfactorily address the statutory language.

2. Uniform Comparative Fault Act

The foregoing discussion illustrates that in government settlement actions courts will generally interpret the language of section 113(f)(2) as requiring application of the UCATA. However, courts deciding contribution suits between private PRPs have almost unanimously adopted the UCFA.[189] This different result is attributable to the contrasting language of section 113(f)(1) and section 113(f)(2). Section 113(f)(2) states that when someone settles with the United States or a state, the other nonsettling parties' liability will be reduced by the amount of settlement,[190] whereas section 113(f)(1) says

184. United States v. Laskin, No. 84-2035Y, 1989 U.S. Dist. LEXIS, at *18 (N.D. Ohio Feb. 27, 1989).

185. *Id.* at *17.

186. *Id.* at *17-18.

187. *Id.* Neuman, *supra* note 41, at 10,301 suggests the legislative history is inconclusive.

188. *Laskin*, LEXIS 4900 at *19.

189. Comerica Bank-Detroit v. Allen Industries, Inc., 769 F. Supp. 1408 (E.D. Mich. 1991); United States v. Western Processing Inc., 756 F. Supp. 1424 (W.D. Wash. 1990) (the court thoroughly examined all the advantages and disadvantages of both the UCFA and UCATA); Lyncott Corp. v. Chemical Waste Management, Inc., 690 F. Supp. 1409, 1417-18 (E.D. Pa. 1998); Edward Hines Lumber Co. v. Vulcan Materials, 1987 WL 27368 (N.D. Ill. 1987).

190. CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) (1988). Courts adopting the UCFA in private suits between PRPs have also chosen the UCFA over the UCATA because the UCFA avoids the inequity of nonsettlers potentially absorbing orphan shares. *Western Processing*, 756 F. Supp. at 1432; *Lyncott*, 690 F. Supp. at 1418.

that "in resolving contribution claims, the court may allocate reponse costs among liable parties using such equitable factors as the court determines are appropriate."[191] Section 113(f)(1)'s specific directive to consider equitable factors and section 113(f)(2)'s omission of the same language appear to dictate application of the UCFA in actions between PRPs and the UCATA where the EPA or state brings the action.

One court has reached a contrary result and applied the UCATA in a decision involving private PRPs. In *United States v. Pepper's Steel and Alloy's, Inc.*, the court approved a consent decree which applied the UCATA in any future actions.[192] The court merely granted the motion for entry of a consent decree, then reproduced the decree in its opinion. There is no discussion of why the UCATA applies or of its attributes or disadvantages. This lack of analysis should limit the case's precedential effect on future decisions involving contribution actions among private PRPs.[193]

B. *Intervention*

As demonstrated by the preceding "fair share" discussion, settlements may drastically affect the nonsettlers' ultimate liability. Thus, an initial problem for the nonsettler is how to gain a voice in the settlement process. In the typical settlement, EPA's approach is to simultaneously file a proposed consent decree and complaint against the settling parties.[194] EPA subsequently brings a separate action to recover from the nonsettlers. This dual approach means that nonsettlers are often not parties to the settlement action and consequently have no say in the settlement process. Many nonsettlers will view intervention as a potential vehicle for participating in the settlement process; however, they should realize there may be obstacles to intervening.[195]

Nonsettling parties should attempt to intervene under both[196] section 113(i) of CERCLA and rule 24(a)(2) of the Federal Rules of

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191. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1988).

192. 658 F. Supp. 1160, 1167-68 (S.D. Fla. 1987).

193. Arguably this case is not necessarily contrary because the consent decree applies to both contribution actions between private parties and actions brought by the United States.

194. Michael Dore, *Dealing With the Post-SARA Dynamics of PRP Settlements; Anyone For a Stay*, 17 ENVTL. L. REP. (Envtl. L. Inst.) 10,431, 10,432 (1987).

195. *See generally* William B. Johnson, Annotation, *Right to Intervene in Federal Hazardous Waste Enforcement Action*, 100 A.L.R. FED. 35 (1990).

196. The advantage in moving to intervene under *both* § 113(i) and Rule 24(a)(2) is the ability to circumvent the argument that Congress did not intend § 113(i) to be a mechanism for nonsettlers to challenge consent decrees. Section 159(h) of CERCLA says that the statute will not impair the rights of any person under federal law. So if a court were to accept the argument that § 113(i) is not available for nonsettler intervention, the nonsettler could still intervene under Rule 24(a)(2). *See* United States v. Acton Corp. 131 F.R.D. 431, 433, 31 Env't. Rep. (BNA) 1383, 1384 (D.N.J. 1990).

Civil Procedure.[197] Both provisions require the applicant to meet a four part test: 1) the motion must be made in a timely manner; 2) the applicant must have a legally protected interest; 3) the applicant's interest must be impaired or impeded, as a practical matter, by disposition of the action; and 4) the applicant's interest must not be adequately represented by an existing party in the litigation.[198]

1. Timeliness

To date, the only elements of this intervention test to be litigated in the CERCLA arena are timeliness and the question of a legally protected interest.[199] Timeliness should not be a problem for the alert applicant. However, in the event of minimal inadvertence or oversight, an applicant should be protected by most courts' relatively flexible approach.

In *United States v. Mid-State Disposal Inc.*, the court found the relevant factors in determining timeliness to be: the length of time the intervenor knew or should have known of his or her interest in the case; the extent of prejudice to the original litigating parties from the intervenor's delay; the extent of prejudice to the would-be intervenor if his or her motion is denied; and any unusual circumstances.[200] In *Mid-State*, the nonsettlers had withdrawn from settlement negotiations in May 1989, after negotiating for six months. The remaining parties settled, and the EPA contemporaneously filed a proposed consent decree and complaint against the settlers in November 1989. Not

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197. Section 113(i) provides:

> In any action commenced under this chapter. . . in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest unless the President or the States show that the person's interest is adequately represented by existing parties.

CERCLA § 113(i), 42 U.S.C. § 9613(i) (1988).

Fed. R. Civ. P. 24(a)(2) provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest in relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2).

The two rules differ only in that the fourth part of the § 113(i) test places the burden of proving that the applicant's interest is adequately protected on the government whereas under Rule 24(a)(2) the burden is on the applicant to show inadequate representation.

198. *Acton*, 31 Env't. Rep. (BNA) at 1384.

199. Some of the decisions briefly discuss all elements of the test, but if the application is timely and the would-be intervenor has an interest to protect, the remaining parts of the test will generally not be a barrier. *See, e.g., Acton*, 31 Env't. Rep. (BNA) at 1387.

200. 131 F.R.D. 573, 576 (W.D. Wis. 1990) (citing Bloomington Ind. v. Westinghouse Elec. Corp. 824 F.2d 531 (7th Cir. 1987)).

until March 1990, when the court heard the motion for entry of the consent decree, did the nonsettlers move to intervene.[201] Not surprisingly, the court found the nearly six month delay excessive.[202] The court found that intervention would unduly prejudice the original litigating parties by rendering the original negotiations useless.[203] Intervenors would not be prejudiced because they already had an opportunity to object to the consent decree during the public comment period.[204]

A contrary result is found in the recent case of *United States v. Browning-Ferris Industries Chemical Services, Inc.*.[205] In *Browning-Ferris*, notice of the proposed consent decree was published in the Federal Register on August 7, 1989. The applicant filed for intervention on September 8, 1989. Essentially, the government argued that the thirty day public comment period was a statutory limitation on intervention, that the applicant was two days late and therefore could not intervene. The court rejected this reasoning, instead interpreting the statutory[206] and regulatory[207] language that a consent decree shall be proposed "at least thirty days before a final judgment is entered" to not be absolute.[208]

To the extent a general rule can be gleaned from *Mid-State* and *Browning-Ferris*, it appears that courts, in their discretion, will accommodate an applicant's interest so long as the applicant is reasonably diligent and will not prejudice the existing parties.[209] Thus, the issue of timeliness is a relatively minor barrier when compared to the second element in the intervention test; whether the applicant has a legally protected interest.

2. Legally Protected Interest

Several recent cases have addressed whether a nonsettler's inability to intervene means the loss of a legally protected interest.[210] Non-

201. *Mid-State*, 131 F.R.D. at 574-75.
202. *Id.* at 576.
203. *Id.*
204. *Id.* at 577. *See also supra* notes 39-40 and accompanying text.
205. 1989 U.S. Dist. LEXIS 16596 (M.D. La.).
206. CERCLA § 122(d)(2)(A), 42 U.S.C. § 9622(d)(2)(A) (1988).
207. 28 C.F.R. § 50.7 (1990).
208. Rather than analyzing each element of the timeliness test the court generally concluded that the applicant had not been dilatory in moving for intervention. *Browning-Ferris*, 1989 U.S. Dist. LEXIS 16596 at *7.
209. For an example of an unreasonably dilatory intervenor, see U.S. v. Bliss, 132 F.R.D. 58 (E.D. Mo. 1990) where, in a CERCLA action, the court rejected two cities' attempt to intervene six years after the action was commenced. However, in *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1023 (D. Mass. 1989), the National Wildlife Federation (NWF) was granted permissive intervention three and one-half years after the suit had been filed because NWF only realized they were inadequately represented once the settlement was announced.
210. United States v. Acton, 31 Env't. Rep. (BNA) 1383 (D.N.J. 1990); United States v. Browning-Ferris Ind., 1989 U.S. Dist. LEXIS 16596 (M.D. La.); Travelers

settling parties' alleged interest is in preserving their right of contribution against settling parties under section 113(f)(1). Under sections 113(f)(2) and 122(h)(4) any right of contribution is lost once a consent decree is approved by the court. Therefore, nonsettling parties might intuitively assume that their right of contribution is a legally protected interest; however, several plausible arguments have been made to the contrary.

In one of the leading CERCLA intervention cases, *United States v. Acton*, the settlers argued that nonsettlers have no protectable interest because the nonsettlers' interest is merely "economic" as opposed to "legally protected."[211] Disagreeing with the settler's "economic" argument, the *Acton* court found that section 113(f)(1) creates a legally protected statutory right of contribution[212]—that while the nonsettlers' interest may be partially economic they are also trying to protect a statutory right which could subsequently be lost.[213]

Limited support for the argument that the nonsettlers' interest is merely economic is found in *Browning-Ferris*.[214] *Browning-Ferris* was a unique situation involving two actions. In the initial action, Marathon settled with the government and Browning-Ferris chose not to settle. The government subsequently brought a second settlement action against Browning-Ferris in which Marathon unsuccessfully sought to intervene. Marathon claimed that the government's settlement with Browning-Ferris would result in Marathon's paying a disproportionate share of the cleanup costs and losing its right of contribution against Browning-Ferris.[215] The court denied Marathon's motion to intervene because any contribution rights of Marathon are subordinate to the government's right to settle with Browning-Ferris under section 113(f)(3)(c), and more importantly because Marathon had claims for contractual indemnification against Browning-Ferris which would not be lost by the second consent decree.[216]

In *Acton*, the settlers relied on *Browning-Ferris* as authority that the nonsettling PRPs should not be allowed to intervene. However, the *Acton* court viewed Marathon's retained contractual indemnification action in *Browning-Ferris* as sufficiently distinguishable from *Acton*, where the nonsettling party had no remedy other than its possible right of contribution.[217] Because *Browning-Ferris* was based on a

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Indemnity Co. v. Dingwell, 884 F.2d 629 (1st Cir. 1989).

211. 31 Env't. Rep. (BNA) at 1384-85.

212. *Id.* at 1385.

213. *Id.*

214. *Browning-Ferris*, 1989 U.S. Dist. LEXIS 16596 at *8.

215. Marathon argued that before the settlement with Browning-Ferris, Marathon had a right of contribution against Browning-Ferris, but once Browning-Ferris settled, Marathon would lose that right of contribution. Marathon contended this would conflict with the proposed consent decree which provided that it was not to affect any contractual rights or obligations of any person not a party to it. *Id.* at *3.

216. *Id.* at *8.

217. *Acton*, 31 Env't. Rep. (BNA) at 1385-86.

peculiar set of facts, most courts should view it as having limited precedential value, as did the *Acton* court.

Nonsettlers attempting to intervene will encounter not only the argument that their interest is merely economic, but also that their right to contribution is not really an interest because it is contingent on court approval of the consent decree. In *Acton* the court disposed of this argument on two grounds. First, section 113(f)(1) grants anyone the right to seek contribution from anyone potentially liable.[218] The fact that a presently held right may be subsequently lost does not mean the present right is contingent. Second, finding a nonsettler's interest contingent would mean a virtual "Catch-22," with the nonsettler being precluded from seeking contribution *before* judicial approval of the consent decree due to the contingency, yet being barred from seeking contribution *after* approval by section 113(f)(2).[219]

Other courts will probably follow the *Acton* court's sound analysis and recognize that a nonsettler's right of contribution is a legally protected interest meriting intervention. However, successful nonsettling intervenors may find they have "won the battle yet lost the war." Upon becoming a party to the settlement litigation, intervenors still face the prospect of limited influence over the settlement process. Given the lax standard of judicial review, the steering committee's power and the overriding preference for settlement, any objections to settlement may fall on deaf ears.

C. *Pre-enforcement Judicial Review*

As discussed previously, EPA has two options for cleaning up a hazardous waste site.[220] First, it can clean up the site itself under section 104 and subsequently seek payment from the responsible parties under section 107. Alternatively, under section 106 EPA can order a party to clean up the site.[221] Fines for failure to comply with such an order can reach $25,000[222] per day and treble the total cost of cleanup.[223] Given EPA's influence over the cleanup process and the large sums associated with CERCLA cleanup,[224] PRPs might naturally

218. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1988).

219. *Id.* One case has found the would-be intervenor's interest contingent. Travelers Indemnity Co. v. Dingwell, 884 F.2d 629 (1st Cir. 1989) involved an insurance company's attempt to intervene in their insured's settlement. The court found that an insurer has an interest in a lawsuit brought by an injured party against its insured. However, the insurer had reserved its right to deny coverage so "the insurer's interest in the liability phase of the proceeding is contingent on the resolution of the coverage issue." *Dingwell*, 884 F.2d at 638. The *Acton* court distinguished the *Dingwell* decision as being unique to the insured-insurer relationship. *Acton*, 31 Env't. Rep. (BNA) at 1387.

220. *See supra* notes 13-18 and accompanying text.

221. Phillips & Gaba, *supra* note 15, at 12-4 to 12-6.

222. CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1) (1988).

223. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1988).

224. *See supra* notes 47-51 and accompanying text.

seek pre-enforcement judicial review of EPA's action when their plan does not appear cost efficient.

However, PRPs will have difficulty in obtaining judicial review at an early stage because federal district courts' jurisdiction over CERCLA controversies pursuant to section 113(b) is severely restricted by section 113(h).[225] Section 113(h), relating to the timing of review, generally precludes judicial review of EPA's action under CERCLA except for: actions under section 107 to recover response costs; enforcement of orders issued under section 106(a); actions for reimbursement under section 106(b)(2); citizen suits challenging removal or remedial action taken, or when EPA seeks to compel a remedial action.[226]

The rationale for having such limited pre-enforcement judicial review is to ensure that pre-enforcement litigation will not create an obstacle to the prompt cleanup of hazardous waste sites.[227] This lack of judicial review creates a problem for all PRPs because they cannot challenge EPA at the RI/FS stage if they perceive EPA's remedy as more costly than necessary. This dilemma is more severe for nonsettlers because, unlike settlers, they have no opportunity to negotiate the cleanup with EPA or to conduct the RI/FS.[228]

Courts which have considered the potentially harsh effect of not having pre-enforcement judicial review point out that PRPs can still contest any unnecessary expenses when defending a cost recovery action.[229] Furthermore, if EPA is aware that PRPs will eventually litigate excessive costs they will have an incentive to initially curtail the cost of cleanup.[230] While the foregoing analysis is true, it is undoubtedly more difficult for PRPs to argue after EPA's action has already been taken.

While section 113(h) generally precludes pre-enforcement judicial review, PRPs can still seek to fit within one of five exceptions. The five exceptions are all quite specific except 113(h)(4) which provides:

> No federal court shall have jurisdiction under federal law . . . to review any challenges to removal or remedial action selected . . . except . . .
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> * * * *
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> (4) An action under § 158 of this title (citizen suits) alleging that the removal or remedial action taken under § 104 of this title or secured under § 106 of this title was in violation of any requirement of this chapter. Such an action may not be brought with

225. CERCLA § 113(b), (h), 42 U.S.C. § 9613(b), (h) (1988).
226. CERCLA § 113(h), 42 U.S.C. § 9613(h) (1988).
227. North Shore Gas Co. v. EPA, 32 Env't Rep. (BNA) 1618 (N.D. Ill. 1990); Reardon v. U.S., 731 F. Supp. 558 (D. Mass. 1990).
228. *See supra* notes 65-67 and accompanying text.
229. *See, e.g.*, Cabot Corp. v. U.S.E.P.A., 677 F. Supp. 823, 829 (E.D. Pa. 1988).
230. *Id.*

regard to a removal where a remedial action is to be undertaken.

Despite the facial appearance of some flexibility, courts have interpreted this language to mean "no challenge to the cleanup may occur prior to completion of the remedy."[231] The statute speaks of remedial action *taken* or *secured*, both of which are in the past tense, indicating the action must be completed before a suit is permissible.[232] Also, the last sentence precludes any claims when remedial action is to be undertaken.

Not only have the courts interpreted section 113(h)(4) narrowly, but it is questionable whether PRPs are even entitled to bring citizen suits. The plain language of 113(h)(4) allows anyone to bring a citizen suit irrespective of PRP status. However, the citizen suit provision's apparent design was to provide citizens an opportunity to prevent irreparable harm, not allow PRPs a chance to claim monetary damages.[233] Moreover, if a PRP could make his claims against EPA under 113(h)(4) before challenging EPA under another section of 113(h), the PRP would effectively be allowed an " 'end-run' around the ban on pre-enforcement judicial review."[234]

D. Due Process

Someone resisting settlement may view a statutory scheme that offers a choice between paying more than your fair share or settling as violating his due process rights. A nonsettler in *Cannons* claimed such a due process violation, arguing that it had a property interest in the money it would have to pay under the consent decree and that due to arbitrary and capricious governmental action [adopting the UCATA approach] it was being forced to bear a disproportionate share of the cleanup costs.[235] The court rejected this argument finding that a joint tortfeasor has no right of contribution as a matter of federal common law.[236] A right of contribution exists only where Congress intended to create such a right in the particular statute.[237] In section 113(f)(1)

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231. Schalk v. Reilly, 900 F.2d 1091, 1095 (7th Cir. 1990).

232. *Id. See also North Shore Gas*, 32 Env't Rep. (BNA) at 1621; Dickerson v. Administrator, E.P.A., 834 F.2d 974 (11th Cir. 1987).

233. South Macomb Disposal Authority v. U.S.E.P.A., 681 F. Supp. 1244, 1249 n.3 (E.D. Mich. 1988); *Cabot Corp.*, 677 F. Supp. at 829.

234. *Cabot Corp.*, 677 F. Supp. at 828.

235. United States v. Cannons Engineering Corp., 720 F. Supp. 1027, 1049-50 (D. Mass 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990). The nonsettler in *Cannons* also claimed an equal protection violation because it would be forced to pay more than the settling parties. The court rejected the equal protection argument because CERCLA is only social and economic legislation and generators of hazardous waste are not a suspect class hence only a rational basis for the disparity is needed. CERCLA's use of the UCATA was rational because it encourages early settlements and limits the use of public funds. *Cannons*, 720 F. Supp. at 1050.

236. *Id.* at 1050 (citing Texas Industries, Inc. v. Radcliff Materials Inc., 451 U.S. 630 (1981) and Northwest Airlines, Inc. v. Transport Workers Union, AFL-CIO, 451 U.S. 77 (1981)).

237. *Cannons*, 720 F. Supp. at 1050.

Congress "established and defined, rather than removed the right of a joint tortfeasor to contribution."[238] So there can be no due process violation if Congress, as here, had a valid legislative purpose.[239]

Nonsettlers who claim that unfair settlements violate their due process rights must also contend with the fact that settlements are generally the result of arm's-length adversarial bargaining. Courts have found this bargaining process sufficient to ensure that settlements fairly apportion responsibility.[240] Given a fair settlement, a nonsettler's due process rights would not be violated because, at least theoretically, there is no shortfall to assume.[241]

Finally, some commentators have recognized that the recent *Martin v. Wilks* decision may be applicable to nonsettlers in CERCLA actions alleging due process violations.[242] In *Wilks*, blacks had entered into consent decrees with the City of Birmingham that set goals for hiring and promoting black firefighters. White firefighters brought suit claiming the consent decrees illegally discriminated against them.[243] So the question became whether white firefighters, who had not been parties to the consent decrees, could collaterally attack the decrees. The Court upheld the white firefighters' challenge, using the rationale that one not a party to an action cannot be bound by its judgment.[244] However, the Court also found that where "a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants," a non-party will not be able to bring such a collateral attack.[245] To date, no court has decided whether CERCLA is such a special remedial scheme.[246]

E. Judicial Review of Proposed Consent Decrees

SARA's legislative history helps define the courts' role in reviewing proposed consent decrees, stating that "a court must satisfy itself that the settlement is reasonable, fair, and consistent with the purposes CERCLA is intended to serve."[247] While reasonableness, fair-

238. *Id.*

239. *Id.* (citing Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978)).

240. United States v. Rohm & Haas Co., 721 F. Supp. 666, 695 (D.N.J. 1989); *Cannons*, 720 F. Supp. at 1040.

241. Of course this is not always true because courts may characterize settlements as fair even when the settling parties pay for less than their proportionate share.

242. 109 S. Ct. 2180 (1989). *See* Borland, *supra* note 90, at 260-61; Neuman, *supra* note 41, at 10,304.

243. *Wilks*, 109 S. Ct. at 2183.

244. *Id.* at 2184 (citing Hansberry v. Lee, 311 U.S. 32 (1940)).

245. *Id.* at n.2 (noting bankruptcy and probate as examples of special remedial schemes).

246. According to Borland, *supra* note 90, at 260-61, this issue is being litigated in United States v. Clean Harbors of Natick, Inc., Civ. A. No. 89-109-L and Civ. A. No. 89-129-L (D.N.H.).

247. H.R. REP. No. 253 pt. 3, 99th Cong., 1st Sess. 19 (1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3042.

ness and consistency tend to be rather amorphous concepts, several courts have attempted to further define the terms.[248]

In *Rohm & Haas* the court identified six factors to use in evaluating the reasonableness of a proposed consent decree: 1) the relative costs and benefits of litigating the case under CERCLA; 2) the risks of establishing liability on the part of the settlers; 3) the good faith efforts and adversarial relationship of the negotiators who crafted the settlement; 4) the reasonableness of the settlement as compared to the settlers' potential volumetric contribution; 5) the ability of the settlers to withstand a greater judgment; and 6) the effect of the settlement on the public interest as expressed in CERCLA.[249] If the decree satisfies these six factors there is no need to separately consider the fairness of the decree to nonsettling parties.[250]

The court's level of intensity in reviewing consent decrees is often described as being greater than "rubber stamp" approval and less than de novo review.[251] Yet in reality most courts lean towards rubber stamp approval, granting substantial deference to a settlement which has been negotiated at arm's-length.[252]

Two recent examples of this extreme deference are the *Acushnet River* and *Exxon* cases.[253] In *Acushnet River*, the government, at the time of settlement, estimated damages to be $34 million yet in the consent decree allowed one of five jointly and severally liable defendants to settle for $2 million.[254] In justifying its approval, the court found it had no obligation to ensure either the best deal possible or that the settlement was perfectly calibrated in terms of shares of liability. Also, the court thought that settlers who had negotiated early

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248. In *Cannons*, 899 F.2d at 86-93, the court identified the factors to consider in approving a consent decree as procedural fairness, substantive fairness, reasonableness and fidelity to the statute. The *Cannons* factors were subsequently adopted in U.S. v. Bliss, 133 F.R.D. 559 (E.D. Mo. 1990). *See also Rohm & Haas*, 721 F. Supp. at 679-81, 685-87; *Exxon*, 697 F. Supp. at 692; *Acushnet River*, 712 F. Supp. at 1028.

249. *Rohm & Haas*, 721 F. Supp. at 687.

250. *Id.*

251. *Id.* at 680 (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 453 (2d Cir. 1974)).

252. In Comerica Bank-Detroit v. Allen Industries, Inc., 769 F. Supp. 1408, 1412 (E.D. Mich. 1991) (quoting Wellman v. Dickinson, 497 F. Supp. 824 (S.D.N.Y. 1980), *aff'd* 647 F.2d 163 (2d Cir. 1981)), the court said, "where there has been arm's length bargaining among the parties and sufficient discovery has taken place to enable counsel to evaluate accurately the strengths and weaknesses of the plaintiff's case there is a presumption in favor of the settlement." *Accord*, City of New York v. Exxon Corp., 697 F. Supp. 677. 692. *See supra*, notes 71-74 and accompanying text.

253. The court in *Rohm & Haas* tried taking a more aggressive approach to reviewing a consent decree. However, even after extensively reviewing the evidence, the court still approved the settlement as being reasonable. The court acknowledged the settlement amount could be disproportionate to volumetric share yet thought the uncertainty in attributing responsibility warranted approving the settlement as being a fair and reasonable compromise. *Rohm & Haas*, 721 F. Supp. at 696. *See* discussion in Neuman, *supra* note 41, at 10,299.

254. *Acushnet River*, 712 F. Supp. at 1031.

in the settlement process deserved a discount.[255]

The court in *Exxon* was similarly deferential, allowing seven of fifteen defendants to settle for $13.8 million when total cleanup costs would approximate $400 million. The *Exxon* court found the settlement reasonable because of certain weaknesses in the government's case, i.e., that the government itself was also probably liable. In addition, the settlement was entered into in good faith, was based on a sufficient factual record and would avoid expensive litigation.[256]

The courts' deferential treatment of proposed settlements is unlikely to change. In most CERCLA actions, the government has difficulty accurately proving contribution amounts. Poor records, faulty memories and a desire to escape liability all add to the difficulty. This inaccurate proof coupled with the already strong incentives to settle means that most courts will continue to find settlements reasonable.[257]

V. CONCLUSION

When counseling a client on whether to settle, the preferred course of action will principally depend on his particular factual circumstances, such as the level of contribution and the number of parties involved. Large volume PRPs and de minimis contributors will almost always settle. In contrast, the mid-level contributor must weigh the consequences of settlement and nonsettlement in light of his particular situation.

Settlement will often appear compelling. Litigating a CERCLA action frequently involves enormous sums of money, years of effort, and as with any litigation, an uncertain outcome. The time, expense and effort expended in litigation can all be saved by settling. Another strong incentive to settle is the additional control settlers have over the cleanup process. Settling PRPs, unlike nonsettlers, can often develop the cleanup plan, thus avoiding the substantially higher costs incurred when EPA administers the cleanup. Perhaps most important though is the broad protection afforded settlers against contribution claims brought by nonsettlers. Not only are settlers protected from subsequent contribution actions, but they can also maintain their own right of contribution against nonsettlers.

Despite the appearance of a safe haven, settlement has its limitations. Most significant among these limitations is the settler's scope of liability to both nonsettlers and the EPA after settlement. Nonsettlers provide a critical threat to liability protection because the parameters on nonsettler suits have not yet been defined. While SARA's contribution protection under section 113(f)(2) significantly enhances a set-

255. *Id.* at 1032.
256. *Exxon*, 697 F. Supp. at 693-94.
257. *See* Neuman, *supra* note 41, at 10,299.

tler's protections, several recent district court decisions have created uncertainty as to the extent of this protection by allowing nonsettlers to bring cost recovery actions under section 107 despite section 113(f)(2)'s contribution protection. Other potentially debilitating limitations include the nonsettler's ability to recover on claims not addressed in the settlement and for claims made pursuant to state law remedies.

Unlike the uncertainty in post-settlement protection from nonsettlers, limitations on protection from the EPA are generally defined by covenants not to sue in the consent decree. While a covenant not to sue defines a settler's protection from EPA, it does not always preclude future litigation. A covenant is limited to its terms and may subject the settler to additional liability when it does not clearly define the remedial action to be taken or the character of the substances covered. Thus, the prudent attorney must negotiate the broadest possible terms yet be specific in drafting the covenant's coverage. One must also be aware that the terms of a covenant not to sue may be weakened where CERCLA mandates that a reopener provision be included in the consent decree, and that the covenant may even be invalidated if not authorized by CERCLA.

Notwithstanding the foregoing limitations, settlement will frequently be preferable to not settling. Initially labeled a recalcitrant, the nonsettler faces a series of obstacles. First, CERCLA may impose liability on the nonsettler for any difference between the settlers' causal share and the total settlement. Second, nonsettlers concerned that the settlement will not accurately reflect the settlers' level of responsibility may find they cannot intervene in the settlement. Even when courts do allow nonsettlers to intervene they often only exercise limited control. Finally, nonsettlers cannot expect courts to remedy any unfairness in the settlement process. Courts almost always approve settlements, citing the statutory scheme favoring settlement and the absence of reliable records to prove definite levels of responsibility. Thus, nonsettlement may only be for those who did not contribute and can readily prove it. However, if courts continue to interpret CERCLA as allowing nonsettlers to bring cost recovery suits against those who settle, many PRPs will not settle and instead opt to litigate and enjoy the finality provided by res judicata.

Congress should view the pending reauthorization of CERCLA as an opportunity to clarify some of these issues, notably the uncertain scope of contribution protection for settlers and the statute's sometimes harsh treatment of nonsettlers.