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Fold or Fight: The Changing Settlement Calculus in CERCLA Enforcement Actions

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FOLD OR FIGHT: THE CHANGING SETTLEMENT CALCULUS IN CERCLA ENFORCEMENT ACTIONS

*Lemuel M. Srolovic and Pamela R. Esterman**

"I propose to fight it out on this line, if it takes all summer."[1]

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"),[2] also known as Superfund, is approaching its third decade. Over the past twenty years, there have been marked changes in the scope of liability under CERCLA as defined by the federal courts.

In the 1980's and the early 1990's, the federal courts seemingly rejected all arguments against broad liability in government enforcement and cost recovery actions under CERCLA. The courts invoked the remedial goals of the Act in broad decisions expanding the reach of the statute.[3] At the same time, the courts accorded a potentially responsible party ("PRP") targeted by the government with ample means to distribute the costs of hazardous substance remediation to other PRPs.[4] This dynamic promoted settlements in government enforcement actions. The inevitable handful of PRPs selected by the government to remediate

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1. Ulysses S. Grant, Dispatch to Washington from Spottsylvania Courthouse (May 11, 1864), *reprinted in* J. BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 501 (16th ed. 1992).

2. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 (1994).

3. *See, e.g.*, United States v. Rohm & Haas, 790 F. Supp. 1255, 1263 (E.D. Pa. 1992) (rejecting third-party defense), *rev'd*, 2 F.3d 1265 (3d Cir. 1993); United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987) (rejecting "act of God" and third-party defenses). The remedial goals embodied in CERCLA are discussed in Section II, *infra*.

4. *See, e.g.*, Shapiro v. Alexanderson, 741 F. Supp. 472, 478-79 (S.D.N.Y. 1990) (arguing that regardless of a PRP's degree of responsibility, that party is still entitled to bring a CERCLA action against other PRPs to seek contribution).

a site or reimburse the government's cleanup costs had powerful incentives to invest their resources in spreading the costs to other PRPs rather than fighting a losing battle against the government.

As CERCLA enters its third decade, new trends are emerging that could significantly alter this dynamic. On the one hand, courts are curtailing the expansive reach of CERCLA liability and breathing new life into its limited defenses.[5] This trend offers a PRP, who is targeted by the government, new weapons with which to defend itself. On the other hand, some courts are more frequently placing obstacles in the way of PRPs trying to shift costs to other PRPs on an equitable basis.[6] For the PRP selected by government enforcers to clean up a contaminated site or to reimburse the government's expenditures under joint and several liability, these dual trends provide new incentives to fight the government as opposed to settling and shouldering the burden of allocating costs more broadly.

To foster settlements and voluntary cleanups with private monies, the courts should continue to exercise their considerable power under CERCLA's contribution provision[7] and fashion rules which promote the equitable distribution of CERCLA liability. Such an approach is consistent with curtailing the expansive reach of CERCLA and protects those parties identified by the government from bearing responsibility for contamination by others.

II. CERCLA'S BROAD REMEDIAL PURPOSE

The overriding purpose of CERCLA is to protect human health and the environment from the dangers posed by hazard-

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5. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51 (1998); ABB Indus. Sys., Inc. v. Prime Tech., Inc. ("ABB"), 120 F.3d 351, 358-59 (2d Cir. 1997); United States v. CDMG Realty Co., 96 F.3d 706, 713 (3d Cir. 1996); New York v. Lashins Arcade Co., 91 F.3d 353 (2d Cir. 1996).

6. *See, e.g.*, Acushnet Co. v. Coaters Inc. ("Acushnet II"), 948 F. Supp. 128 (D. Mass. 1996); Acushnet Co. v. Coaters Inc. ("Acushnet I"), 937 F. Supp. 988 (D. Mass. 1996); Kalamazoo River Study Group v. Rockwell Int'l, 3 F. Supp. 2d 799 (W.D. Mich. 1998).

7. 42 U.S.C. § 9613 (1994).

ous substances.[8] The two principal goals of the statute are to:

> (1) clean up hazardous waste sites promptly and effectively; and (2) ensure that those responsible for the problem "bear the costs and responsibility for remedying the harmful conditions they created."[9]

Because CERCLA is a remedial statute, courts have often cited the remedial purpose canon to support expansive interpretations of the statute.[10] The elements of CERCLA liability, the scope and nature of liability, as well as the costs that may be recovered upon a determination of liability have all been broadly construed.[11] Conversely, defenses have been narrowly construed.[12]

III. NEW WEAPONS TO FIGHT THE GOVERNMENT

During CERCLA's first fifteen years, the courts deciding Superfund cases rewrote traditional rules of liability to further CERCLA's broad remedial purposes.[13] More recent appellate decisions, however, have limited the seemingly boundless expansion

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8. S. REP. NO. 96-848, at 51-63 (1980) (stating that paramount purpose for response authority provided by S. 1480 is protection of health, welfare, and environment).

9. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). Under the statutory paradigm, "Superfund" permits the government to respond quickly to a release or threatened release of hazardous substances, and then the public fund is replenished through cost recovery from responsible parties. *See* Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1445 (W.D. Mich. 1989).

10. *See, e.g.*, United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1503 (6th Cir. 1989) (finding that the "all costs incurred" language of CERCLA, together with the statute's broad remedial purpose, support a liberal interpretation of recoverable costs), *cert. denied*, 494 U.S. 1057 (1990).

11. *Id.*

12. *See, e.g.*, United States v. Conservation Chem. Co., 619 F. Supp. 162, 203 (W.D. Mo. 1985) (CERCLA defenses are narrow).

13. *See, e.g.*, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) (ruling that a lender could be liable without being an operator by participating in the financial management of a facility), *cert. denied*, 498 U.S. 1046 (1991); United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1496 (D. Utah 1987) (holding that CERCLA, because of its broad remedial purpose, superseded state corporate law in determining the capacity of a dissolved corporation to be sued).

of CERCLA. This trend may be seen in the Supreme Court's recent decision in *United States v. Bestfoods* ("*Bestfoods*"),[14] the Court's first decision addressing the reach of CERCLA's liability provision, Section 107.[15] The trend may also be seen in recent decisions curtailing liability from the passive migration of contaminants.[16] Decisions breathing life into CERCLA's third-party defense[17] are further examples of the recent judicial trend narrowing the scope of CERCLA liability.[18]

A. *Bestfoods & Corporate Parent Liability*

In 1991, the U.S. District Court for the Western District of Michigan held that a corporate parent could be liable under CERCLA for contamination at a site owned and operated by a subsidiary.[19] Relying in part on the remedial nature of the statute, the District Court ruled that if a corporate parent "exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste," then the parent was directly liable under CERCLA.[20] After a lengthy journey through the Sixth Circuit,[21] the Supreme Court granted certiorari on the issue of corporate parent liability under CERCLA.[22]

In *Bestfoods*,[23] the Supreme Court held that a parent corpora-

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14. 524 U.S. 51 (1998) (holding that when the corporate veil is pierced, a parent corporation may be charged with derivative CERCLA liability for its subsidiary's actions in operating a polluting facility).

15. *See infra* Part III.A.

16. *See infra* Part III.B.

17. 42 U.S.C. § 9607(b)(3)(1994).

18. *See infra* Part III.C.

19. CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549 (W.D. Mich. 1991), *rev'd sub nom.* United States v. Bestfoods, 524 U.S. 51 (1998).

20. *CPC Int'l, Inc.*, 777 F. Supp. at 573.

21. United States v. Cordova Chem. Co. of Michigan, 59 F.3d 584 (6th Cir.), *vacated and reh'g en banc granted*, 67 F.3d 586 (6th Cir. 1995); United States v. Cordova Chem. Co. of Michigan, 113 F.3d 572 (6th Cir. 1997), *en banc*, (The Sixth Circuit's *en banc* decision ratified a prior ruling by two of three judges on the original appeal panel).

22. United States v. Bestfoods, 524 U.S. 51 (1998).

23. *Id.*

tion that actively participates in and exercises control over the operations of a subsidiary generally may not be held liable as an operator of a contaminated site owned or operated by the subsidiary. The parent corporation will be held liable, however, if the corporate veil is pierced under state law.[24] The Supreme Court found that CERCLA does not authorize departure from traditional principles of limited liability for a corporate parent:

> It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. Although this respect for corporate distinctions when the subsidiary is a polluter has been severely criticized in the literature nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible.[25]

In *Bestfoods*, the Court recognized that a parent corporation may be directly liable for its own acts where those acts satisfy the elements for operator liability under CERCLA.[26] The Supreme Court, however, refused to sanction an expansive interpretation of the statute which would place (i) direct CERCLA liability on a parent in circumstances where the parent is not an "operator" based on its own actions or (ii) vicarious liability in circumstances where the corporate veil could not be pierced under traditional veil-piercing standards.[27] The Court found no basis to presume that Congress intended to abrogate common law principles shielding shareholders:

> Nothing in CERCLA purports to rewrite this well-settled rule [of veil-piercing] . . . . CERCLA is thus like any another congressional enactment in giving no indication "that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute," and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that "[i]n order to abrogate a common-

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24. *Id.* at 1885.

25. *Id.* at 1884-85 (quoting William O. Douglas and Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193 (1929)) (citations omitted).

26. *Id.* at 1886.

27. *Id.* at 1885-87.

> law principle, the statute must speak directly to the question addressed by the common law."[28]

The Supreme Court rejected the notion that Congress intended to establish some CERCLA-specific liability rule for corporations that would outrank traditional common law doctrine. For example, the Court refused to cast off the presumption that officers employed by both a parent and a subsidiary are serving the subsidiary when they act on behalf of the subsidiary.[29] The Court explained: "There would in essence be a relaxed, CERCLA-specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability."[30] The *Bestfoods* rejection of CERCLA-specific rules of corporate parent liability is a major change in the way the statute has been interpreted by the courts.[31]

B. *Passive Migration*

Courts have also contracted the scope of CERCLA liability in the passive migration arena.[32] In the late 1980's and the early 1990's, the majority of courts that addressed this issue viewed passive migration of contaminants as a form of disposal under CERCLA.[33] The Fourth Circuit in *Nurad, Inc. v. William E. Hooper*

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28. *Id.* at 1885 (quoting Burks v. Lasker, 441 U.S. 471, 478 (1979); United States v. Texas, 507 U.S. 529, 534 (1993)) (citations omitted). In a footnote, the *Bestfoods* Court acknowledged the issue of whether applicable common law principles would be drawn from state or federal law, but concluded that "the question is not presented in this case, and we do not address it further." 524 U.S. 51 at 64, n.9.

29. *Id.* at 70.

30. *Id.*

31. In Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 132 F.3d 1295 (9th Cir. 1997), the Ninth Circuit anticipated the Supreme Court's ruling in *Bestfoods*. In *Atchison*, the Ninth Circuit ruled that CERCLA liability of a corporate successor is determined by traditional state law rules on successor liability, not by an expansive federal common law under CERCLA. The Ninth Circuit began its analysis by noting that CERCLA "lacks any clear directive that federal courts develop standards for successor liability." *Id.* at 1300.

32. ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351 (2d Cir. 1997). According to the court, passive migration exists when "hazardous chemicals have spread underground." *Id.* at 354.

33. *See, e.g.*, Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d

& Sons Co.[34] held a former owner of property liable as an owner at the time of disposal because hazardous substances had leaked from underground storage tanks during its ownership. The former owner moved for summary judgment, arguing that it had not "actively dealt with hazardous substances at the site" and so was not an owner or operator at the time of the disposal.[35] The District Court agreed and dismissed the claim.[36] The Fourth Circuit reversed, reasoning that to read "disposal" to require "active participation would frustrate [CERCLA's] policy of encouraging 'voluntary private action to remedy environmental hazards.' "[37]

More recently, courts have moved away from such a broad reading of "disposal."[38] Under current decisions, passive migration of contamination does not give rise to CERCLA liability unless a party consciously acted to dispose of the waste in a manner that promoted its migration through the soil or water.[39]

For example, in *ABB Industrial Systems, Inc. v. Prime Technology, Inc.* ("*ABB*"),[40] the Second Circuit held that former owners and operators of a contaminated site were not liable under CERCLA for the passive migration of chemicals that were already in the ground at the site. The Second Circuit was persuaded by the Third Circuit's 1996 decision in *United States v. CDMG Realty Co.* ("*CDMG*"),[41] which found that CERCLA's definition of "disposal"

837, 845 (4th Cir.), *cert. denied*, 506 U.S. 940 (1992); Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659, 664 (E.D. Cal. 1990); CPC Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 789 (W.D. Mich. 1989).

34. 966 F.2d 837 (4th Cir.), *cert. denied*, 506 U.S. 940 (1992).

35. *Id.* at 841.

36. Nurad, Inc. v. William E. Hooper & Sons Co., 22 ENVTL. L. REP. 20079, 20088 (D. Md. 1991).

37. *Id.* at 845 (quoting *In re* Dant & Russell, Inc., 951 F.2d 246, 248 (9th Cir. 1991)).

38. *See, e.g.*, ABB Indus. Sys., Inc. v. Prime Tech., Inc. ("ABB"), 120 F.3d 351, 358-59 (2d Cir. 1997); United States v. CDMG Realty Co., 96 F.3d 706, 713 (3d Cir. 1996); Kalamazoo River Study Group v. Rockwell Int'l ("Kalamazoo"), 3 F. Supp. 2d 799, 812 (W.D. Mich 1998); Carson Harbor Village, Ltd. v. Unocal Corp., 990 F. Supp. 1188 (C.D. Cal. 1997).

39. *See Kalamazoo*, 3 F. Supp. 2d at 812.

40. 120 F.3d 351 (2d Cir. 1997).

41. 96 F.3d 706 (3d Cir. 1996).

was not so broad as to hold a prior owner or operator liable for the passive migration of contaminants from a landfill.[42]

The Second Circuit agreed with the Third Circuit in *CDMG* that rejecting liability for passive migration of contaminants is consistent with CERCLA's goal "to force polluters to pay the cost associated with their pollution."[43] That goal is not served if "a person [who] merely controlled a site on which hazardous chemicals have spread without that person's fault" is held liable as a polluter.[44]

C. *The Third-Party Defense*

In the 1980's and the early 1990's, the majority of courts rejected attempts made by various PRPs to invoke any defense to Superfund liability, including those premised on the CERCLA third-party defense.[45] In *New York v. Shore Realty Corp.* ("*Shore Realty*"),[46] the Second Circuit rejected a third party defense to Superfund liability in a case involving the leakage of chemicals during the defendant's ownership of the site. The court concluded that the release was not caused "solely" by the acts or omissions of a third-party, and the defendant failed to take precautions against the foreseeable acts of others.[47]

Yet recently, courts have been more receptive to the third-party defense. In *New York v. Lashins Arcade Co.* ("*Lashins*"),[48] the Second Circuit affirmed a district court's decision that a shopping center owner was not liable under CERCLA for contamination

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42. *See id.* at 714. The *ABB* court invoked the plain language of the statute as indicative of Congressional intent. The Second Circuit pointed out that the term "leaching" is expressly used in the definition of "release" but is omitted from the definition of "disposal." The court reasoned that this distinction shows that Congress was aware of passive migration through leaching or otherwise, but opted to draft the statute not to include liability for passive acts. *ABB*, 120 F.3d at 358.

43. *ABB*, 120 F.3d at 358 (quoting *CDMG Realty Co.*, 96 F.3d at 717).

44. *Id.* at 358-59. *See* Mark A. Chertok & Michael S. Bogin, *Passive Disposal: New Protection Now Available*, 218 N.Y.L.J. S2 (1997).

45. 42 U.S.C. § 9607(b)(3) (1994).

46. 759 F.2d 1032 (2d Cir. 1985).

47. *See id.* at 1048-49.

48. 91 F.3d 353 (2d Cir. 1996).

from a dry cleaner that leased space years before the site owner had acquired the property. The Second Circuit held that the shopping center owner was shielded from liability by the third-party defense.[49]

In *Lashins*, the State of New York argued that the shopping center owner was not protected by the third-party defense because it had failed to adequately investigate the site prior to acquisition or to exercise "due care" regarding the contamination caused by others.[50] The State argued that in order to avail itself of the defense, the owner would have to take affirmative steps to remediate the pre-existing contamination.[51] The Second Circuit rejected New York's arguments:

> It is surely the policy of CERCLA to impose liability upon parties responsible for pollution rather than the general taxpaying public, but this policy does not mandate precluding a 'due care' defense by imposing a rule that is tantamount to absolute liability for ownership of a site containing hazardous waste.[52]

The Second Circuit's acceptance of a third-party defense in *Lashins*, eleven years after rejecting the same defense in *Shore Realty*, is consistent with a judicial trend curtailing rather than expanding CERCLA's reach.

IV. THE GROWING BURDEN ON COST SHIFTING

At the same time that the courts are refusing to expand CERCLA liability, courts are also placing impediments on redistributing CERCLA liability through contribution. This latter trend appears in decisions analyzing whether under CERCLA a PRP can pursue a Section 107 cost recovery action against other PRPs or whether a PRP is limited to a contribution claim under Section 113 of CERCLA.

The distinction between Sections 107 and 113 raises several issues that affect the rights and liabilities of PRPs. The significance of making this distinction is most obvious where contribution is barred either because defendant-PRPs have received contribution

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49. *Id.* at 361-62.
50. *Id.* at 361.
51. *Id.*
52. *Id.* at 361-62 (citations omitted).

protection as a result of settling with the government[53] or because the three-year statute of limitations for contribution claims has expired.[54]

Even though Section 107 of CERCLA clearly authorizes private parties to bring actions to recover response costs,[55] a question nonetheless arises when such a private party pursues a Section 107 action and is itself liable under that Section. May a PRP maintain a Section 107 "cost recovery" action or must a PRP proceed with a "contribution" action under Section 113? While there is still a split of authority in the lower courts, "[e]very court of appeals that has examined this issue has come to the same conclusion: a Section 107 action brought for recovery of costs may be brought only by *innocent* parties that have undertaken clean-ups," and a non-innocent PRP may only bring a Section 113 action for contribution.[56]

The United States Courts of Appeals for the First, Third, Seventh, Ninth, Tenth, and Eleventh Circuits have addressed this issue and have uniformly held that PRPs are limited to Section 113 contribution actions.[57] The Fifth and Eighth Circuits, while not

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53. CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) (1994), confers "contribution protection" upon a PRP who enters into a settlement with the government.

54. CERCLA Section 113(g) creates a three-year statute of limitations period for most Section 113 contribution actions, and a 6-year statute of limitations for Section 107 cost recovery actions. 42 U.S.C. § 9613(g)(2),(3) (1994). *See* United Techs. Corp. v. Browning-Ferris Indus., Inc. ("United Techs."), 33 F.3d 96, 103 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). *But see* Sun Co., Inc. v. Browning Ferris, Inc., 124 F.3d 1187, 1192 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 1045 (1998) (6-year statute of limitations period under Section 113(g)(2) applies to a contribution claim by a PRP that incurred response costs in any way except pursuant to a Section 106 order or a Section 107 government civil action, because in such cases the PRP contribution action is itself the "initial action" under CERCLA).

55. *See* 42 U.S.C. § 9607(a)(4)(B)(1994). *See also* Key Tronic Corp. v. United States, 511 U.S. 809, 812 n.1 (1994); *In re* Hemingway Transport, Inc., 993 F.2d 915, 931 (1st Cir. 1993), *cert. denied*, 510 U.S. 914 (1993).

56. New Castle County v. Halliburton NUS Corp. ("New Castle"), 11 F.3d 1116, 1120 (3d Cir. 1997) (emphasis in original).

57. *See* Pinal Creek Group v. Newmont Mining Corp. ("Pinal

directly addressing the issue, have taken the same position.[58]

These courts have reasoned that the very definition of contribution indicates that it is the only appropriate remedy for PRPs. Where a claim is "by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make," it is a claim for contribution and not cost recovery.[59] Some courts have found that the 1986 enactment of Section 113 indicates that Congress intended contribution to be the exclusive remedy for PRPs[60] and that to allow PRPs to recover cleanup costs under Section 107 would render Section 113 meaningless.[61] Others have insisted that the availability of Section 107 actions should be limited to governmental or "innocent" PRPs for public policy reasons[62] and that PRP-initiated Section 107 actions would be "both procedurally unwieldy and substantively unfair."[63]

Creek"), 118 F.3d 1298 (9th Cir. 1997); *New Castle*, 11 F.3d 1116 (3d Cir. 1997); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996); United States v. Colorado & E. R.R. Co. ("Colorado & E. R.R. Co."), 50 F.3d 1530 (10th Cir. 1995); United Techs. Corp. v. Browning-Ferris Indus., Inc. ("United Techs."), 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); Akzo Coatings, Inc. v. Aigner Corp. ("Akzo Coatings"), 30 F.3d 761 (7th Cir. 1994).

58. *See* Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995) (once a party is found liable under § 9607, the focus shifts to contribution to determine its equitable share); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989) ("When one liable party sues another to recover its equitable share of the response costs, the action is one for contribution . . . .").

59. *See Colorado & E. R.R. Co.*, 50 F.3d at 1536 (noting that a claim for reapportionment among PRPs is "the quintessential claim for contribution"); *United Techs.*, 33 F.3d at 99-101; *Akzo Coatings*, 30 F.3d at 764; *See also In re* Reading Co., 900 F. Supp. 738, 748 (E.D. Pa. 1995) ("contribution" should be given its plain meaning), *aff'd*, 115 F.3d 111 (3d Cir. 1997); Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132 (D.R.I. 1992); Transtech Indus., Inc. v. A&Z Septic Clean, 798 F. Supp. 1079 (D.N.J. 1992), *cert. denied*, 512 U.S. 1213 (1994).

60. *See, e.g.*, Reichhold Chems., Inc. v. Textron, Inc., 888 F. Supp. 1116, 1123-24 (N.D. Fla. 1995).

61. *See Colorado & E. R.R. Co.*, 50 F.3d at 1536.

62. *See United Techs.*, 33 F.3d at 100.

63. SC Holdings, Inc. v. A.A.A. Realty Co., 935 F. Supp. 1354, 1364 (D.N.J. 1996) (quoting Ciba-Geigy Corp. v. Sandoz Ltd., No. 92-4491,

The unsettled nature of the relationship between Sections 107 and 113 creates impediments for the PRP seeking to shift CERCLA response costs to other PRPs. While those impediments flow indirectly from the divergence in judicial decisions and resulting uncertainty, two courts have placed direct impediments on contribution by fashioning a threshold burden of proof that a PRP must meet in order to shift a portion of cleanup costs to others.

In *Acushnet Co. v. Coaters Inc.* ("*Acushnet I*"),[64] the U.S. District Court for the District of Massachusetts granted a defendant's motion for summary judgment on the ground that the wastes that a particular defendant had disposed of, together with the wastes of many others, did not cause the incurrence of any response costs. Analyzing CERCLA's statutory structure in the light of traditional common law principles of strict liability, the court held that the plaintiff in a CERCLA case has the burden of proving that a particular defendant's wastes caused some response costs.[65]

In a subsequent decision, *Acushnet II*,[66] the court granted judg-

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1993 WL 668325, at *6-7(D.N.J. 1993) ("In a case involving multiple PRPs, [allowing a PRP Section 107 action] could result in a chain reaction of multiple, and unnecessary lawsuits," and would provide an "unjustified windfall for the party who filed the first lawsuit")). *See also* Stearns & Foster Bedding Co. v. Franklin Holding Corp., 947 F. Supp. 790, 801 (D.N.J. 1996) (stating that it is "fundamentally unfair" to impose joint and several liability "simply because the first PRP won the race to the courthouse door").

While agreeing that a private PRP may not bring a direct Section 107 action, several courts have explained that Sections 107 and 113 should be read to work together — the first section establishing the claim for contribution and the second creating the mechanism for apportioning that liability among PRPs. *See, e.g., Pinal Creek*, 118 F.3d at 1302; *New Castle*, 11 F.3d at 1122 ("section 113 does not in itself create any new liabilities; rather, it confirms the right of a [PRP] under section 107 to obtain contribution from other [PRPs]"); *United Techs.*, 33 F.3d at 102 (same); Town of Oyster Bay v. Occidental Chem. Corp., 987 F. Supp. 182, 207-09 (E.D.N.Y. 1997) (explaining that Section 107 provides a PRP with a right of contribution which is mapped out by Section 113).

64. 937 F. Supp. 988 (D. Mass. 1996).

65. *See id.* at 993-1001.

66. Acushnet Co. v. Coaters Inc., 948 F. Supp. 128, 134-38 (D. Mass. 1996).

ment as a matter of law to three other parties based upon the insufficiency of the evidence of a relationship between the wastes that they disposed at the site and the incurrence of response costs. In doing so, the court established a "threshold-of-significance standard": "plaintiffs must proffer sufficient evidence as to a particular defendant to satisfy a minimum standard of significance of that defendant's responsibility as a source of one or more hazardous substances deposited at the site."[67] More recently, the court in *Kalamazoo River Study Group v. Rockwell International*[68] applied the threshold-of-significance test articulated in *Acushnet II* and held that evidence of a defendant's release must be of sufficient significance in causing the incurrence of response costs to justify holding defendant liable for those costs. There, the district court drew support for the application of such a test from the Sixth Circuit's opinion in *United States v. Cordova Chemical Co. of Michigan*:

> [T]he widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue . . . . [W]e adhere to the tenet that the liability attaches only to those parties who are culpable in the sense that they, by some realistic measure, helped create the harmful conditions.[69]

If followed by other courts, this amorphous threshold burden would establish a significant impediment to shifting costs under CERCLA. Such a rule shifts the focus of contribution actions from determining shared responsibility to conducting cost-benefit analyses of litigation. Under this additional burden, the PRP contemplating cost shifting would face a powerful disincentive against pursuing any parties beyond those most obviously responsible.

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67. *Id.* at 136. *See also* Acushnet Co. v. Coaters Inc., 972 F. Supp. 41, 49 (D. Mass. 1997) (requiring the plaintiff in a contribution action to satisfy a threshold-of-significance standard).

68. 3 F. Supp. 2d 799 (W.D. Mich. 1998).

69. *Id.* at 806 (quoting United States v. Cordova Chem. Co., 113 F.3d 572, 578 (6th Cir. 1997)).

V. CONCLUSION

As the federal courts develop rules governing shifting CERCLA costs among PRPs, they should consider the effects of those rules on the statutory goals of fostering settlements and using private rather than public monies to remediate contaminated sites. Restricting the ability to spread costs to others impedes rather than fosters those important CERCLA goals.