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Touro Law Review

Volume 17 | Number 2

Article 8

March 2016

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Recommended Citation

LeVerrier, Dianne K. (2016) "Are Some Polluters More Equal Than Others? A Critique of Caselaw Establishing Preferential Treatment of Federal Potentially Responsible Parties (PRPS) Under CERCLA," *Touro Law Review*: Vol. 17: No. 2, Article 8.

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Cover Page Footnote

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**ARE SOME POLLUTERS MORE EQUAL THAN OTHERS?
A CRITIQUE OF CASELAW ESTABLISHING
PREFERENTIAL TREATMENT OF FEDERAL
POTENTIALLY RESPONSIBLE PARTIES (PRPS) UNDER
CERCLA**

Dianne K. LeVerrier¹

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")² is, to put it simply, a tough statute. By its terms, the arm of the statute is long, subjecting a wide range of parties associated with hazardous waste to liability including:³ owners and operators,⁴ those who owned or operated the facility at the time of the discharge,⁵ arrangers,⁶ transporters,⁷ generators⁸ and successors.⁹ These parties are commonly known as potentially responsible parties ("PRPs").

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² 42 U.S.C. §§ 9601-9675 (1980) *amended by* H.R. REP. NO. 99-253(I) at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835 (The Superfund Amendments Reauthorization Act of 1986, extended in October, 1990, to September 30, 1994 [hereinafter *SARA*]).

³ CERCLA liability is not limited to the following parties while forward-thinking litigators attempt to create new categories of liable parties in an effort to reduce their client's share of liability. *See, e.g.,* Commander Oil Corp. v. Barlo Equipment Corp., 215 F.3d 321 (2d Cir. 2000) *cert. denied* ___ U.S. ___, 121 S. Ct. 427, 138 L. Ed. 2d 436 (2000) (here the litigator unsuccessfully argued that a sublessee should be considered an owner for the purpose of CERCLA Section 107).

⁴ 42 U.S.C. § 9607 (a) (1). *See also* United States v. Bestfoods, 524 U.S. 51 (1998) (holding that a corporate parent which actually participates in and exercises control over the operations of its subsidiary's facility may be held directly liable as an "operator" under CERCLA); *see also* B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996) (holding that corporate parents and individual officers may be held liable as "operators" under Section 107), *cert denied sub nom.*, Zollo Drum Co. v. B.F. Goodrich, 524 U.S. 926 (1998).

⁵ 42 U.S.C. § 9607 (a) (2).

⁶ 42 U.S.C. § 9607 (a) (3). *See also* Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160, 164 (2d Cir. 1999) (quoting Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990) "whether arrangement for disposal exists depends on the facts of each case.").

⁷ 42 U.S.C. § 9607 (a) (4). *See also* United States v. USX Corp., 68 F.3d 811, 820 (3d Cir. 1995) (determining that transporter liability "is established by

Following CERCLA's enactment in 1980, the judiciary empowered the statute by interpreting liability to be strict, joint and several.¹⁰ The courts reasoned that a harsh liability scheme was essential to effectuate the policy of the statute; remediate hazardous waste sites expeditiously, and make polluters pay.¹¹

Recently, the circuit courts amplified CERCLA's harsh scheme by preventing PRPs, even those who *voluntarily* remediate hazardous waste sites, from recovering the entire costs of remediation from joint and severally liable defendants in a Section 107 cost-recovery action.¹² A Section 107 cost-recovery action

showing that a person accepted hazardous substances for transport, and either selected the disposal facility or had substantial input into deciding where hazardous substances should be disposed.”).

⁸ Although generators are not specifically mentioned in the statute, they fall within the parameters of 42 U.S.C. § 9607 (a) (3). This section subjects to liability “[a]ny 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 such person, by any other party or entity, at any facility or incineration vessel owned or operated by any other party or entity, and containing such hazardous substances....”

⁹ See 42 U.S.C. § 9601 (21) (defining “person” as “a corporation, association, partnership, consortium, joint venture [or] commercial entity”); see also *Betkoski*, 99 F.3d at 518 (holding that CERCLA’s definition of “persons” includes “successor corporations”).

¹⁰ See 42 U.S.C. § 9601 (32); see also *Betkoski*, 99 F.3d at 514 (stating that “[t]he Act imposes strict liability [which] is intended to make sure that those who benefit financially from a commercial activity internalize the environmental costs of the activity as a cost of doing business.”); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (explaining that “[s]ection 9601 (32) provides that ‘liability’ under CERCLA ‘shall be construed to be the standard of liability’ under section 311 of the Clean Water Act . . . which courts have held to be strict liability”).

¹¹ See *infra* note 16. See also *Commander Oil Corp. v. Barlo Equipment Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) quoting *B.F. Goodrich v. Murtha*, 958 F.2d at 1192, 1198 (2d Cir. 1992) (“Because it is a remedial statute, CERCLA must be construed liberally to effectuate its two primary goals: (1) enabling the EPA to respond efficiently and expeditiously to toxic spills, and (2) holding those parties [potentially] responsible for the releases liable for the costs of the cleanup”).

¹² But see *United Technologies v. Browning-Ferris Indus.*, 33 F.3d 96, 99 n.8 (1st Cir. 1994) (suggesting that “a PRP who initiates a clean-up without government prodding” might be permitted to bring a Section 107 cost recovery action) *cert. denied*, 513 U.S. 1183 (1995). A significant part of CERCLA’s interpretive history involved serious debate regarding whether Section 107

imposes strict,¹³ joint and several¹⁴ liability on PRPs for costs associated with hazardous waste clean-up and site remediation. Nearly all of the circuits have held that private PRPs are limited to Section 113¹⁵ contribution actions.¹⁶ Under Section 113, the

permitted private parties, who incurred remediation costs, to recover obtain full cost recovery from jointly and severally liable defendants. Those courts which permitted private parties proceed under Section 107, interpreted the section to provide such a right of action *see* *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994). *Key Tronic* provided: “although § 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs, that cause of action is not explicitly set out in the text of the statute.” *Id.* at 818-819. This language was strangely uninfluential to the circuit courts in subsequent decisions.

¹³ *See* *New Castle County v. Haliburton NUS Corp.*, 111 F.3d 1116, 1120-21 (3d Cir. 1997) (stating that “[a] section 107 cost recovery action imposes strict liability on potentially responsible persons for costs associated with hazardous waste clean-up and site remediation”); *United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995) (“it is now well settled that § 107 imposes strict liability on PRPs”); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259 (3d Cir. 1992) (reiterating the fact that “CERCLA imposes strict liability on responsible parties.”); *see also* H.R. REP. NO. 99-253(I) at 74 (1985), *reprinted in* 1986 U.S.C.A.N. 2835, 2856 (“liability under CERCLA is strict, that is, without regard to fault or willfulness”).

¹⁴ *See* *Colorado & Eastern R.R. Co.*, 50 F.3d at 1535 (“It is also well settled that § 107 imposes joint and several liability on PRPs regardless of fault”); *United Technologies*, 33 F.3d at 100 (recognizing “presumed existence of joint and several liability”); *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280-81 (3d Cir. 1993).

¹⁵ 42 U.S.C. § 9613 (f) (1994).

¹⁶ *See* *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998) (explaining that their “decision today to limit the recovery of a potentially responsible person to contribution under § 113 (f) not only is in keeping with the holding of other circuits... but also gives CERCLA its full intended effect.”); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998) *cert. denied*, 525 U.S. 963 (1998); *Centerior Service Co. v. Acme Scrap Iron and Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998) (finding that “parties who themselves are PRPs ...are limited to actions for contribution governed by the mechanisms set forth in CERCLA § 113. (f).”); *New Castle County*, 111 F.3d at 1121 (3d Cir. 1997); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997) *cert. denied* 524 U.S. 937 (1998); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1513-1514 (11th Cir. 1996); *Colorado & Eastern R.R. Co.*, 50 F.3d at 1536; *United Technologies*, 33 F.3d at 103; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

plaintiff's own liability for contamination is considered simultaneously with that of the severally liable defendants and serves as an offset thereto.¹⁷

Despite the virtual unanimity amongst the circuits regarding *private* PRPs, limiting them to Section 113 actions, most courts which have addressed the issue have created exceptions for *federal* PRPs; permitting them to obtain full cost recovery under Section 107, regardless of their PRP status.¹⁸ These decisions create a distinction between private and federal PRPs, which is not evident in the statute.

This article will address the merits of this distinction by first reviewing CERCLA's enactment and interpretive history. Next, it will discuss the procedural and substantive differences between a Section 107 indemnification action and a Section 113 contribution action. Next, it will review the reasoning applied by the majority of circuit courts which limited private PRPs to Section 113 contribution actions. Finally, the article will critique the

¹⁶ *United Technologies*, 33 F.3d at 103

The word 'contribution' for the purpose of 42 U.S.C. § 9613(f) should be given its plain meaning. Adapted to an environmental case, it refers to an action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share of the aggregate response costs...

Id.

¹⁸ See, e.g., *United States v. Hunter*, 70 F. Supp. 2d 1100, 1108 (C.D. Cal. 1999) (permitting the United States government an alleged arranger to proceed under Section 107) *Town of Wallkill v. Tesa Tape*, 891 F. Supp. 955, 959 (S.D.N.Y. 1995) (distinguishing a first circuit decision limiting private PRPs to Section 113 contribution action because "neither a town nor other governmental entity was involved"); *United States v. Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991) (holding that the federal government as an alleged PRP "is therefore entitled to full recovery of clean-up costs whatever its potential liability for contribution"); *United States v. Western Processing Co.*, 734 F. Supp. 930, 939-40 (W.D. Wash. 1990) (holding that although the United States was a former site operator, it may proceed with a Section 107 cost-recovery action). Although this article refers to the distinction between federal and private PRPs, it should be noted that state and local governmental PRPs have been treated the same as the latter.

district courts' rationale for distinguishing between federal and private PRPs concluding that this distinction has no basis in the statute, common law, or public policy.

II. CERCLA's ENACTMENT AND INTERPRETIVE HISTORY

CERCLA,¹⁹ commonly known as "Superfund,"²⁰ was hastily enacted on December 11, 1980.²¹ The Act is referred to as the Superfund because it enabled the creation of the Hazardous Waste Superfund; a monetary fund generated by taxing chemical and petroleum industries, and used by governmental entities to respond promptly to releases or threatened releases of hazardous substances that may endanger public health or the environment.²²

CERCLA's enactment also enabled the revision of the National Contingency Plan (NCP). This plan established guidelines and procedures for responding to releases and threatened releases of hazardous substances, pollutants, or

¹⁹ See 42 U.S.C. §§ 9601-9675 (1980) amended by H.R. REP. NO. 99-253(I) at 74 (1985), reprinted in 1986 U.S.C.A.N. 2835 (The Superfund Amendments Reauthorization Act of 1986 extended in October, 1990, to September 30, 1994 [hereinafter *SARA*]).

²⁰ See 26 U.S.C. § 9507. (The super "fund" is established by Section 9507 of the Internal Revenue Code of 1986). The super "fund" is generated by taxing crude oil received at a United States refinery, and petroleum products which enter the United States for consumption. See 26 U.S.C. § 4611 (a) (1) & (2). The "fund" may be used to pay for: response costs for cleaning up abandoned or uncontrolled hazardous waste sites, grants for technical assistance, removal and decontamination of lead-contaminated soil, restoration of injured natural resources, and research. See 42 U.S.C. § 9611.

²¹ For a complete discussion of CERCLA's hasty enactment by a lame-duck Congress see Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982) (discussing CERCLA's hasty enactment); *Public Lands, Toxic Chemicals Dominate 96th Congress, 2d Session*, 10 ENVTL. L. REP. (Envtl. L. Inst.) 10,231, 10,232 (1980) (discussing CERCLA's ambiguities resulting from its hasty enactment).

²² See *supra* note 20. See also EPA 540-K-96/004 Office of Solid Waste and Emergency Response, *EPA Superfund Today, Focus on Cleanup Costs* (June 1996) ("78% of the Superfund Trust Fund has come from chemical, petroleum, and corporate taxes.").

contaminants.²³ The plan is implemented at hazardous waste sites throughout the country. Sites which have a high level of priority are listed on the National Priorities List ("NPL"), established by the NCP.²⁴ The Act was amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA").²⁵ In October 1990, SARA was extended to 1994.²⁶ An appropriation by Congress for Fiscal Year 1995 authorized Superfund to continue to operate.²⁷ The Act's purpose is to provide for liability, compensation, cleanup and emergency response for the clean-up of hazardous waste.²⁸

Despite its success in remediating hazardous waste sites,²⁹ courts have criticized CERCLA since its inception due to its "ambiguous" and "miasmatic provisions."³⁰ For example, following its enactment in 1980, the courts grappled with the liability standard under the statute since Congress specifically left it up to the courts to determine CERCLA's liability scheme.³¹ The

²³ See 42 U.S.C. § 9605. The original NCP was prepared and published pursuant to Section 311 of the Federal Water Pollution Control Act ("Clean Water Act"). 33 U.S.C. § 1321(d) (2000) (providing that "the National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances..."); see also 40 C.F.R. § 300.1 (1998) which establishes the National Oil and Hazardous Substances Pollution Contingency Plan.

²⁴ See 42 U.S.C. § 9605 (a) (8) (B) (providing that "the President shall list as part of the plan national priorities among the known releases or threatened releases throughout the United States.").

²⁵ See 42 U.S.C. §§ 9601-9675 (1980) amended by H.R. REP. NO. 99-253 (I) at 74 (1985), reprinted in 1986 U.S.C.C.A.N. 2835 (The Superfund Amendments Reauthorization Act of 1986 extended in October, 1990, to September 30, 1994 [hereinafter *SARA*]).

²⁶ EPA, Office of Solid Waste and Emergency Response, *Descriptions of 14 Proposed Sites and 7 Final Sites Added to the National Priorities List in May 2000*, Intermittent Bulletin, Volume 3, Number 2 (May 2000).

²⁷ *Id.*

²⁸ PUB. L. NO. 96-510, 94 Stat. 2767 (1980) (providing that CERCLA was enacted "to provide for liability, compensation, cleanup and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites...").

²⁹ See generally 1997 ENVIRONMENTAL PROTECTION AGENCY ANNUAL REPORT.

³⁰ *Commander Oil Corp.*, 215 F.3d at 326.

³¹ The only reference to a standard of liability is provided in the definitional section of CERCLA. See 42 U.S.C. § 9601 (32) (providing that "liability under

courts eventually agreed that liability under Section 107 should be strict, joint and several, to ensure expeditious remediation of hazardous waste sites.³²

Subsequently, the courts were faced with the task of discerning whether persons held jointly and severally liable under the statute had a right to contribution from other co-defendants, since a contribution provision was not included in the statute as originally enacted.³³ Again, the courts reached agreement that the

this title ... shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act [33 U.S.C. § 1321]”). Philip Cummings, who was chief counsel of the Senate Environment and Public Works Committee at the time of CERCLA’s enactment, explains that this was the final compromise reached prior to the Senate passage of CERCLA:

The committee staff had argued that strict, joint, and several liability, explicitly referred to in § 1480 and the November 18 substitute was not radical but was the standard of liability under § 311 of the CWA. Alan Simpson (R-Wyoming) was skeptical: if that were so, he countered, why not just say that. The committee staff agreed to put in the reference to the standard of liability under § 311 that is now § 101(32) of CERCLA. [Cummings, *Completing the Circle*, ENVTL. FORUM 11, 15 (Nov.-Dec.1990)].

Percival, *ENVIRONMENTAL REGULATION, Law, Science, and Policy* (2d Ed.) (1996).

³² See *supra* notes 12-13.

³³ The original CERCLA legislation created only the cost recovery mechanism of § 107, which made PRPs “liable for (A) all costs of removal or remedial action incurred by [government entities] . . . ; [and] (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.” 42 U.S.C. §§ 9607 (a) (4) (A) and (B); see *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1190 (10th Cir. 1997) (explaining that “CERCLA, as originally enacted, left a PRP who was singled out as a defendant in a cost recovery action without any means of apportioning costs to other PRPs who may have contributed much of the waste.”); see also *Colorado v. ASARCO, Inc.* 608 F. Supp. 1484, 1486 (D. Col. 1985) (explaining that “[t]o date, the liability issue most litigated under § 107 has been whether CERCLA provides for joint and several liability”); *Wehner v. Syntex Agribusiness*, 616 F. Supp. 27, 31 (E.D. Mo. 1985); *United States v. Ward*, 1984 U.S. Dist. LEXIS 16774, *9-*11, 14 E.L.R. 20804 (E.D.N.C. 1984); *United States v. Northeastern Pharmaceutical and Chemical Co.*, 579 F. Supp. 823, 844-45 (W.D. Mo. 1984); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1256-57 (S.D. Ill.

statute permitted a right of contribution among co-defendants. Congress eventually confirmed the courts' conclusions on this issue by establishing a right of contribution as part of the SARA amendments with the addition of Section 113(f).³⁴

The courts took the contribution issue one step further by limiting private PRPs to Section 113 contribution actions, rather than permitting them to obtain full cost-recovery under Section 107.³⁵ This determination did not resolve the PRP plaintiff issue in its entirety since federal courts declined to apply similar limitations to federal PRPs. Before reviewing these determinations, this article will proceed with an evaluation of the Section 107 and Section 113 causes of action, demonstrating that the hurdles encountered by the Section 113, private PRP plaintiffs are significant, and not merely procedural.

III. SECTION 107 v. 113 – SIGNIFICANT DIFFERENCES

A. *Persons Liable*

Section 107 lists "persons" liable under the statute.³⁶ These "persons" are more commonly referred to as potentially responsible parties or "PRPs". They include: (1) the owner and operator of a facility; (2) any person who owned or operated a facility at the time of the discharge; (3) any person who arranged for disposal of hazardous wastes at a facility; and (4) any person who transported hazardous waste to a facility.³⁷ The

1984); *United States v. Wade*, 577 F. Supp. 1326, 1337-38 (E.D. Pa. 1983); *United States v. Chem-Dyne*, 572 F. Supp. 802, 807 n.3 (S.D. Ohio 1983); Smith, *A Right to Contribution in Superfund Cost-Recovery Actions*, 8 CHEM. & RAD. WASTE LITIG. REP. 41, 52-3 (1984).

³⁴ 42 U.S.C. § 9613 (f). See also H.R. REP. NO. 99-253, pt. 3, at 18-19 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3041 (Section 113 "clarifies the availability of judicial review regarding contribution claims"); S. REP. NO. 99-11, at 43 (1985) (bill "clarifies and confirms existing law" by adding contribution provision).

³⁵ See *supra* note 16. See also Karl Tilleman & Shane Swindle, *Closing the Book on CERCLA Section 107 "Joint and Several" Claims By Liable Private Parties*, 18 VA. ENVTL. L. J. 159 (1999).

³⁶ 42 U.S.C. §§ 9607 (a) (1) - (4).

³⁷ *Id.* This section was initially utilized by the federal government to recover response costs from PRPs. Presently, this section is available to private

forementioned parties are similarly liable for contribution under Section 113.³⁸ This is virtually the only similarity between the two sections. The following discussion demonstrates how these sections differ greatly with respect to liability imposed, burdens of proof, affirmative defenses, and allocation of orphan shares, with the greater burden placed on Section 113 plaintiffs.

B. Liability and Related Burdens

To prove a *prima facie* case under Section 107, the plaintiff must demonstrate that: (1) the defendant falls within one of the four categories of PRPs; (2) hazardous³⁹ substances were disposed of at the facility; (3) there was a release or threat of release of hazardous substances into the environment; and (4) the release caused "response costs" to be incurred.⁴⁰ Once a *prima facie* case is proven under this Section, the PRP defendants are strictly, jointly, and severally liable.⁴¹ Hence, the successful, Section 107 plaintiff may recover the *entire costs* of remediation from *any*

"innocent" parties as defined in 42 U.S.C. § 101 (35). Section 101 (35) permits an innocent purchaser of contaminated property to assert the third-party defense of Section 107 (b) (3) if it can establish that: (1) it did not have actual or constructive knowledge of the presence of hazardous substances at the time the land was acquired; (2) it is a government entity acquiring the property through involuntary transfer; or (3) it acquired the land by inheritance or bequest. 42 U.S.C. § 101 (35).

³⁸ See *supra* note 44.

³⁹ Hazardous substances are defined in 42 U.S.C. § 9601 (14).

⁴⁰ See *supra* note 23. In order to establish their *prima facie* case, *private* parties have the additional burden of establishing that response costs were incurred and that those costs were consistent with the NCP. See *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258-59 (3d Cir. 1992).

⁴¹ See *supra* notes 12-13. Expeditious recovery of response costs incurred by the government was the primary purpose of CERCLA. Although CERCLA did not mandate the imposition of joint and several liability, courts permitted it under principles of tort law that where two or more persons acting independently cause a single harm, they are jointly and severally liable. See *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert denied* 490 U.S. 1106 (1989). For an in-depth discussion of joint and several liability in governmental cost recovery actions under CERCLA see John M. Hyson, *Fairness and Joint and Several Liability in Government Cost Recovery Actions under CERCLA*, 21 HARV. ENVTL. L. REV. 137 (1997).

defendant without having to prove the extent of the defendant's liability.⁴²

After the Section 107 plaintiff successfully proves its *prima facie* case, the burden shifts to the defendants to establish that joint and several liability under Section 107 should be avoided because the harm is divisible and damages may be reasonably apportioned.⁴³ This affirmative defense, while conceptually available, is, as a practical matter, nearly impossible to prove.⁴⁴ Essentially, a Section 107 plaintiff need only prove a *prima facie* case to recover the entire cost of remediation.⁴⁵

⁴² District and Circuit courts have also held that private PRPs who are "innocent" may maintain a Section 107 action to "recoup the whole of their expenditures" from jointly and severally liable defendants. *See Rumpke of Indian, Inc. v. Cummings Engine Co., Inc.*, 107 F.3d 1235, 1239-42 (7th Cir. 1997); *see also Pinal Creek*, 118 F.3d at 1303; *Redwing Carriers*, 94 F.3d at 1513 (stating that "when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107 (a). Rather, it is a claim for contribution under § 113 (f)"); *United Technologies v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994) (explaining that "it is sensible to assume that Congress intended only innocent parties – not parties who were themselves liable – to be permitted to recoup the whole of their expenditures."); *Akzo Coatings, Inc.*, 30 F.3d at 764; *Boyce v. Bumb*, 944 F. Supp. 807, 812 (C.D. Cal. 1996) (realizing that "[p]laintiffs may maintain a § 9607 (a) claim for full cost recovery to the extent that they can prove themselves to be "innocent landowners" within the meaning of § 9601 (35) and § 9607 (b)").

⁴³ *See County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1515 n.11 (10th Cir. 1991) (quoting *U.S. v. Monsanto*, 858 F.2d at 171 "Liability under CERCLA may not be joint and several however, where the harm is divisible."). *See also Dent v. Beazer Materials & Services*, 156 F.3d 523, 529 (4th Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *OHM Remediation Services v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1579 (5th Cir. 1997); *Redwing Carriers*, 94 F.3d at 1513; *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993) (holding that apportionment under Section 107 may be warranted where defendant can prove divisibility of harm).

⁴⁴ *See Centerior Serv. Co.*, 153 F.3d at 348 (explaining that "[g]iven the nature of hazardous waste disposal, rarely if ever will a PRP be able to demonstrate divisibility of harm, and therefore joint and several liability is in the norm."). *But see In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 902-03 (5th Cir. 1993) (defendant successfully proved harm was divisible and escaped joint and several liability).

⁴⁵ *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69 (1st Cir. 1999).

By contrast, the Section 113 plaintiff recovers severally (as opposed to jointly and severally) from each defendant.⁴⁶ Under Section 113, the burden does not shift to the defendants to establish divisibility of harm. Instead, the Section 113 plaintiff has the added burden of establishing the defendants' *pro rata* share of liability relative to its own.⁴⁷

C. Available Defenses and Limitations of Actions

Sections 107 and Section 113 also differ greatly with respect to available defenses. Section 107 defendants are limited to asserting the specific defenses listed in Section 107(b).⁴⁸ This section exempts from liability defendants who can establish that the release or threat of release of hazardous substances, and damages resulting therefrom, were caused by: (1) an act of God; (2) an act of war; (3) an act or omission of a third party; (4) or any combination of the aforementioned defenses.⁴⁹ No other defense is available to Section 107 defendants. Since Section 107 defendants rarely prevail upon these defenses, the Section 107 plaintiff is very likely to recover its entire share of response costs after establishing its *prima facie* case.

Unlike Section 107, Section 113 defendants are not limited by defenses enumerated in the statute. Rather, equitable defenses may also be considered. Section 113 expressly permits the courts to "allocate response costs among liable parties using such

⁴⁶ *Centerior Serv. Co.*, 153 F.3d at 348; *but see* *Browning-Ferris Indus. v. Ter Maat* 195 F.3d 953, 956 (7th Cir. 1999) (noting that "CERCLA does not preclude imposition of joint as distinct from several liability" in a Section 113 action).

⁴⁷ *Minyard Enters Co., Inc. v. Southeastern Chem. & Solvent Co.*, 184 F.3d 373, 385 (4th Cir. 1999) (explaining that "plaintiff bears the burden of proving that defendant is a responsible party under §107 (a) of CERCLA, and also the burden of proving the defendant's equitable share of costs"). *Cf.*, *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 n.4 (4th Cir.) (holding that a Section 113 plaintiff need not demonstrate that the harm is divisible, he need only present equitable considerations to guide the allocation of liability), *cert. denied*, 525 U.S. 963 (1998).

⁴⁸ *See* 42 U.S.C. §§ 9607 (b)(1) - (4).

⁴⁹ *Id.*

equitable factors⁵⁰ as the courts determine are appropriate.”⁵¹ In determining the defendants’ equitable shares of liability in a Section 113 action, courts may consider, *inter alia*: the amount of waste involved; the extent of the parties’ involvement; and the extent of the parties’ cooperation with governmental agencies - which cumulatively diminish the Section 113 plaintiff’s recovery.

In addition, a Section 113 plaintiff must commence its action within three (3) years of the judgment date or entry of cost-recovery settlement. A Section 107 plaintiff has six (6) years after the initiation of the remedial action to file its claim.⁵²

D. Orphan Shares

⁵⁰ Such factors include the “Gore factors” named after an unsuccessful amendment to CERCLA proposed by then-Congressman Al Gore. The six factors are:

- a. the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
- b. the amount of the hazardous waste involved;
- c. the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- d. the degree of toxicity of the hazardous waste involved;
- e. the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- f. the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

⁵¹ 42 U.S.C. 9613 (f). *See also* Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1187 (9th Cir. 2000); Bancamerica Commercial Corp. v. Mosher Steel, 100 F.3d 792, 802 (10th Cir. 1996) *quoting* FMC Corp. v. Aero Indus., Inc., 998 F.2d 842, 846 (10th Cir. 1993) (noting that “[t]he district court has considerable discretion in apportioning equitable shares of response costs” in a Section 113 action); Westfarm Associates Ltd. Partnership v. International Fabricare Inst., 846 F. Supp. 422, 433-34 (D.C. Md. 1993) (noting that “in actions for contribution under CERCLA [the] court has broad discretion to apply a wide variety of factors in order to reach an equitable resolution,” and “may consider traditional equitable defenses such as caveat emptor, estoppel, laches, or unclean hands,” however “in a CERCLA context these doctrines are not defenses to liability but are merely factors for the court to consider.”).

⁵² *See* 42 U.S.C. § 9613 (g)(2) & (3) respectively.

Finally, Section 107 plaintiffs are exempt from participating in the allocation of orphan shares. These are shares of recovery costs attributable to PRPs who either are insolvent or cannot be identified.⁵³ Defendants found jointly and severally liable under Section 107, are typically left with the additional burden of allocating orphan shares and paying response costs attributable to insolvent or unidentifiable PRPs. By contrast, in a Section 113 action, costs attributable to insolvent or unidentifiable parties are shared between the Section 113 plaintiff and the defendants.⁵⁴

E. A Substantive Difference

As set forth above, the difference between a Section 107 indemnification action and a Section 113 contribution action is substantive; not merely procedural. Thus, the *federal* PRP plaintiff, permitted to proceed under Section 107, reaps significant benefits. The federal PRP is fully indemnified for its response costs merely after establishing its *prima facie* case⁵⁵. Thereafter, the jointly and severally liable defendants are left litigating their shares of liability, and the allocation of orphan shares.

In contrast, the private PRP, limited to Section 113, must establish its *prima facie* case, assess the defendants' share of responsibility, address numerous equitable considerations - which cumulatively diminish the defendants' liability and consequently, the plaintiff's recovery - commence its claim within a shorter statute of limitations, and absorb some portion of the outstanding orphan shares, before recovering monies expended in remediation.

⁵³ *Pinal Creek*, 118 F.3d at 1303. For a general discussion of different approaches to orphan share allocation see White & Kezbom, "The Debate Over Orphan Share Allocation," 34 CHEMICAL WASTE REPORTER 3, (Aug. 1997) and White & Kezbom, "No Need to Redefine Orphan Shares," 34 CHEMICAL WASTE REPORTER 391, (Nov. 1997).

⁵⁴ *Id.* But see *Gould, Inc. v. A&M Battery and Tire Service*, 901 F. Supp. 906, 908 (M.D. Pa. 1995) (holding that defendant PRPs could not be responsible for any orphan shares and that plaintiff was responsible for the entire amount), *vacated by Gould, Inc. v. A&M Battery and Tire Svce.*, 232 F.3d 162, 172 (3d Cir. 2000).

⁵⁵ See *supra* note 30.

IV. LIMITING PRIVATE PRPs TO SECTION 113 ACTIONS - THE CIRCUITS' RATIONALE

A. Enactment and Judicial Interpretation

In 1980, when CERCLA was enacted, it was unclear whether a person found jointly and severally liable under Section 107 could obtain contribution for that portion of its expenditures which exceeded its fair share of responsibility from other co-defendants.⁵⁶ Courts took the initiative, as they did in establishing liability of a plaintiff under CERCLA, and implied an action for contribution under Section 107.⁵⁷ In 1986, the SARA added Section 113 which created a statutory right to obtain contribution from co-defendants.⁵⁸

B. Section 113 and its Application

The judicial debates that ensued following the enactment of Section 113 essentially consisted of two schools of thought amongst federal courts. The first was that private PRP plaintiffs should be permitted to recover jointly and severally from other PRP defendants. Those courts reasoned that if private PRPs could anticipate full recovery of remediation costs, they would be more likely to volunteer to remediate the site.

The second school of thought (adopted by the majority of the circuits) was that Section 113 was the vehicle by which

⁵⁶ See *supra* note 33.

⁵⁷ In *Walls v. Waste Resource Group*, 761 F.2d 311 (6th Cir. 1985), Judge Merritt noted that the district courts "have been virtually unanimous" in holding that Section 107 (a) (4) (B) created a private right of action for the recovery of response costs. *Id.* at 318.

⁵⁸ See H.R. REP. NO. 99-253, pt.3, at 18-19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3041 (noting that section 113 "clarifies the availability of judicial review regarding contribution claims"); S.REP. NO. 99-11, at 43 (1985) (stating that the bill "clarifies and confirms existing law" with the addition of a contribution provision); see also *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 100-01(1st Cir. 1994) (citing SARA's legislative history indicating that Section 113 was added to confirm a right of jointly and severally liable defendants to assert contribution claims against co-defendants).

plaintiff PRPs could obtain cost-recovery from defendant PRPs,⁵⁹ while Section 107 was exclusively available to innocent private parties, and non-PRP governmental entities.⁶⁰

C. The Restatement and Its Applicability to Private PRP Contribution Actions

The Restatement Second of Torts was extremely influential to the circuit courts comprising the second school of thought.⁶¹ The Restatement explains that joint and several liability evolved to enable *innocent* parties to obtain complete recovery for expenditures resulting from damages caused by one of several joint tortfeasors where the harm is indivisible.⁶² By contrast, contribution actions developed to enable the tortfeasor, who fully indemnified the innocent plaintiff, to recover that portion of liability in excess of its fair share from its fellow joint tortfeasors.⁶³ Accordingly, the majority of circuits have held that the appropriate cause of action for a private PRP/joint tortfeasor against its fellow tortfeasors is a contribution action -- precisely the remedy provided under Section 113.⁶⁴

V. DISTRICT COURTS – REJECTING THE CONTRIBUTION RATIONALE

A. Overview

⁵⁹ 42 U.S.C. § 9613 (f). *See supra* note 16.

⁶⁰ *See supra* note 16; *but see* *United Technologies v. Browning-Ferris Indus.*, 33 F.3d 96, 99 n.8 (1st Cir. 1994) (suggesting that “a PRP who initiates a clean-up without government prodding” might be permitted to bring a Section 107 cost recovery action), *cert. denied*, 513 U.S. 1183 (1995).

⁶¹ *See, e.g., Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 77 (1st Cir. 1999) (embracing the Restatement (Second) of Torts in construing [CERCLA]).

⁶² *See* RESTATEMENT (SECOND) OF TORTS § 433B comment d (1979) (“As between the proved tortfeasor who has clearly caused some harm and the *entirely innocent plaintiff*, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former”) (emphasis added).

⁶³ *See, e.g., In Re Bell Petroleum Services, Inc.*, 3 F.3d 889, 895-96 (5th Cir. 1993) (extensively citing the Restatement (Second) of Torts).

⁶⁴ 42 U.S.C. § 9613 (f). *See supra* note 16.

In *United States v. Hunter*, a California District Court permitted the United States Government, a PRP plaintiff, to proceed under Section 107 regardless of its potential liability under the statute.⁶⁵ To achieve this result, the District Court rejected the fundamental principles set forth in the Restatement Second of Torts and consistently applied by the majority of circuit courts evaluating PRP plaintiffs: including the ninth circuit in *Pinal Creek*.⁶⁶ This is ironic since the United States in *Pinal Creek* submitted amicus curiae briefs⁶⁷ asserting that the private PRP plaintiffs should be limited to Section 113 actions.

The District Court not only rejected fundamental common law tort analysis, but also relied instead on outdated precedent, ambiguous legislative history, and questionable economic theory.

B. Section 113's Ambiguous Legislative History

District Courts which have held that federal PRPs may recover fully from jointly and severally liable defendants share a common line of reasoning. They generally begin their decisions by reiterating a small portion of the legislative history of the SARA.⁶⁸ The oft-cited legislative history is as follows:

⁶⁵ See *Hunter* 70 F. Supp. 2d 1100 (C.D. Cal. 1999) (proceeding as though the United States, an alleged arranger, was a PRP).

⁶⁶ 118 F.3d 1298 (9th Cir. 1997).

⁶⁷ See *Pinal Creek*, 118 F.3d (United States filing as amicus). See also *Akzo Coatings, Inc.*, 30 F.3d 761 (7th Cir. 1994) (U.S. filing as amicus); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 665 (5th Cir. 1989) (United States as amicus curiae); see also Karl Tilleman & Shane Swindle, *Closing the Book on CERCLA Section 107 "Joint and Several" Claims by Liable Private Parties*, 18 VA. ENVTL. L.J. 159, 160 (noting that "[t]he United States appeared as amicus curiae in *Pinal Creek Group v. Newmont Mining Corp.* and several other private party CERCLA actions and argued for a contribution - only remedy").

⁶⁸ *Hunter*, 70 F. Supp.2d at 1106 (relying upon Section 113' legislative history although the United States was an alleged "arranger" of hazardous waste at the site. See also *Town of Wallkill v. Tesa Tape, Inc.*, 891 F. Supp. 955, 961 (S.D.N.Y. 1995) (holding that the Town of Wallkill, former operator of the Town of Wallkill municipal landfill may proceed under Section 107 since the legislative history of SARA amendments demonstrates that liability may be fixed first under Section 107); see also *United States v. Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991) ("[T]he legislative history of the Superfund Amendments of 1986 makes clear that the United States may bring either a

This section [113] does not affect the right of the United States to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, whether or not the United States was an *owner or operator of a facility or a generator of waste at the site*. Where the United States has been required to pay response costs as a generator or facility owner or operator, the United States may maintain an action to recover such costs from other responsible parties.⁶⁹

This passage is inadequate to justify unequal access to Section 107 for several reasons. First, the legislative history of CERCLA, as a whole, is conspicuous in its lack of precision and clarity.⁷⁰

Second, this passage in particular is unpersuasive because it omits mention of federal *arrangers* and *transporters*: two explicit categories of PRPs in the statute.⁷¹ The folly in relying on this passage despite these glaring omissions is evident in *Hunter*,⁷² where the District Court in California quoted the passage in support of its decision to permit the United States, an alleged *arranger*,⁷³ to proceed under Section 107.

Third, nothing in the express language of the statute indicates an intent to allow non-“innocent” federal parties, alone

Section 106 or Section 107 action, regardless of whether the United States itself was a generator of waste at the site”).

⁶⁹ See H.R. REP. NO. 99-235 (I) at 79-80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861-62 (emphasis supplied).

⁷⁰ See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039 (2d Cir. 1985) (stating that “CERCLA’s history reveals as much about the nature of the legislative process as about the nature of the legislation....”); see also *Commander Oil Corp. v. Barlo Equipment*, 215 F.3d 321, 329 (2d Cir. 2000) (referring to CERCLA’s “disjointed legislative history”). See also *supra* note 21.

⁷¹ See *supra* notes 6 & 7 respectively.

⁷² 70 F. Supp. 2d 1100 (C.D. Cal. 1999).

⁷³ *Id.* at 1102 (“Because section 107(a) imposes liability on even those parties that merely arrange for disposal or treatment of hazardous substances, 42 U.S.C. §9607(a)(3), and it appears that several agencies contracted to have waste delivered to the site, the court will proceed as though the United States, through its various agencies, is a PRP”).

amongst all PRPs, to reap the advantages of Section 107 over Section 113. Indeed, CERCLA expressly includes the federal government in its definition of “persons” liable under the statute.⁷⁴ Had Congress intended to exempt the federal government from the equitable considerations of Section 113, it could have, and should have, done so as part of the SARA Amendments. Congress’s failure to do so evinces an intent to maintain the *status quo*, and treat federal PRPs substantively and procedurally similarly to non-federal PRPs.

Fourth, there is no preferential treatment of federal PRPs – as opposed to other PRPs – with regard to their initial liability to plaintiffs under Section 107. On the contrary, it is well-settled that a federal owner, operator, generator, *arranger*, or *transporter* of hazardous waste to a facility, is liable to the same extent as a non-federal entity under Section 107.⁷⁵

⁷⁴ See 42 U.S.C. § 9601 (21) (“[T]he term ‘person’ means... United States government, State, municipality...”); see also 42 U.S.C. § 9620 (“Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity, including liability under section 9607 of this title.”).

⁷⁵ See *FMC Corp. v. U.S. Dept. of Commerce*, 29 F.3d 833, 840-44 (3rd Cir. 1994) (holding that the federal government was liable as an operator under Section 107(a) where the government had substantial control over a high-tenacity rayon production facility and had active involvement in the activities there.); *United States v. Iron Mountain Mines*, 881 F. Supp. 1432, 1444 (E.D. Cal. 1995) (holding that where the federal government’s regulatory or remedial activities, of whatever nature, bring the activity within the definition of the terms owner, operator, arranger or transporter, as those terms are applied to private parties, the government will be liable); *Chesapeake & Potomac Telephone Co. v. Peck Iron & Metal Co.* 814 F. Supp. 1281, 1285 (E.D. Va. 1993) (noting that CERCLA intends to hold the federal government liable to the same extent as non-governmental entities under Section 107); *United States v. Stringfellow*, 1990 U.S. Dist. LEXIS 19001, *15-*16, 20 ELR 20656 (C.D. Cal. 1990) (holding that the state of California was clearly a generator for the purposes of CERCLA since the state had arranged for disposal and treatment of hazardous substances at a site after it had been closed by its landowner.); *United States v. Freeman*, 680 F. Supp. 73, 74-75 (W.D.N.Y. 1988) (holding state liable as operator through its agents where, through its agents, the state secured the site with a barrier and posted signs, declaring the site to be a crime scene, and the agents opened various drums and due to failure to close them properly, allowed some of their contents to escape. *But see*, *Town of New Windsor v. Tesa Tuck*,

C. The "Public Monies" Rationale

Another argument shared by District Courts which permit federal PRPs to proceed under Section 107 is the "public monies" rationalization.⁷⁶ An example of this rationale is found in the New Jersey District Court's decision in *United States v. Kramer*.⁷⁷

The district court in *Kramer* (which preceded *Hunter*⁷⁸) permitted the United States government, an alleged *transporter*⁷⁹ of wastes, to proceed under Section 107. It reasoned, *inter alia*, that "reimbursing the government for its entire response costs in a Section 107 action -- whatever its own liability as a PRP -- serves the important public policy of maintaining Superfund reserves for response costs at other sites."⁸⁰

This reasoning ignores the fact that Superfund reserves are "preserved" each year by taxing crude oil imports, petroleum imports, and "certain uses or exports."⁸¹ In fact, 78% of the

Inc., 935 F. Supp. 805, 809 (S.D.N.Y. 1996) (holding that the state thruway authority was not a PRP where it had no obligation to exercise control over disposal of hazardous substances emanating from vehicles travelling along thruway and did not have active involvement in disposing of any hazardous substance); *United States v. Skipper*, 781 F. Supp. 1106, 1112 (E.D.N.C. 1991) (holding that the United States Coast Guard had not, through its regulatory activity subjected itself to liability under Section 107).

⁷⁶ See *United States v. Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991) ("[T]he brute fact is that the government and not the named defendants has spent public monies on the clean up, and is therefore entitled to full recovery of those monies whatever its potential liability for contribution."); see also *Hunter*, 70 F. Supp. 2d at 1108 (noting the EPA's responsibility for enforcing CERCLA and recovering response costs to protect the public fisc).

⁷⁷ 757 F. Supp. 397 (D.N.J. 1991).

⁷⁸ 70 F. Supp. 2d 1100 (C.D. Cal. 1999).

⁷⁹ "Transporter" is another category of PRP explicitly omitted from the portion of legislative history relied on by certain courts to allow access to Section 107 by federal PRPs. Perhaps the *Kramer* court realized the folly in trying to rely on a passage which omitted the very category of PRP before it and, thus resorted to a policy-based rationale.

⁸⁰ 70 F. Supp. 2d at 1000 (C.D. Cal. 1999).

⁸¹ See 26 U.S.C. §§ 4611 (d) (1) - (3) (listing persons liable for [Hazardous Substance Superfund] tax). This statute establishes the Oil Spill Liability Trust Fund.

Hazardous Waste Trust Fund comes from chemical, petroleum, and corporate taxes.⁸²

D. The District Courts Impede Judicial Economy

The District Courts attempt to rationize their ill-founded preferential treatment of federal PRPs by rationalizing that co-defendants may, at some point in the future, commence a Section 113 action against federal PRPs for contribution.⁸³ This rationale, however, begs the question of whether it is fair, or efficient, to create a two-step process for co-defendants defending themselves against governmental PRPs as opposed to a one-step process against private PRPs.

The first step ignores any liability on the part of federal PRPs and permits them to recover, jointly and severally, from their fellow PRPs. The second step forces them to re-litigate the issue of liability, which could have been easily addressed during the first stage of the litigation.

VI. CONCLUSION

In CERCLA proceedings, where a federal PRP is liable for response costs, it should be required to apportion its share of the responsibility simultaneously with other PRPs in a Section 113 action. The statute does not distinguish between federal and other PRPs and a poorly written excerpt from the legislative history should not be used to override the clear Congressional intent to treat all PRPs equally. Nor should it be used to contravene

⁸² See *supra* note 20. See also EPA 540-K-96/004 Office of Solid Waste and Emergency Response, *EPA Superfund Today, Focus on Cleanup Costs* (June 1996) ("78% of the Superfund Trust Fund has come from chemical, petroleum, and corporate taxes.").

⁸³ *Hunter*, 70 F. Supp. at 1107; see also *Town of Wallkill v. Tesa Tape*, 891 F. Supp. 955, 961 (S.D.N.Y. 1995) ("[L]iability may be fixed first and immediately for enforcement purposes, and litigation later to determine what contribution is owed and by whom as a result of the remediation effort."); *Kramer*, 757 F. Supp. at 416 ("Any PRP is entitled under Section 113 to bring a contribution action against other PRPs-- including the PRP who previously cleaned up the mess and was paid for its trouble through a Section 107 proceeding -- to apportion costs equitably among all the PRPs").

common law principles of indemnification and contribution firmly ingrained in tort jurisprudence – and applicable to private and federal PRPs.

Furthermore, preferential treatment of federal PRPs is not needed to maintain Superfund reserves. The purported economic benefit gained from such treatment is outweighed by indirect costs arising from both the diminished deterrence against federal pollution and the inevitable decline in environmental concern by a private sector justifiably frustrated by big brother's favorable treatment.

For the foregoing reasons, federal PRPs should be limited to Section 113 contribution actions. In holding otherwise, certain federal courts have created a distinction between federal and other PRPs which contradicts CERCLA's express provisions and underlying policies.

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