Chapter 6
STRATEGIC CONSIDERATIONS IN LITIGATING AND SETTLING PRIVATE COST RECOVERY ACTIONS FOR ENVIRONMENTAL CLEANUPS

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Synopsis

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§ 6.01 Introduction

Since nearly the inception of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] there has been a gradual, yet discernable, trend from government-initiated environmental cleanups to private party-initiated environmental cleanups. Limited federal resources available to address the number of hazardous waste sites in need of cleanup,[2] the Environmental Protection Agency's (EPA) enforcement success against private parties,[3] and cost inefficiencies and delays associated with EPA-initiated cleanups are just some of the reasons articulated for this trend. Faced with substantial costs of environmental cleanups,[4]

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[1]Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9657 (1988)), *as amended by* the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (1988)).

[2]The Environmental Protection Agency (EPA) has a backlog of approximately 36,000 potential CERCLA sites and approximately 1,200 sites on the National Priorities List (NPL). *See* 20 Env't Rep. (BNA) 112-13 (1989) and 40 C.F.R. pt. 300, app. B (1993). With some shifting in emphasis to the federal facilities program under CERCLA and the addition of the soil exposure pathway in the revised Hazard Ranking System (40 C.F.R. pt. 300, app. A (1993)), an increasing number of mining sites may someday join the ranks of either potential CERCLA sites or NPL sites.

[3]Recent decisions of the Second, Third, and Fifth Circuit Courts of Appeal appear to undercut the enforcement stronghold that EPA has enjoyed. *See In re* Bell Petroleum Servs. Inc., 3 F.3d 889, 905 (5th Cir. 1993) ("[a]lthough the arbitrary and capricious standard of review is very lenient on the [EPA]...[this court] will not accept the EPA's post-hoc rationalizations in justification of its decision, nor will [the court] attempt to supply a basis for its decision that is not supported by the administrative record."); United States v. Rohm & Haas Co., 2 F.3d 1265, 1272 (3d Cir. 1993) (EPA plays a significant role in the corrective action process but CERCLA does not authorize recovery of costs spent under RCRA); United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993) (*Alcan-II*) and United States v. Alcan Aluminum Corp., 964 F.2d 252, 269 (3d Cir. 1992) (*Alcan-I*) (potentially responsible parties should not have to pay response costs if they can prove that their pollutants, when mixed with other wastes, did not contribute to a release or resulting response costs).

[4]Remediation at hazardous waste cleanup sites often involves multiple operable units (e.g., a separate operable unit for soil and groundwater remediation). The

private parties often must resort to contributions from other parties and resources. Thus, private cost recovery has become an important aspect of hazardous waste litigation.

The private right of action under section 107 of CERCLA[5] has emerged as the principal means of cost recovery. However, the scope of cost recovery under section 107 is not without limitations. For openers, relief under section 107 is limited solely to response costs. Furthermore, private parties, particularly those performing voluntary cleanups without the benefit of government oversight, may not be in a position to meet the critical elements of a section 107 claim. Accordingly, private parties often must seek additional relief under alternative theories based on other federal statutes and state common law.

Understanding the means by which private parties can recover environmental cleanup costs from other potentially responsible parties and indemnitors has become increasingly important and sometimes a matter of economic survival. This paper will analyze the law of private cost recovery for environmental cleanups including statutory, contractual, and tort claims, by comparing and contrasting alternative theories of recovery, including standards of liability and problems of proof. The paper will also discuss considerations in litigating and settling private cost recovery actions. Strategic issues concerning insurance coverage for environmental claims will also be addressed.

§ 6.02 Private Right of Action Under CERCLA Section 107

Section 107(a) of CERCLA expressly creates a private cause of action for recovery of costs incurred by private parties in response to a release or threatened release of hazardous substances. This provision provides, in pertinent part:

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average cost to perform a remedial investigation and remedial design is now estimated at approximately $1.35 million and $1.26 million, respectively, per operable unit. The average cost to complete a remedial action is estimated at $21.96 million per operable unit. *See* 59 Fed. Reg. 27,989, 27,995 (May 31, 1994).

[5] 42 U.S.C. § 9607 (1988).

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
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> (1) the owner and operator of . . . a facility,
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> (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,
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> (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 such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances, and
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> (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, *shall be liable for* — . . .
>
> (B) *any other necessary costs of response incurred by any other person consistent with the national contingency plan*; . . . .[6]

Thus, CERCLA establishes a private right of action against persons responsible for contamination at a site for "any other person" that incurs response costs. Consistent with the purposes behind CERCLA, this private right of action encourages the cleanup of hazardous waste sites and allocates liability for the cost of cleanup to those parties that are responsible for the environmental pollution. As discussed later in this paper, this private right of action stands in contrast to other private actions or claims authorized by CERCLA.[7]

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[6]CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988) (emphasis added). Moreover, as discussed in § 6.03[1] *infra*, § 113(f) of CERCLA specifically authorizes an action for contribution by any person against "any other person who is liable or potentially liable under section 9607(a)." CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1988).

[7]Other private actions authorized by CERCLA are claims against the Superfund trust fund, contribution claims, and citizen suits under §§ 112(a), 113(f), and 310(a), respectively.

[1] Elements of a Private Cost Recovery Action

A private cost recovery action under section 107(a) of CERCLA consists of six prima facie elements. A private plaintiff must establish (1) that the "person" against whom recovery is sought is a "liable person" under section 107(a); and (2) that there has been a release or threatened release; (3) of a hazardous substance; (4) from a facility resulting in; (5) the incurrence of necessary costs of response; (6) that are consistent with the National Contingency Plan.[8]

The first five elements, often referred to as the "liability" elements, are uniquely suited to disposition by way of summary judgment. Thus, entry of partial summary judgment on the issue of liability is common in CERCLA cost recovery cases.[9] Pursuing summary judgment often promotes the efficient use of the parties' and court's resources by narrowing the scope of discovery and issues before a court.[10] Moreover, an early liability determination often enhances the negotiating leverage of a private plaintiff vis-a-

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[8] *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989); Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1152 (9th Cir. 1989); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1278-79 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

[9] *See, e.g.*, United States v. Mottolo, 695 F. Supp. 615, 620 (D.N.H. 1988) ("[s]ummary judgment is routinely applied to resolve legal issues in CERCLA cases."); *see also* New York v. Shore Realty Corp., 759 F.2d 1032, 1037 (2d Cir. 1985) (upholding entry of partial summary judgment); United States v. Bliss, 16 Chem. Waste Lit. Rep. 1061, 1070 (E.D. Mo. 1988) (granting motion for partial summary judgment).

[10] Private cost recovery matters are often complex and, if not properly managed, can become fragmented, expensive, and seemingly endless. Complicating issues may include the difficulty in identifying potentially responsible parties; enormous numbers of potentially responsible parties, some viable, some defunct; staleness of records; uncertainties of future costs and risks; impacts of ongoing administrative cleanup; impacts of related litigation such as enforcement actions or tort claims by neighboring residents or workers; high uncertainty regarding sources of funding such as through insurance coverage; high stakes in the millions of dollars; and high transaction costs and lengthy delays. Thus, cost recovery actions must be managed in a manner that strives to focus the issues and efforts of private litigants, streamline procedures, reduce litigation costs and delays, and promote meaningful negotiations and settlement. For an insightful article on managing complex CERCLA cost recovery litigation and settlements, see Jerome B. Simandle, "Managing the Complex Superfund Cost Recovery Case for Litigation and for Settlement," paper presented at the 23rd Annual Conference on Environmental Law, American Bar Association, Section of Natural Resources, Energy, and Environmental Law, Keystone, Colorado (Mar. 10-13, 1994).

vis the other potentially responsible parties. With certain exceptions, the first five elements of liability have not proved difficult obstacles for private plaintiffs to establish.

[a] Potentially Responsible Parties

Section 107(a) identifies four categories of potential defendants that may be liable for reimbursement of response costs incurred by private parties at a hazardous waste site:

(1) Current owner and operator at the site;

(2) Any person that owned or operated the site at the time of disposal of hazardous substances;

(3) Transporter of hazardous substances for disposal or treatment at the site; and

(4) Anyone that arranged for disposal or treatment of hazardous substances at the site.[11]

The first category of potentially responsible defendants, established by section 107(a)(1), has been construed broadly to include not only current owners and operators of a facility,[12] but may include bankruptcy estates,[13] absent landowners or lessors,[14] lessees,[15] foreclosing banks,[16]

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[11] *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

[12] For purposes of § 107(a)(1), the term "current" has been defined as ownership or operation at the time the cost recovery action is filed. *See, e.g.*, United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

[13] *In re* T.P. Long Chem. Inc., 45 B.R. 278, 284 (Bankr. N.D. Ohio 1985) (bankruptcy estate may become an owner of a facility).

[14] United States v. Argent Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,616 (D.N.M. May 4, 1984) (absent landowner that leased a facility to another party is liable as an owner or operator). However, no decisions interpreting the term "owner" under CERCLA suggest that a royalty interest in minerals production constitutes ownership of the underlying mineral or surface estate and, therefore, ownership of a CERCLA facility. It appears equally clear that holding a bare royalty interest in minerals production does not make the holder an "operator" of property. "Only those who actually operate or exercise control over the facility that creates an environmental risk can be held liable under CERCLA for the costs of reducing that risk." Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651, 657 (N.D. Ill.), *aff'd*, 861 F.2d 155 (7th Cir. 1988).

[15] United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 999-1006 (D.S.C. 1984) (lessee of a facility may be an owner or operator, particularly when a lessee had authority to sublease).

[16] The two leading cases are United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577-82 (D. Md. 1986) (bank that foreclosed on a facility, then

corporate officers,[17] parent corporations,[18] successors,[19] and liquidating trusts.[20] Section 107(a)(1) imposes liability on current owners and operators regardless of whether the disposal of hazardous substances occurred during the current ownership or operation period. Section 107(a)(2), on the other hand, imposes liability on persons that owned or operated a facility "at the time of disposal" of hazardous substances, whether before or after the enactment of CERCLA. Thus, these provisions are sufficiently broad to include not only current owners and operators at a mine site, but also former owners, operators, and lessees that mined claims or processed ore and disposed of tailings, overburden, and other materials at the site.

The third category of potential defendants, established by section 107(a)(3), consists of persons, usually generators of hazardous waste, that "arranged for" the treatment or disposal of hazardous substances at a facility from which there was a release or threatened release of hazardous substances.[21] This

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purchased it at a foreclosure sale, and then owned the facility for four years was liable as a current owner) and United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,996 (E.D. Pa. Sept. 6, 1985) (a bank that foreclosed on a facility, but assigned its right to purchase to another party, was not liable as an owner).

[17] United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,699, 20,700 (D.S.C. June 15, 1984) (corporate officers that exercise control or authority over a facility's activities are personally liable as operators).

[18] United States v. Kayser-Roth Corp., 910 F.2d 24, 27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991) (parent corporation was an operator of its subsidiary's facility because the parent exercised pervasive control of the subsidiary).

[19] Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991) (successor corporations are within the scope of potentially responsible parties if their activities constitute a substantial continuation of the predecessor's activities).

[20] *See* United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1498 (D. Utah 1987) (dissolved corporations are within the scope of liability under § 107); *but see* Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448, 1451 (9th Cir. 1987) (corporation could not maintain action against dissolved corporation for cleanup costs under CERCLA, which was enacted nine years after corporation dissolved).

[21] United States v. Aceto Agric. Chems. Corp., 699 F. Supp. 1384, 1387 (S.D. Iowa 1988), *aff'd in part and rev'd in part*, 872 F.2d 1373 (8th Cir. 1989) (defendant pesticide manufacturers, by virtue of their relationship with pesticide formulation, "arranged for" disposal because generation of hazardous waste was inherent in formulation process). *Contra* United States v. Sharon Steel Corp., 18 Chem. Waste Lit. Rep. 366, 370 (D. Utah May 18, 1989) (ore provided by companies for processing at CERCLA mill site does not constitute "arranging for disposal" and, therefore, companies are not liable).

category of potential defendants may be of particular importance if the mine site included operation of a mill or processing facility and received ore for processing from other parties.

The final category of potential defendants, established by section 107(a)(4), consists of persons that transported hazardous substances to treatment or disposal facilities. Courts have, however, interpreted this section as requiring plaintiffs to establish that the transporter chose the treatment, storage, or disposal facility.[22]

[b] Release or Threatened Release

Determining whether a "release" has occurred is governed, in large part, by statutory interpretation.[23] Although the definition of "release" has been construed broadly, courts have held that more than the mere act of disposal is required to constitute a release.[24] In other words, there must be some evidence that the hazardous substance has reached or migrated to the environment—i.e., soil, ground water, surface water, sediment, or air. Although conceptually more difficult to grasp than a "release," courts have likewise interpreted "threatened release" broadly. "Threatened releases" have been found when hazardous substances are stored in deteriorating or corroding drums and tanks,[25] are stored in an unsafe manner,[26] or are stored

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[22]Jersey City Redev. Auth. v. PPG Indus. Inc., 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,364, 20,366 (D.N.J. Sept. 3, 1987) (defendant was not liable as a transporter because defendant did not select the facility).

[23]*See* CERCLA § 101(22), 42 U.S.C. § 9601(22) (1988). "Release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . . ."

[24]*See, e.g.*, United States v. Wade, 577 F. Supp. 1326, 1332-34 (E.D. Pa. 1983).

[25]New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) (finding a "threatened release" when hazardous substances were stored in corroding drums and tanks); O'Neil v. Picillo, 682 F. Supp. 706, 725 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) (interpreting "threatened release" as including storage drums with pin prick leaks that have not yet, but could, result in a release in the future).

[26]United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1148-49 (D. Ariz. 1984) (possibility of asbestos tailings being wind-blown constituted a "threatened release").

without proper supervision, training, and expertise.[27] Moreover, liability may result when a regulatory agency has a "reasonable belief" that a release may occur in the future.[28] Thus, for example, wind-blown mine tailings may constitute a "threatened release," though the threatened release may not necessarily be imminent.

[c] Hazardous Substance

As part of the prima facie case, a private plaintiff must demonstrate a release or threatened release of a hazardous substance.[29] CERCLA defines hazardous substances by reference to several other environmental statutes, including the Resource Conservation and Recovery Act (RCRA).[30] Although courts have consistently interpreted the definition of hazardous substances broadly, petroleum, crude oil, and natural gas are expressly excluded from this definition. Furthermore, most courts,[31] but not all,[32] have held mining wastes to be hazardous substances. Thus, in the context of either an energy or mining site, a private plaintiff's

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[27] *Shore Realty*, 759 F.2d at 1045 (finding a "threatened release" when defendant lacked proper supervision, training, and expertise in storing hazardous substances); United States v. Northernaire Plating Co., 670 F. Supp. 742, 747 (W.D. Mich. 1987), *aff'd*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990) (finding a "threatened release" when no one assumed responsibility for properly storing and safeguarding hazardous waste found at a facility).

[28] United States v. Northside Sanitary Landfill, Inc., 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,850, 20,851 (S.D. Ind. Apr. 12, 1988) (standard is "not whether there *will be* environmental harm, but whether there may be *a threat* of harm from the release.").

[29] CERCLA § 101(14), 42 U.S.C. § 9601(14) (1988). CERCLA defines "hazardous substance" by incorporating by reference the substances identified as hazardous or toxic under the following federal statutes: Resource Conservation and Recovery Act (RCRA) § 3001, 42 U.S.C. § 6921 (1988); Federal Water Pollution Control Act §§ 311(b)(2)(A) and 307(a), 33 U.S.C. §§ 1321(b)(2)(A) and 1317(a) (1988); Clean Air Act § 112, 42 U.S.C. § 7412 (1988); and Toxic Substances Control Act § 7, 15 U.S.C. § 2606 (1988).

[30] *See* RCRA § 3001, 42 U.S.C. § 6921 (1988).

[31] *See, e.g.*, Louisiana-Pacific Corp. v. ASARCO Inc., 6 F.3d 1332, 1340 (9th Cir. 1993); Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 922, 927-28 (D.C. Cir. 1985); Idaho v. Hanna Min. Co., 699 F. Supp. 827, 833 (D. Idaho 1987), *aff'd*, 882 F.2d 392 (9th Cir. 1989). Similarly, asbestos mine and mill wastes have been held to be hazardous substances in United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1146-47 (D. Ariz. 1984).

[32] *See* United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1537-40 (E.D. Cal. 1992) (Bevill Amendment excludes mining wastes from scope of CERCLA).

burden of demonstrating a release or threatened release of a "hazardous substance" may be somewhat heightened.

[d] Facility

As with the terms "release or threatened release" and "hazardous substance," courts have almost uniformly construed the definition of "facility" expansively.[33] Because the definition of facility[34] includes any site where hazardous substances "come to be located," a private plaintiff that establishes the existence of a hazardous substance should, by definition, be able to demonstrate that the location where the hazardous substance is situated must constitute a facility. Thus, as one commentator has suggested,[35] the "facility" element of the prima facie case may be merely a "phantom" hurdle once a plaintiff has established a release or threatened release of a hazardous substance.

Nevertheless, the concept of what constitutes a "facility" often takes on greater significance at a CERCLA mining site. Almost without exception, most mining sites consist of substantial acreage. In order to manage remedial investigation and cleanup effectively, EPA will frequently seek to divide a mining site into multiple facilities, commonly referred to as "operable units." Operable units may be determined by discrete contamination sources, geographical considerations, or by environmental media (e.g., groundwater operable unit as opposed to a soil operable unit).

The splitting of the mine site into multiple operable units has not only remedial implications but also implications for issues in a private cost recovery action. Operable units frequently result in fragmented investigation, piecemeal remediation, and duplication of work effort, all of which dramatically impact cost-effectiveness. Thus, multiple

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[33] *See* United States v. Stringfellow, 661 F. Supp. 1053, 1059 (C.D. Cal. 1987) ("nothing in the statute or case law supports defendants' claim that a 'facility' must be defined by or be coextensive with an owner's property lines."); United States v. Conservation Chem. Co., 619 F. Supp. 162, 185 (W.D. Mo. 1985) (facility includes "every place where hazardous substances come to be located").

[34] *See* CERCLA § 101(9), 42 U.S.C. § 9601(9) (1988).

[35] *See* James L. Rogers, Jr. & Eugene C. McCall, Jr., "The Private Plaintiff's Prima Facie Case Under CERCLA Section 107," 41 *S.C.L. Rev.* 833, 848 (1990).

operable units often translate into increased response costs and environmental liability, thereby raising the stakes in cost recovery litigation. Moreover, the manner in which a mining site is divided into operable units can affect allocation of liability. For example, if environmental impacts attributable to one operable unit are unrelated to environmental impacts at another operable unit, and a defendant has involvement with respect to only one of those operable units, a private plaintiff may have the added burden of establishing a defendant's relationship to both operable units in order to recover fully all of its response costs. For these reasons and others, it is often advisable to steer completely away from, or substantially limit, the number of operable units in negotiations with EPA or a state concerning investigations and ultimate cleanup at a site.

[e] Necessary Costs of Response

As part of the prima facie case, section 107(a)(4)(B) mandates that a private plaintiff may recover only "necessary costs of response."[36] Statutory guidance on what constitutes necessary costs of response is limited inasmuch as neither "necessary costs" or "response costs" are defined under CERCLA or the National Contingency Plan (NCP).[37] Similarly, judicial interpretations of "necessary costs of response" are somewhat sparse and, therefore, parties may be hard pressed to find a clearly articulated standard of what constitutes necessary response costs.[38] However, those

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[36] CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988). *Compare* CERCLA § 107(a)(1)-(4)(A), 42 U.S.C. § 9607(a)(1)-(4)(A) (1988) (government plaintiffs may recover "all costs of removal or remedial action") *with* CERCLA § 107(a)(1)-(4)(B), 42 U.S.C. § 9607(a)(1)-(4)(B) (1988) (all other parties may recover "necessary costs of response").

[37] 40 C.F.R. §§ 300.1 to 300.1105 (1993). The NCP establishes the basic criteria that govern responses to releases and threatened releases of hazardous substances and the investigation and development of appropriate remedial alternatives, whether financed by the government or private parties.

[38] The circuitous language of the statute has been frequently criticized for its "inartful drafting and numerous ambiguities." Artesian Water Co. v. New Castle County, 851 F.2d 643, 648 (3d Cir. 1988). Not surprisingly, the legislative history likewise provides few meaningful clues as to the meaning of the statutory language "necessary costs of response." *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 (1982); *see also* Kyle E. McSlarrow, David E.

courts that have considered the meaning of "necessary costs of response" have generally construed the phrase broadly.

In *General Electric Co. v. Litton Industrial Automation Systems, Inc.*,[39] for example, the Eighth Circuit concluded that costs incurred in a cleanup performed in compliance with state standards constituted "necessary" response costs and, therefore, are recoverable.[40] Furthermore, the Tenth Circuit in *FMC Corp. v. Aero Industries, Inc.*,[41] addressing whether non-litigation attorneys' fees are necessary response costs, defined "necessary costs of response" as those response costs "necessary to the containment and cleanup of hazardous releases."[42] Applying this definition to the particular facts in *FMC*, the court remanded the matter for further proceedings to determine whether any of the non-litigation attorneys' fees sought by plaintiffs were necessary to the containment and cleanup of hazardous releases and, therefore, recoverable as necessary costs under CERCLA.[43]

Almost without exception, courts have held that response costs incurred to comply with government administrative orders or to meet a federal or state cleanup standard or requirement under the NCP constitute "necessary costs of response."[44] On the other hand, private plaintiffs that fail to document any justification for response costs incurred may not meet the "necessary" burden.[45] Thus, private plaintiffs

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Jones, & Eric J. Murdock, "A Decade of Superfund Litigation: CERCLA Case Law From 1981-1991," 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,367, 10,395 n.445 (1991) ("The term 'necessary' has not received much judicial attention, with courts concentrating instead on whether the costs were incurred as part of an allowable removal or remedial action.").

[39] 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991).

[40] *Id.* at 1420-21.

[41] 998 F.2d 842 (10th Cir. 1993).

[42] *Id.* at 848 (citing Daigle v. Shell Oil Co., 972 F.2d 1527, 1535-37 (10th Cir. 1992)).

[43] *Id.* On remand, the lower court held that non-litigation attorneys' fees are recoverable. FMC Corp. v. Aero Indus., Inc., Civ. No. 88C-984G (D. Utah May 20, 1994).

[44] NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986) (response costs required by state and local governments were "necessary" under § 107(a)(2)(B)).

[45] Arnold W. Reitze, Jr., Andrew J. Harrison, Jr., & Monica J. Palko, "Cost Recovery By Private Parties Under CERCLA: Planning A Response Action For Maximum Recovery," 27 *Tulsa L.J.* 365, 400 (1992).

seeking cost recovery are well-advised to follow carefully the requirements of the NCP and to document fully all response costs incurred. Response costs which have been held to be "necessary costs of response" and, therefore, recoverable are discussed below.[46]

[f] Consistency with the National Contingency Plan

With some exceptions, the "liability" elements of the prima facie case discussed at § 6.02[1], *supra*, generally pose few obstacles to a private plaintiff's recovery of response costs. However, CERCLA also provides that private plaintiffs may only recover necessary response costs incurred "consistent with the National Contingency Plan."[47] The NCP is comprised of regulations promulgated by EPA that establish procedures and standards for responding to releases or threatened releases of hazardous substances and pollutants, including detailed guidance in performing remedial investigations, feasibility studies, remedial design, and remedial actions in conformity with CERCLA requirements.[48]

The "NCP consistency" requirement poses the most difficult burden in the prima facie case for recovery of response costs under section 107. This difficulty stems, in large part, from the breadth of the requirements themselves and inconsistent application by courts of the "NCP consistency" standard. Critical to the initial evaluation and ultimate resolution of a cost recovery claim under section 107 are the issues of what

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[46] *See infra* § 6.02[3].

[47] The standard for NCP compliance substantially differs between government and private plaintiffs. Section 107(a)(4)(B) of CERCLA states that potentially responsible parties are liable for all necessary costs of response incurred by parties *consistent* with the NCP. In contrast, government plaintiffs may recover all costs of response that are incurred in a manner *not inconsistent* with the NCP. *See supra* note 36. Thus, the government enjoys a rebuttable presumption that its response actions are consistent with the NCP, whereas private plaintiffs bear the affirmative burden of proving that all of their response actions are consistent with the NCP. *See* United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 850-51 (W.D. Mo. 1984), *aff'd in part and rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). This elevated standard may act as a disincentive to those private parties that are considering voluntary cleanup actions.

[48] The NCP, drafted originally in 1980, addressed federal responses to releases under the Clean Water Act. The scope of the NCP has been substantially expanded with subsequent revisions in 1982, 1985, and most recently in 1990.

measures must be taken to meet the NCP consistency requirement and how this consistency requirement fits into a private plaintiff's prima facie case.[49]

[i] Standard of Compliance

Before promulgation of the revised NCP in 1990, courts were divided on whether *strict* compliance or *substantial* compliance was necessary to establish consistency with the NCP's procedures and standards. In *Amland Properties Corp. v. Aluminum Co. of America*,[50] for example, the court, after deciding that a determination of NCP consistency was ripe for review, ruled that strict compliance with the NCP was an essential element of a private cost recovery action.[51] In contrast, other courts had consistently ruled that "NCP consistency" required only substantial compliance.[52]

The 1990 revisions to the NCP, however, effectively resolved this split in authority by establishing substantial compliance as the measure of NCP consistency.[53] Although this departure from the strict compliance standard should encourage more voluntary cleanups and ease cost recovery, strict compliance may still be applicable if response costs are judged against the NCP in effect at the time those costs are incurred. Though courts have so held in the past,[54] the NCP expressly states that cleanups already in progress should be evaluated based on the 1990 NCP. Given the federal courts'

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[49]Daniel M. Steinway, "Private Cost Recovery Actions: What is the Impact of the Consistency Requirements?," 20 *Env't Rep. (BNA)* 1947, 1948 (Apr. 6, 1990).

[50]711 F. Supp. 784 (D.N.J. 1989).

[51]*Id.* at 796-97; Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1579-83 (E.D. Pa. 1988); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1291-97 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

[52]*See* Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 891-92 (9th Cir. 1986) ("section 107(a) does not require strict compliance with the national contingency plan; rather, response costs incurred by a private party may be 'consistent with the national contingency plan' so long as the response measures promote the broader purposes of the plan."); General Elec. Co. v. Litton Business Sys., Inc., 715 F. Supp. 949, 962 (W.D. Mo. 1989), *aff'd sub nom.* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991) (strict compliance with the letter of the NCP is not necessary provided that actions are consistent with the NCP).

[53]40 C.F.R. §§ 300.400(i)(2) and 300.700(c)(3)(i) (1993).

[54]*See Wickland Oil Terminals*, 792 F.2d at 891; *Versatile Metals*, 693 F. Supp. at 1574-76.

usual deference to EPA, it is likely that any controversy regarding the standard of compliance will be resolved by the 1990 NCP. Nevertheless, even the substantial compliance standard is just that—substantial. Thus, in evaluating a cost recovery claim under section 107, private plaintiffs must carefully assess whether response costs incurred, or to be incurred, will at a minimum meet this standard of NCP compliance.

[ii] Issue of Liability or Damages

The second issue, more strategic in nature than the standard of compliance, essentially concerns whether the NCP consistency requirement is an element of the prima facie case on liability, or relates only to damages, or both. Recent decisions appear to conflict on this point. Some decisions have held that the NCP consistency requirement is merely a factor in determining which response costs are recoverable, while other decisions have held that the NCP consistency requirement is part of a plaintiff's prima facie case on liability.

In *Artesian Water Co. v. New Castle County*,[55] the plaintiff moved for summary judgment on liability only, arguing that the court need not inquire into NCP consistency issues relating to response costs when a private plaintiff seeks declaratory relief on the issue of liability.[56] Rejecting this view, the court held that a private plaintiff must demonstrate consistency with the NCP as part of its prima facie case when, as in that case, a sufficient factual record of response costs incurred has been developed.[57] Similarly, in *Amland Properties*, the court concluded that a determination of NCP consistency was appropriate upon a motion for summary judgment on liability because a complete record of response costs had been developed.[58]

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[55] 659 F. Supp. 1269 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

[56] 659 F. Supp. at 1291.

[57] *Id.* at 1291-93.

[58] Amland Properties Corp. v. Aluminum Co. of America, 711 F. Supp. 784, 794 (D.N.J. 1989); *see also* McSlarrow, *supra* note 38, at 10,398 ("When a sufficient factual record has been developed, the question of consistency becomes ripe for decision and necessary before a court can award response costs.").

In contrast to *Artesian Water* and *Amland Properties*, several recent decisions have concluded that, in the absence of a complete factual record on which a determination of NCP consistency can be made, private plaintiffs are entitled to summary judgment on the defendant's liability for past and future response costs consistent with the NCP.[59] Several commentators have noted that this conflict in authority may stem simply from the procedural posture of the cases rather than any disagreement over the elements of the prima facie case.[60]

The issue of when a determination on NCP consistency is appropriate may have important ramifications for settlement and litigation strategy. Faced with the prospect of substantial, long-term response costs and exacting and costly requirements to comply with the NCP, private plaintiffs may opt to bifurcate the issues of liability and damages and seek a determination on defendants' liability from the outset of the cost recovery litigation. Under this approach, a private plaintiff would incur some minimal level of response costs in order to gain standing and move for summary adjudication against defendants on liability for past and future response costs consistent with the NCP. A favorable determination on liability would not only limit the remaining scope of the case to damages and, therefore, reduce transaction costs, but more importantly, would provide a plaintiff with significant negotiating leverage to seek an early, favorable settlement with defendants.[61] Of course, private plaintiffs that pursue this approach must thoroughly understand the requirements necessary to demonstrate consistency with the NCP. Other-

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[59] *See, e.g.*, T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 709 (D.N.J. 1988); Sunnen Prods. Co. v. Chemtech Indus., Inc., 658 F. Supp. 276, 278 (E.D. Mo. 1987).

[60] Steinway, *supra* note 49, at 1949; Reitze, Jr., *supra* note 45, at 386-87; and McSlarrow, *supra* note 38, at 10,398.

[61] The development of a substantial factual record in the discovery phase of a cost recovery action may inadvertently result in expanding the scope of an environmental investigation and cleanup at a site, or claims asserted in a related third-party toxic tort matter involving neighboring residents or workers. Factual information disclosed in discovery may also trigger the filing of such third-party claims. Thus, early settlement of a cost recovery action may substantially reduce these potential risks.

wise, plaintiffs' strategy may backfire, and render meaningless the summary judgment on liability, and merely delay an inevitable determination of no cost recovery at the point when a sufficient record has been established.

For those private plaintiffs that anticipate incurring substantial response costs but have reservations respecting compliance with the applicable standard for NCP consistency, the value of a section 107 claim may be more limited, but nevertheless strategically significant. By seeking to bifurcate the issues on liability and damages and/or moving for summary judgment on the liability issue early in the cost recovery litigation, private plaintiffs may gain a strategic edge which could translate into settlement and avert the more difficult issue of damages. However, those private plaintiffs that have incurred, or will incur, substantial response costs which are unlikely to satisfy, either strictly or substantially, the NCP consistency requirement, will likely need to pursue alternative theories of recovery in addition to section 107.

[2] Statutory Exclusions and Defenses

As part of evaluating a cost recovery claim under section 107, private plaintiffs must consider the scope of the statutory exclusions and defenses under CERCLA. Those exclusions and defenses, though limited, may have the effect of either diminishing or even defeating a cost recovery claim under section 107.

The statutory exclusion of most significance is the so-called "petroleum" exclusion.[62] Section 101(14) expressly excludes petroleum, crude oil, and natural gas as hazardous substances under CERCLA. This exclusion has been interpreted by courts to encompass hazardous substances that are indigenous to petroleum substances or that are routinely added or blended to petroleum substances during the refining pro-

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[62]CERCLA § 101(14), 42 U.S.C. § 9601(14) (1988). Other statutory exclusions available under CERCLA include the "Good Samaritan" and cleanup contractors' exemptions under §§ 107(d)(1) and 119(a)(1)-(2), respectively.

cess.[63] However, the petroleum exclusion does not apply to hazardous substances that are either added to the petroleum substance or that increase in concentration solely as a result of contamination of the petroleum during use.[64] Thus, if the cost recovery action involves a release or threatened release of petroleum substances, or a release of petroleum substances which is divisible from other hazardous substances released, then cost recovery under section 107 may be either not available or substantially limited. On the other hand, the petroleum exclusion arguably would not preclude cost recovery arising out of a release or threatened release of petroleum substances commingled with other hazardous substances that, as a practical matter, cannot be separated.

Contrary to the petroleum exclusion, the scope of the mining waste exclusion, as discussed above, is less certain.[65] Thus, cost recovery actions under section 107 concerning mining wastes appear to be on much safer grounds.

In addition to these statutory exclusions, section 107(b) of CERCLA also provides for three affirmative defenses to persons that are otherwise liable under section 107(a).[66] Of the statutory defenses available, the "third party" defense has been the subject of considerable litigation. Under this defense, defendants must demonstrate no direct or indirect contractual relationship with a third person responsible for the release or threatened release of hazardous substances.[67] Thus, this defense imposes a substantial burden on a

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[63] *See, e.g.*, Wilshire Westwood Assocs. v. Atlantic Richfield Corp., 881 F.2d 801, 806-07 (9th Cir. 1989) (dismissing government's claim for response costs incurred in the cleanup of leaded gasoline on the grounds that such material is exempt by the petroleum exclusion under CERCLA).

[64] *See, e.g.*, United States v. Alcan Aluminum Corp., 964 F.2d 252, 266-67 (3d Cir. 1992) (*Alcan-I*); City of New York v. Exxon Corp. 766 F. Supp. 177, 185-88 (S.D.N.Y. 1991).

[65] *See supra* notes 31-32 and accompanying text.

[66] CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988). The three limited defenses are: acts of God; acts of war; and acts or omissions of a third party that is not contractually related to a defendant, provided that defendant exercised due care and took all appropriate precautions.

[67] CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1988).

defendant to show that a "*totally unrelated third party* is the *sole* cause of the release."[68]

With adoption of the Superfund Amendments and Reauthorization Act (SARA),[69] the third party defense was broadened to include the "innocent purchaser" defense.[70] This defense requires that a defendant "did not know and had no reason to know that any hazardous substance . . . was disposed of . . . at the facility" at the time defendant acquired the property.[71] To establish this defense, a defendant must have undertaken "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice."[72] As one might expect and consistent with the strict liability regime under CERCLA, this statutory defense has been construed narrowly.[73]

[3] Recoverable Response Costs

Although Congress and the EPA have provided some direction on response costs that are recoverable in a private cost recovery action, private plaintiffs often must resort to judicial interpretations for a determination of what constitutes a recoverable cost.[74] The statutory definitions of

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[68]O'Neil v. Picillo, 682 F. Supp. 706, 720 n.2, 728 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) (quoting United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987).

[69]Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

[70]*See* CERCLA §§ 101(35) and 107(b)(3), 42 U.S.C. §§ 9601(35) and 9607(b)(3) (1988).

[71]CERCLA § 101(35)(A)(i), 42 U.S.C. § 9601(35)(A)(i) (1988).

[72]CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B) (1988).

[73]*See* Wickland Oil Terminals v. ASARCO, Inc., 590 F. Supp. 72, 75 (N.D. Cal. 1984), *aff'd*, 792 F.2d 887 (9th Cir. 1986) (landowner not entitled to innocent purchaser defense, notwithstanding lack of knowledge of contamination, because of failure to conduct "all appropriate inquiry" regarding the property prior to acquisition); *but see* United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1348-49 (D. Idaho 1989) (persons that acquired an interest in contaminated property through inheritance or gift are entitled to assert the innocent purchaser defense because they did not know, or have reason to know, of the contamination at the time of transfer).

[74]McSlarrow, *supra* note 38, at 10,396-98 nn.450-69; Reitze, Jr., *supra* note 45, at 401.

"removal"[75] and "remedial"[76] provide limited guidance by articulating certain actions for which private plaintiffs may recover response costs. Similarly, the NCP deems recoverable costs to include, for example, costs incurred in conducting response actions necessary to determine the nature and extent of contamination, the nature and extent of risk to human health and the environment posed by releases or threatened releases of hazardous substances, as well as activities necessary to evaluate, design, and implement response actions and public participation.[77]

Following this direction, courts have construed recoverable response costs to include, for example, costs of investigation, assessment, soil and groundwater monitoring, and other information-gathering activities;[78] cleanup costs incurred as part of either a removal or remedial action;[79] RCRA closure costs;[80] temporary relocation and evacuation costs;[81] costs of providing alternative water supplies;[82] and security and

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[75]Removal actions include those actions necessary to "monitor, assess and evaluate" releases or threatened releases to "prevent, minimize or mitigate" threats to human health and the environment. CERCLA § 101(23), 42 U.S.C. § 9601(23) (1988).

[76]Remedial actions are those actions taken consistent with permanent remedy instead of or in addition to removal actions. CERCLA § 101(24), 42 U.S.C. § 9601(24) (1988).

[77]40 C.F.R. § 300.700(c) (1993).

[78]*See, e.g.*, Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 892 (9th Cir. 1986) (interpreting § 107(a)(2)(B) of CERCLA to allow recovery of on-site investigation and monitoring costs); *see also* Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1294-95 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

[79]Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1577-78 (E.D. Pa. 1988).

[80]*See* Chemical Waste Management, Inc. v. Armstrong World Indus., Inc., 669 F. Supp. 1285, 1289-91 (E.D. Pa. 1987); *but see* United States v. Rohm & Haas Co., 2 F.3d 1265, 1277 (3d Cir. 1993) (EPA is not entitled to recover its RCRA oversight costs using CERCLA's cost recovery provisions). One possible consequence of *Rohm & Haas* may be that EPA cannot recover its oversight costs in private party-initiated cleanups under CERCLA either. Accordingly, private parties that pay EPA's oversight costs would do so voluntarily and, therefore, such costs may not be "necessary."

[81]Lutz v. Chromatex, Inc., 718 F. Supp. 413, 419-20 (M.D. Pa. 1989); *Artesian Water*, 659 F. Supp. at 1287.

[82]*Lutz*, 718 F. Supp. at 419; *Artesian Water*, 659 F. Supp. at 1289 (costs of providing alternative water supplies are recoverable, but only if the existing water supply is either contaminated as a result of a release of, or threatened by the release of, hazardous substances).

fencing costs.[83] Other categories of response costs which courts have uniformly upheld as recoverable include indirect costs,[84] prejudgment interest,[85] and future cleanup costs.[86]

Although section 107 supports the recovery of a broad range of response costs, cost recovery is not without its limitations. For example, the federal courts of appeals have been almost evenly divided on whether response costs recoverable under CERCLA include a private party's litigation attorneys' fees.[87] The United States Supreme Court's recent decision in *Key Tronic Corp. v. United States*[88] effectively resolved this split of authority, finding that section 107 does not provide for the recovery of litigation attorneys' fees arising from either the

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[83]Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 695 (9th Cir. 1988); United States v. Ottati & Goss, 694 F. Supp. 977, 988 (D.N.H. 1988).

[84]Early judicial decisions held that only EPA was entitled to recover indirect costs. However, private plaintiffs more recently have been successful in recovering indirect costs. *See, e.g.*, Lykins v. Westinghouse Elec. Corp., 715 F. Supp. 1357, 1359 (E.D. Ky. 1989) (supervisory costs are recoverable as response costs); T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 706-07 (D.N.J. 1988) (value of time devoted to monitoring, assessing, and evaluating cleanup by company president are deemed recoverable).

[85]Section 107(a) expressly provides for recovery of interest at the same rate as specified for interest on the Superfund trust fund. For decisions upholding prejudgment interest, see, e.g., Key Tronic Corp. v. United States, 766 F. Supp. 865, 869 (E.D. Wash. 1991), *rev'd in part on other grounds*, 984 F.2d 1025 (9th Cir. 1993), *aff'd in part and rev'd in part on other grounds*, No. 93-376, 1994 U.S. LEXIS 4275 (U.S. June 6, 1994); General Elec. Co. v. Litton Business Sys., Inc., 715 F. Supp. 949, 963 (W.D. Mo. 1989), *aff'd sub nom.* General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991).

[86]Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 999 (D.N.J. 1988) (citing T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J. 1988)).

[87]Beginning with the decision in United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 851 (W.D. Mo. 1984), *aff'd in part and rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), courts have recognized that the United States may recover litigation costs, including attorneys' fees under CERCLA. However, there exists a split of authority among the circuit courts with respect to recovery of attorneys' fees by private parties. *See* FMC Corp. v. Aero Indus., Inc., 998 F.2d 842, 847 (10th Cir. 1993) (only non-litigation fees are recoverable); *In re* Hemingway Transp., Inc., 993 F.2d 915, 934-35 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 636 (1993) (fees are not recoverable); Key Tronic Corp. v. United States, 984 F.2d 1025, 1027 (9th Cir. 1993), *aff'd in part and rev'd in part*, No. 93-376, 1994 U.S. LEXIS 4275 (U.S. June 6, 1994) (attorneys' fees are not recoverable, but certain non-litigation fees are recoverable); Donahey v. Bogle, 987 F.2d 1250, 1256 (6th Cir. 1993) (fees are recoverable); *General Elec.*, 920 F.2d at 1421-22, *cert. denied*, 114 S. Ct. 303 (1993) (fees are recoverable).

[88]No. 93-376, 1994 U.S. LEXIS 4275 (U.S. June 6, 1994).

prosecution of a private cost recovery action or the negotiations of a consent decree with EPA.[89] Although rejecting those fees, the Supreme Court upheld the recovery of non-litigation attorneys' fees incurred in identifying other potentially responsible parties.[90] In several respects, the scope of the Supreme Court's decision appears limited and, therefore, it may not fully resolve the uncertainty surrounding the recovery of litigation costs, including attorneys' fees. For example, it is still unclear whether attorneys' fees generated in preparing and negotiating either work plans associated with a CERCLA section 106 unilateral administrative order,[91] or post-consent decree work plans related to cleanup efforts at a site constitute "non-litigation" fees as opposed to "litigation" fees and, therefore, are recoverable under the rationale of *Key Tronic*.

Although *Key Tronic* will not likely reduce cost recovery actions involving substantial response costs, the decision may deter a private party from pursuing cost recovery where the costs of litigating the claim may closely approximate the amount of response costs at issue. Furthermore, the decision may substantially diminish a private plaintiff's negotiation leverage vis-a-vis recalcitrant defendants. Thus, in order to recover litigation expenses associated with cost recovery actions and to gain a strategic upper hand against defendants, private plaintiffs should consider pursuing, in addition to section 107 claims, alternative theories, such as those under RCRA or, if available, contractual theories, to recover litigation costs.

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[89] *Id.* at *20, *22. In rejecting the recovery of litigation attorneys' fees, Justice Stevens, writing for a 6-3 majority, noted the absence of any explicit congressional grant for the recovery of attorneys' fees by private parties under §§ 107 and 113 of CERCLA. Furthermore, the Court distinguished attorneys' fees associated with cleanup efforts from those fees associated with allocation of liability, and concluded that fees incurred with respect to negotiations of a consent decree relate to the latter and, therefore, are not recoverable.

[90] *Id.* at *22.

[91] In FMC Corp. v. Aero Indus., Inc., 998 F.2d 842, 847-48 (10th Cir. 1993), the Tenth Circuit concluded that, though attorneys' fees arising from litigation in cost recovery actions are not recoverable, non-litigation attorneys' fees generated in designing and negotiating with EPA a removal action undertaken at the site pursuant to a unilateral administrative order under § 106, and in preparing and negotiating related work plans approved by EPA for that removal action may be necessary response costs and, therefore, recoverable. On remand, the lower court recently awarded attorneys' fees for these activities. FMC Corp. v. Aero Indus., Inc., Civ. No. 88C-984G (D. Utah May 20, 1994).

Whether *Key Tronic* silences the debate on the recoverability of attorneys' fees remains to be seen; however, other costs incurred and damages sustained arising from the release or threatened release of hazardous substances are clearly not recoverable under CERCLA. As articulated by the United States Supreme Court in *Exxon Corp. v. Hunt*,[92] CERCLA does not provide a private right of action for *damages* arising from the release or threatened release of hazardous substances.[93] Accordingly, courts have uniformly concluded that economic damages are not recoverable under section 107(a)(4)(B). Unrecoverable economic damages include, for example, diminution in property value,[94] lost profits,[95] consequential damages,[96] and natural resource damages.[97] However, private plaintiffs are not without restitutional recourse for these economic damages. Those private parties that sustain economic damages apart from incurring response costs may pursue state common law theories such as nuisance, negligence, trespass, or strict liability in either state court or as pendent or supplemental claims to the CERCLA cost recovery claim in federal court.

Furthermore, the statutory definitions under CERCLA do not authorize injunctive relief[98] and punitive damages[99] for private plaintiffs. If nothing else, the threat of injunctive relief

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[92] 475 U.S. 355 (1986).

[93] *Id.* at 373.

[94] Wehner v. Syntex Corp., 681 F. Supp. 651, 653 (N.D. Cal. 1987) (diminution in value of property resulting from dioxin contamination is not recoverable).

[95] Fallowfield Dev. Corp. v. Strunk, 766 F. Supp. 335, 337 (E.D. Pa. 1991) (lost profits are not recoverable under CERCLA).

[96] Artesian Water Co. v. New Castle County, 851 F.2d 643, 650 (3d Cir. 1988) (lost capacity of artesian well as a result of contamination is not recoverable).

[97] Lutz v. Chromatex, Inc., 718 F. Supp. 413, 418-19 (M.D. Pa. 1989); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1287-88 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988). Pursuant to § 107(f)(1), only the federal or state government or an Indian tribe acting as trustee may bring litigation for natural resource damages.

[98] New York v. Shore Realty Corp., 759 F.2d 1032, 1049-51 (2d Cir. 1985) (concluding that § 107 provides relief for only response costs and, therefore, injunctive relief is not available to private plaintiffs under § 107).

[99] *See* Regan v. Cherry Corp., 706 F. Supp. 145, 151-52 (D.R.I. 1989) (no recovery for punitive damages because § 107 allows only recovery of response costs).

and punitive damages can provide important leverage to plaintiffs and lead to a more expeditious settlement of the cost recovery litigation. To avail themselves of this important leverage, private plaintiffs may consider claims for injunctive relief and/or punitive damages under RCRA and state common law theories.

[4] Causation

Aside from the very limited affirmative defenses, section 107 liability is strict and independent of traditional common law notions of causation.[100] Although private plaintiffs do not have to establish that a defendant's hazardous substances caused a release or threatened release or caused response costs to be incurred, private plaintiffs must establish a causal nexus between the release or threatened release of hazardous substances and the response costs incurred.[101] Adding a further spin, the First Circuit Court of Appeals in *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*[102] held that a private plaintiff need not establish that a defendant's release or threatened release caused actual

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[100] *See Shore Realty*, 759 F.2d at 1044 n.17 (§ 107(a) unequivocally imposes strict liability on responsible parties without regard to causation). Other circuits have reached the same conclusion. *See, e.g.*, United States v. Alcan Aluminum Corp., 964 F.2d 252, 264-65 (3d Cir. 1992) (*Alcan-I*); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1152-54 (1st Cir. 1989); United States v. Monsanto Co., 858 F.2d 160, 170 n.17 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *but see* United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993) (*Alcan-II*) ("In so ruling we candidly admit that causation is being brought back into the case—through the back door, after being denied entry at the front door—at the apportionment stage.").

[101] *See, e.g., Alcan-I*, 964 F.2d at 265 ("[V]irtually every court that has considered this question has held that a CERCLA plaintiff need not establish a direct causal connection between the defendant's hazardous substances and the release or the plaintiff's incurrence of response costs."); *Artesian Water*, 659 F. Supp. at 1282 ("CERCLA's strict liability scheme does not diminish the necessity of demonstrating a causal connection between a release or threatened release and the incurrence of costs by a section 107 plaintiff"); *but see* Louisiana-Pacific Corp. v. ASARCO, Inc., 735 F. Supp. 358, 362 (W.D. Wash. 1990) ("[L]iability does not attach because the defendant caused 'a release,' but because it caused 'response costs.'"); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 674 (D. Idaho 1986) ("[T]he damage for which recovery is sought must still be causally linked to the act of the defendant."). The court in *Dedham Water* dismissed *Bunker Hill* as irrelevant to causation requirements in § 107(a)(4)(B) claims because *Bunker Hill* involved claims for natural resource damages under § 107(a)(4)(C). *Dedham Water*, 889 F.2d at 1154 n.7.

[102] 889 F.2d 1146 (1st Cir. 1989), *vacating and remanding* 689 F. Supp. 1223 (D. Mass. 1988).

contamination on plaintiff's property.[103] Consistent with CERCLA's statutory language imposing liability for threatened releases which result in response costs, the First Circuit concluded that a defendant's hazardous substances could trigger response costs to be incurred without actually causing contamination. Thus, the burden of causation in a section 107 cost recovery claim does not generally pose much of an obstacle.

In contrast, the burden of establishing causation in state common law claims is steep.[104] As discussed below,[105] to establish liability under common law principles of causation, a private plaintiff must establish a causal or contributory connection between the acts of a defendant and the conditions which necessitate response costs. The mere existence of an owner's or generator's hazardous substances at a site for which response costs are incurred may not, in and of itself, trigger liability. Thus, the burden of proving causation underscores one of the major advantages of a cost recovery claim under section 107 as opposed to cost recovery under state common law theories.

[5] Scope of Liability

Since CERCLA's enactment, federal courts have struggled to resolve the complicated issues posed by the application of joint and several liability to a statute whose provisions are silent with respect to the scope of liability, but whose legislative history clearly acknowledges that common law principles of joint and several liability may affect liability.[106] Courts appear to have crafted three distinct, although closely related approaches to the issues of liability.

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[103] 889 F.2d at 1154.

[104] *See infra* notes 268-71 and accompanying text.

[105] *See infra* § 6.05[3][c].

[106] For a discussion on the legislative history regarding deletion of the joint and several liability statutory provisions prior to enactment of CERCLA, see United States v. A & F Materials Co., 578 F. Supp. 1249, 1253-55 (S.D. Ill. 1984) and United States v. Chem-Dyne Corp., 572 F. Supp. 802, 806-07 (S.D. Ohio 1983).

The first approach, articulated in *United States v. Chem-Dyne Corp.*,[107] the first decision to address the scope of liability under CERCLA, places the burden of proof on a defendant seeking to avoid imposition of joint and several liability to establish divisibility of harm. Applying the *Restatement (Second) of Torts*[108] as its guide in establishing a presumption of joint and several liability, the court in *Chem-Dyne* concluded that defendants had not met their burden of demonstrating the divisibility of the harm and, therefore, were held jointly and severally liable.[109] The *Chem-Dyne* approach has been widely embraced by other courts.[110]

A second approach, articulated in *United States v. A&F Materials Co.*,[111] advocates a "moderate approach" to the imposition of joint and several liability. Under this approach, a court applies the principles of the *Restatement* in determining whether there is a reasonable basis, regardless of the indivisibility of the harm, for apportionment of liability. In contrast to the *Chem-Dyne* approach, which suggests that equitable factors are relevant in apportioning costs, but have applied joint and several liability upon a showing of indivisible harm, the *A&F Materials* approach suggests that courts may reject joint and several liability, regardless of the indivisibility of the harm, where such a result would be

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[107] 572 F. Supp. 802 (S.D. Ohio 1983).

[108] Under the *Restatement 2d* adopted by the *Chem-Dyne* court, a court must make a factual determination of whether the harm caused is divisible or indivisible. If the harm is divisible, then the burden of proof as to apportionment is upon defendants. If, however, the harm is indivisible, then each defendant is subject to joint and several liability. 572 F. Supp. at 810.

[109] *Id.* at 811.

[110] *See, e.g.*, O'Neil v. Picillo, 883 F.2d 176, 182 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) (applying the *Chem-Dyne* approach, the court concludes that because most of the waste could not be identified, and defendants had the burden of accounting for that uncertainty, the imposition of joint and several liability was appropriate); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1396 (D.N.H. 1985) (although defendant generators satisfied their burden of establishing the approximate number of drums brought to the site, the court nevertheless imposed joint and several liability because the exact amounts or quantities of hazardous substances could not be pinpointed as to each defendant and the resulting harm to surface and groundwater could not be apportioned with any degree of accuracy as to each individual defendant).

[111] 578 F. Supp. 1249 (S.D. Ill. 1984).

equitable.[112] The court in *Allied Corp. v. Acme Solvents Reclaiming, Inc.*,[113] a private cost recovery action, appears to be the only other court to adopt the *A&F Materials* moderate approach to joint and several liability.[114]

A third approach, recently articulated by the Third and Second Circuit Courts of Appeal in *Alcan-I*[115] and *Alcan-II*,[116] respectively, suggests that a defendant may escape liability altogether, or in part, if it can establish that its waste did not or could not, even when mixed with other waste at the site, contribute to the release and resulting cleanup costs.[117] The Third Circuit in *Alcan-I* noted that a determination on the divisibility issue is best resolved at the initial liability phase and not at the damages phase.[118]

The recent decision in *In re Bell Petroleum Services, Inc.*,[119] adopted the *Chem-Dyne* approach and concluded that joint and several liability is *not* appropriate where the

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[112] *Id.* at 1256-57. This approach was expressly rejected in United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 994 (D.S.C. 1984), *aff'd in part and vacated in part sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988). Affirming the lower court's decision, the Fourth Circuit stated that while equitable factors are relevant in actions for contribution, those factors are not relevant to the issue of joint and several liability, which focuses principally on the divisibility of harm to the environment among potentially responsible parties. *Id.* at 171-72. Other courts have concluded similarly. *See, e.g., Alcan-I*, 964 F.2d at 270 n.29 ("the contribution proceeding is an equitable one in which a court is permitted to allocate response costs based on factors it deems appropriate, whereas the court is not vested with such discretion in the divisibility determination"); United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987) ("the Court's discretion in apportioning damages among the defendants during the contribution phase does not [a]ffect the defendants' liability").

[113] 691 F. Supp. 1100 (N.D. Ill. 1988).

[114] *Id.* at 1118 n.12. Citing to *A & F Materials*, the *Allied* court stated that a court may "reject joint and several liability, regardless of the indivisibility of the harm, where the peculiar facts of the case point to a more fair apportionment of liability." *Id.* at 1116.

[115] United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992).

[116] United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993).

[117] *Alcan-I*, 964 F.2d at 269; *Alcan-II*, 990 F.2d at 722.

[118] *Alcan-I*, 964 F.2d at 270 n.29. On the other hand, the Second Circuit in *Alcan-II* concluded that the "choice as to when to address divisibility and apportionment are questions best left to the sound discretion of the trial court in the handling of an individual case." *Alcan-II*, 990 F.2d at 723. However, both the Second and Third Circuits noted that the burden on a defendant to establish divisibility of harm is substantial and the analysis factually complex.

[119] 3 F.3d 889 (5th Cir. 1993).

underlying harm is divisible. In that matter, the government brought an action to recover response costs for its cleanup of an aquifer contaminated with chromium. In reversing the lower court finding of joint and several liability, the Fifth Circuit concluded that the expert testimony and other evidence established a factual basis for making a reasonable estimate that fairly apportioned liability and the court, therefore, rejected joint and several liability.[120] The court further observed that potentially responsible parties should be afforded the opportunity, preferably at the liability phase rather than the damages phase, to demonstrate a reasonable basis for apportioning harm and thereby avoid joint and several liability.[121]

Undoubtedly, the *Bell Petroleum*, *Alcan-I*, and *Alcan-II* decisions will complicate the issue of joint and several liability in government cost recovery cases. Presumably, defendants in private cost recovery actions will also rely on these decisions to avoid the imposition of joint and several liability. Furthermore, the timing of the resolution of the divisibility issues, as articulated in *Bell Petroleum* and *Alcan-I*, may further complicate litigation strategy in private cost recovery actions. If subsequent courts are willing to address the divisibility issue in the liability phase rather than in the damages phase of a cost recovery action, then the strategic advantages of seeking an early summary judgment on the issue of joint and several liability may be largely undermined.

§ 6.03 Contribution Claims Under Section 113

[1] Right of Contribution

Contribution is a statutory or common law right available to those parties that have paid more than their equitable share

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[120] *Id.* at 902-904. The Fifth Circuit noted that the fact that apportionment may be difficult, because each defendant's exact contribution to the harm could not be established to an absolute certainty, or the fact that it would require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability. *Id.* The court further noted that the existence of competing theories of apportionment is an insufficient reason to reject all theories and, therefore, impose joint and several liability. *Id.* at 904-905.

[121] *Id.* at 901.

of a common liability.[122] As enacted in 1980, CERCLA did not expressly provide for contribution actions among parties held jointly and severally liable under its section 107 liability scheme. Thus, responsible parties under section 107 faced the prospect of being singled out as defendants in either a government or private cost recovery action without any apparent means of fairly apportioning CERCLA liability to other responsible parties. Responding to the inequities of the situation and the disincentive to private parties to undertake voluntary environmental cleanups, several courts recognized an implicit federal right to contribution under CERCLA.[123] With the enactment of SARA, Congress ratified these judicial efforts by amending section 113 of CERCLA to provide expressly for a right of contribution under the statute.[124]

Contribution claims under CERCLA may arise under a variety of procedural settings. Certainly private parties that are subject to liability may bring an independent action for contribution under section 113 against other responsible parties. Additionally, defendants in a cost recovery action under section 107 may assert counterclaims and cross-claims for contribution or file third party complaints for contribution against other responsible parties.[125] Defendants in these cost recovery actions commonly assert their contribution right and seek a declaratory judgment against other responsible parties on the issue of liability. Contribution claims in this procedural setting often raise interesting procedural issues. Because a defendant's claim for contribution technically does not arise until that defendant has been compelled to pay damages in excess of its proportionate share under a comparative negli-

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[122] *See* W. Page Keeton & Wm. Lloyd Prosser, *Prosser & Keeton on the Law of Torts* § 50 (5th ed. 1984); *Restatement (Second) of Torts* § 886A (1977).

[123] *See, e.g.*, Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1457 n.3 (9th Cir. 1986); United States v. Conservation Chem. Co., 619 F. Supp. 162, 226 (W.D. Mo. 1985); Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1491-92 (D. Colo. 1985).

[124] CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1988). Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable . . . under section 9607(a) . . . [and in] resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as a court determines are appropriate."

[125] *See, e.g.*, *ASARCO*, 608 F. Supp at 1492.

gence theory, the claim is, at least in theory, contingent on the outcome of the plaintiff's case.[126] Although courts are somewhat divided on whether contingent contribution claims may be asserted under the Federal Rules of Civil Procedure, the trend, and the more pragmatic approach, has allowed such claims for contribution.[127] However, damages may not be awarded until the defendant is found liable under section 107.[128]

The prima facie elements of a contribution claim under section 113 are less clear than the elements of a cost recovery claim under section 107. At least one circuit court has stated that private plaintiffs, in order to prevail, must establish the prima facie elements of a cost recovery action under section 107. In *County Line Investment Co. v. Tinney*,[129] a case of first impression, the Tenth Circuit concluded that the liability standard under section 113(f)(1) expressly links the contribution right to liability under section 107.[130] Accordingly, the court ruled that no right to contribution exists absent a showing of a prima facie case of liability under section 107, including a showing that response costs were "necessary" and "consistent with the NCP."[131] As is the case with private cost

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[126] Jeffrey M. Gaba, "Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA," 13 *Ecology L.Q.* 181, 229 (1986).

[127] *Compare* Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1571 (E.D. Pa. 1988) (party may assert a claim for contribution even though the government has not yet chosen to commence an action against liable parties) *with* United States v. Seymour Recycling Corp., 686 F. Supp. 696, 700 (S.D. Ind. 1988) (holding that § 113(f)(3) does not allow a party to seek contribution until that party has been subjected to liability with the government).

[128] *See, e.g.*, Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1390 (N.D. Ill. 1988) (Rockwell could obtain a declaratory judgment as to liability prior to being subject to an action under §§ 106 or 107 of CERCLA; however, it could not obtain a monetary award on that judgment until Rockwell was itself found liable in a subsequent action).

[129] 933 F.2d 1508 (10th Cir. 1991).

[130] *Id.* at 1516-17. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1988) ("[a]ny person may seek contribution from any other person *who is liable or potentially liable under section 9607(a)*") (emphasis added).

[131] *County Line*, 933 F.2d at 1516-17. For other decisions which hold that § 113 contribution claims are dependent on establishing a prima facie case of liability under § 107, see Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651, 658 (N.D. Ill. 1988), *aff'd*, 861 F.2d 155 (7th Cir. 1988); New York v. Shore Realty Corp., 648 F. Supp. 255, 262 (E.D.N.Y. 1986); *but see* Environmental Transp. Sys., Inc. v. ENSCO, Inc., 763 F. Supp. 384, 387 (C.D. Ill. 1991), *aff'd*, 969 F.2d 503

recovery actions under section 107, the point at which a private plaintiff must make the necessary showing of consistency with the NCP is dependent on the development of the factual record, which in turn is dependent on the time a contribution action is filed relative to when the response costs were incurred.[132]

Although any party may assert a CERCLA contribution claim, a defendant, as a condition to a private contribution action, must be a person that is liable or potentially liable under sections 106 or 107. Thus, a plaintiff may not bring a contribution action under section 113 against a defendant such as a former mine owner or operator that did not dispose of hazardous substances. In those circumstances, courts would generally allow a private plaintiff to assert a pendent or supplemental state law contribution action for response costs against a defendant.[133]

[2] Apportionment of Liability

Consistent with the notion of contribution, section 113 further provides that courts may allocate response costs among responsible parties by using "such equitable factors as the court determines are appropriate."[134] By the terms of the statute, courts have considerable latitude in determining what criteria should govern the allocation process.[135] Courts have consistently identified five "equitable factors" (the so-called "Gore factors") to consider in apportioning response costs:

(1) Amount of hazardous substances involved;

(7th Cir. 1992) ("necessary costs of response" and consistency with the NCP are not expressly identified as elements of a § 113(f) contribution claim).

[132] *County Line*, 933 F.2d at 1516 n.12.

[133] *See, e.g.*, United States v. Hooker Chems. & Plastics Corp., 739 F. Supp. 125, 128-29 (W.D.N.Y. 1990) (CERCLA does not preempt "any state law remedies to recover the costs of site cleanup from parties who are not liable under CERCLA but are potentially liable under state law.").

[134] CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1988).

[135] The use of alternate dispute resolution (ADR) to resolve complex issues in CERCLA litigation such as apportionment of liability is becoming more common. ADR includes a variety of dispute resolution techniques other than litigation, such as mediation and binding and non-binding arbitration. Although there is no guarantee that ADR will in fact achieve liability apportionment more efficiently than litigation, there have been enough success stories coupled with dissatisfaction over traditional litigation approaches that one should at least consider ADR when faced with complex CERCLA issues such as liability apportionment.

(2) Degree of toxicity or hazard of the materials involved;

(3) Degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of the substances;

(4) Degree of care exercised by the parties with respect to the substances involved; and

(5) Degree of cooperation of the parties with government officials to prevent any harm to public health or the environment.[136]

The first two equitable factors, the amount and toxicity of material, have traditionally been utilized by courts to apportion liability among generator potentially responsible parties. Where, however, the allocation is between past and present owners or operators, or between a group of generator potentially responsible parties and an owner or operator, as is often the case at a mining site, courts have found the first two equitable apportionment factors unimportant and have focused on the remaining factors.[137] The remaining factors, degree of involvement, degree of care exercised, and degree of cooperation with government officials, essentially collapse into an examination of the parties' respective dealings with the government. Thus, if a defendant's dealings with respect to a site are characterized by a pattern of recalcitrance, while a plaintiff expeditiously responds to governmental concerns

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[136] *See, e.g.*, United States v. Northernaire Plating Co., 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,200, 20,200 (W.D. Mich. Sept. 18, 1989); Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1116-17 (N.D. Ill. 1988); United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984).

[137] *See, e.g.*, Amoco Oil Co. v. Dingwell, 690 F. Supp. 78, 86 (D. Me. 1988), *aff'd sub nom.* Travelers Indem. Co. v. Dingwell, 884 F.2d 629 (1st Cir. 1989) (applying the Gore factors, the court stated that in a "dispute between waste generators and the site operator, the last three factors . . . are most important for the Court's consideration."); *see also* Elizabeth H. Temkin & Kristin Tita, "Multiparty Issues at CERCLA Mining and Energy Sites," 35 *Rocky Mt. Min. L. Inst.* 6-1, 6-77 to 6-78 (1989) in which the authors state:

> In the mining context, the prospects for devising an apportionment scheme according to CERCLA's traditional waste volume and toxicity analysis typically are bleak. Volumetric waste numbers, particularly at sites with long histories, are difficult to come by . . . . Finally, while toxicity or metals content data may be more useful than volumes, it raises its own set of problems—how to account for naturally high background concentrations, for example, or how to account for the toxicity of the hundreds of orphan waste piles or dumps that typically litter the landscape in a historic mining region.

and efficiently completes response actions, liability should be apportioned accordingly.

The Gore factors are neither exhaustive nor exclusive. Thus, courts have looked beyond those factors to other equitable factors to allocate liability.[138] Equitable defenses such as the doctrines of unclean hands, estoppel, and laches, though not applicable as defenses to liability under section 107, may be relevant to apportionment of liability in contribution claims under section 113.[139] Similarly, the doctrine of caveat emptor and the existence of an "as is" clause in an agreement for sale of property are two other equitable factors that have been identified by courts as potentially relevant between buyers and sellers of property.[140] Other courts have also considered the economic benefits received by parties from the contaminating activities and the parties' respective knowledge or acquiescence in such activities as well as economic benefits derived from cleanup activities.[141]

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[138] *See, e.g.*, Environmental Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 509 (7th Cir. 1992) (CERCLA § 113(f)(1) does not limit courts to any specific list of equitable factors).

[139] *See, e.g.*, Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1572 (E.D. Pa. 1988).

[140] Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); *In re* Sterling Steel Treating, Inc., 94 B.R. 924, 930-31 (Bankr. E.D. Mich. 1989) (though neither caveat emptor nor the "as is" condition are defenses to CERCLA liability, they may be used by courts to allocate costs). For decisions on application of the equitable doctrine of "unclean hands," see Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1119 (N.D. Ill. 1988); Chemical Waste Management, Inc. v. Armstrong World Indus., Inc., 669 F. Supp. 1285, 1291-92 (E.D. Pa. 1987); Mardan Corp. v. C.G.C. Music Ltd., 600 F. Supp. 1049, 1057-58 (D. Ariz. 1984), *aff'd on other grounds*, 804 F.2d 1454 (9th Cir. 1986).

[141] *See, e.g.*, Weyerhaeuser Co. v. Koppers Co., Inc., 771 F. Supp. 1420, 1426-27 (D. Md. 1991) (allocating 40% of the cleanup cost to the site owner and 60% to the lessee operator because the site owner had requested the lessee's contaminating wood treatment activities for the site and had derived some indirect benefit from those activities); PVO Int'l, Inc. v. Drew Chem. Corp., 16 Chem. Waste Lit. Rep. 669, 684 (D.N.J. 1988) (possible increases in value of the burdened property arising after a cleanup may in some instances be an important factor to consider in allocating response costs between a seller and purchaser); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 673 (5th Cir. 1989) ("the circumstances and conditions involved in the property's conveyance, including the price paid and discounts granted, should be weighed in allocating response costs.").

The list of equitable factors to be considered in allocating liability will likely continue to evolve. Certainly equitable factors that may be relevant to mining sites will vary depending on the particular facts of the case. However, it is likely that parties purchasing mining property will be presumed to have knowledge of potential environmental impacts arising from prior operations. Thus, it is unlikely that such purchasers will be able to rely on equitable factors such as caveat emptor or "as is" provisions to shift liability.

[3] Section 107 Cost Recovery Claims and Section 113 Contribution Claims

In many respects, private cost recovery actions under section 107 and contribution actions under section 113 are inextricably linked, and the distinction between these two actions may be somewhat artificial. Commonly, a plaintiff or third party plaintiff in a private cost recovery action under section 107 is itself a responsible party pursuing statutory cost recovery against other responsible parties. Thus, with few exceptions, the private cost recovery action, particularly in the damages phase, is reduced to essentially a contribution action as courts wade into equitable factors to apportion liability.[142] Moreover, as contribution claims have become more common, courts have appeared more willing to address issues of apportionment of liability from the outset in private cost recovery and contribution actions.[143] The recent decisions in *Bell Petroleum, Alcan-I*, and *Alcan-II*, though government cost recovery cases, underscore this point. As a consequence, courts appear

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[142] *See Key Tronic Corp.*, No. 93-376, 1994 U.S. LEXIS 4275, at *16 (U.S. June 6, 1994) (CERCLA expressly authorizes a cause of action for contribution under § 113 and impliedly authorizes a "similar and somewhat overlapping remedy" under § 107); Environmental Trans. Sys., Inc. v. ENSCO, Inc., 763 F. Supp. 384, 388 (C.D. Ill. 1991) (defendant is a responsible party and, thus, strictly liable for contribution under CERCLA § 107(a) means only that defendant is *potentially* liable for contribution depending upon the relative fault of the parties; once defendant is found to be responsible under § 107(a), the question shifts to *how much* defendant is responsible for under § 113(f)(1)); *PVO Int'l*, 16 Chem. Waste Lit. Rep. at 683 ("[S]ection 107(a) should be read in conjunction with the contribution provision in § 113(f)(1), which does provide for allocation of response costs 'among liable parties using such equitable factors as a court determines are appropriate.'").

[143] Temkin, *supra* note 137, at 6-44.

increasingly disinclined to impose joint and several liability in private cost recovery actions under section 107.[144]

Other similarities include the elements of the prima facie case itself. At least according to the Tenth Circuit, the elements of a section 113 contribution claim parallel those of a section 107 cost recovery claim.[145] Thus, a contribution claim offers no strategic advantage with respect to the burden of establishing "necessary costs of response" and "consistency with the NCP." Furthermore, defenses to the section 113 contribution claim do not appear, at least at the liability phase, to be more expansive than the limited affirmative defenses in the section 107 cost recovery claim. Although the broad array of common law defenses such as unclean hands, estoppel, laches, and caveat emptor are considered in the damages or allocation phase of a contribution claim, the same defenses have likewise been considered in that phase of the section 107 cost recovery claim. Thus, the technical distinctions between private cost recovery claims and contribution claims under CERCLA appear to be largely distinctions without difference.

Notwithstanding these similarities, important differences arguably remain. Cost recovery claims under section 107 generally begin with the premise of joint and several liability, with apportionment allowed at a court's discretion. In contrast, contribution claims begin from the premise that apportionment is necessary and appropriate, and that liability is several

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[144] *See id.*; *see also* Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1117-18 (N.D. Ill. 1988); *PVO Int'l*, 16 Chem. Waste Lit. Rep. at 683. Although such a result is probably fair where the private litigants share culpability, a blanket prohibition against joint and several liability in certain circumstances may be wholly unfair and may discourage an otherwise willing responsible party from undertaking environmental cleanup. This is particularly true when one or more of the responsible parties is insolvent and, therefore, incapable of sharing in cleanup costs. Abandoning joint and several liability in this situation would not encourage private cleanup and would essentially burden those persons that engage in voluntary cleanup projects with responsibility for the insolvent shares or so-called "orphan shares." Without joint and several liability, private cost recovery defendants that, contrary to CERCLA's policies, refused to cooperate with the government and undertake private cleanup activities, would have their liability capped at their "fair share" while those that did what the statute encourages and performed the cleanup would bear their own share, plus that of any other entity which, because of insolvency or otherwise, could not be located or compelled to contribute.

[145] County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1516-17 (10th Cir. 1991).

rather than joint and several. This difference may be of strategic importance as defendants in cost recovery actions face, at least in theory, the prospect of joint and several liability in the liability phase of the case. However, as courts show an increasing propensity to address apportionment or equitable issues in the liability phase as opposed to the damages phase of a cost recovery action,[146] this distinction concerning scope of liability will substantially diminish. Another distinction between a private cost recovery claim and a contribution claim is the statute of limitations.[147] The statute of limitations for cost recovery claims generally provides a longer time period than the statute of limitations for contribution claims. Thus, private plaintiffs may attempt to pursue a cost recovery claim if the contribution claim is time-barred.

Perhaps the brightest line between cost recovery claims and contribution claims has been drawn in the context of administrative and judicially-approved settlement agreements under sections 113(f)(2) and 122(g)(5).[148] Under these sections, potentially responsible parties may resolve their liability for response costs and natural resource damages with the government and obtain, as a *quid pro quo*, contribution protection regarding matters covered by the settlement agreement. This distinction between cost recovery claims and contribution claims typically arises when a responsible party that has settled with the government invokes the contribution protection provision as a defense to a non-settling party's claims arising from the same site. In several decisions, courts have distinguished a non-settling party's cost recovery claim based on response costs incurred by that party from a contribution claim based on that party's liability for response costs incurred

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[146] *See, e.g., In re* Bell Petroleum Servs., Inc., 3 F.3d 889, 894-95 (5th Cir. 1993); United States v. Alcan Aluminum Corp., 964 F.2d 252, 267 (3d Cir. 1992).

[147] *Compare* 42 U.S.C. § 9613(g)(2) (1988) *with* 42 U.S.C. § 9613(g)(3) (1988).

[148] *See* CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) (1988) ("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."). Contribution protection is also afforded to de minimis settlors under CERCLA § 122(g)(5), 42 U.S.C. § 9622(g)(5) (1988).

by the government.[149] In those cases where a court has viewed the non-settling party's claims as a cost recovery claim as opposed to a contribution claim, contribution protection in sections 113(f)(2) and 122(g)(5) has been of no avail to settling parties.

Strategic advantages, if any, between private cost recovery claims and contribution claims will be dictated by the specific facts of the case. Although the distinction between cost recovery and contribution claims has become less clear, most private plaintiffs plead both claims to circumvent any issues of res judicata or collateral estoppel.

§ 6.04 Private Claims Against the Superfund

In certain instances, private parties may be able to recover their environmental response costs from the Superfund (Fund) pursuant to sections 111 and 106 of CERCLA.[150]

[1] Section 111(a)(2) Claims

Section 111 of CERCLA authorizes use of the Fund for government response actions as well as for the "payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan."[151] Private claims under section 111(a)(2) are, however, subject to significant limitations. For example, a

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[149] *See, e.g.*, Burlington N.R.R. v. Time Oil Co., 738 F. Supp. 1339, 1342 (W.D. Wash. 1990) (denying defendant's motion for summary judgment to dismiss non-settling party's cost recovery claim because claims are not barred by contribution protection provisions under § 113(f)(2)); United States v. Hardage, 19 Chem. Waste Lit. Rep. 132, 140 (W.D. Okla., 1989) (private party claim for recovery of response costs incurred independently by that party against another potentially responsible party does not constitute a contribution claim subject to contribution protection under § 122(g)(5)); *but see* Dravo Corp. v. Zuber, 804 F. Supp. 1182, 1188-89 (D. Neb. 1992) (rejecting the *Hardage* analysis which distinguished § 107 claims from § 113 claims and held that § 107 claims between responsible parties are claims for contribution and, therefore, subject to contribution protection).

[150] Section 111 of CERCLA authorizes the use of the Superfund trust fund for the "[p]ayment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan. . . ." CERCLA § 111(a)(2), 42 U.S.C. § 9611(a)(2) (1988). Furthermore, § 106 of CERCLA provides that "[a]ny person who receives and complies with the terms of any order issued under [section 106(a)] may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest." CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A) (1988).

[151] CERCLA § 111(a)(2), 42 U.S.C. § 9611(a)(2) (1988).

private claimant seeking recovery from the Fund must first present its claim for cost recovery to the owner or operator of a facility from which a hazardous substance has been released and to any other potentially responsible party that may be liable under section 107.[152] If the claim is not satisfied within 60 days, then a private claimant may present the claim to the Fund for payment.[153] However, a claim against the Fund may not be approved or certified during the pendency of a cost recovery or contribution action by a private claimant concerning response costs which are the subject of the claim against the Fund.[154]

In order to recover against the Fund, a claim for response costs must be "necessary" in order to carry out the requirements of the NCP and must be certified by a responsible federal official.[155] A private party must notify EPA and receive approval before undertaking the response action.[156] According to the NCP, this "preauthorization" may, at EPA's discretion, be granted provided that a private party demonstrates technical capabilities to respond safely and effectively to releases of hazardous substances and establishes that the response action will be consistent with the NCP.[157] Moreover, EPA will grant preauthorization only in accordance with an order issued pursuant to section 106 of CERCLA, or a settlement with the government in accordance with section 122 of CERCLA.[158]

Another important limitation to the section 111 claim is that Fund reimbursement for remedial actions applies only to those sites on the National Priorities List (NPL).[159] In contrast, private parties that seek cost recovery or contribu-

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[152] CERCLA § 112(a), 42 U.S.C. § 9612(a) (1988).

[153] *Id.*

[154] *Id.*

[155] CERCLA § 111(a)(2), 42 U.S.C. § 9611(a)(2) (1988).

[156] 40 C.F.R. § 300.700(d)(2) (1993).

[157] *Id.* § 300.700(d)(4)(i)-(ii). For purposes of pursuing Fund reimbursement, the elements of NCP consistency are set forth in 40 C.F.R. § 300.700(c)(5)-(8) (1993); *see also supra* notes 47-61 and accompanying text.

[158] 40 C.F.R. § 300.700(d)(5) (1993).

[159] *Id.* § 300.700(d)(3)(iii).

tion from other potentially responsible parties for remedial actions under CERCLA are not limited to response costs incurred solely at NPL sites and need not obtain government preauthorization prior to incurring response costs. Consistent with private cost recovery claims and contribution claims under CERCLA, however, claims for natural resource damages by private parties against the Fund are not recoverable.[160]

[2] Section 106(b) Petitions

In addition to private claims against the Fund pursuant to section 111, private parties may seek reimbursement from the Fund for response costs incurred pursuant to a section 106(b) petition. In order to obtain reimbursement, section 106(b)(2) provides that a petitioner must (1) receive and comply with an order issued under section 106(a); (2) file a petition within 60 days after completion of the required response action; (3) establish that it is not liable for response costs under section 107(a) or, if liable, that the response action required was arbitrary and capricious and not in accordance with law; and (4) establish that the costs for which reimbursement is sought are reasonable.[161] These limitations can pose substantial obstacles. For private parties liable under section 107(a), demonstrating that EPA's issuance of a section 106 order was "arbitrary and capricious" can be difficult. Furthermore, the 60-day petition period is short and may expire before private parties gain knowledge of a claim under section 106(b).

Because of these limitations, private party claims for Fund reimbursement under sections 111(a)(2) and 106(b) are generally rare. Nevertheless, given EPA's desire to limit the use of Fund resources at sites where a private party performs a cleanup, the filing, or even the threat of filing, of a claim or petition against the Fund can exact negotiating leverage in multi-phase response actions. Private parties, for example, may be able to negotiate a reduced scope of work in subsequent phases of investigation in exchange for agreeing

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[160] CERCLA § 111(b)(1), 42 U.S.C. § 9611(b)(1) (1988).

[161] CERCLA § 106(b)(2); 42 U.S.C. § 9606(b)(2) (1988).

to waive all or a portion of their claim against the Fund. Thus, although a claim or a threatened claim against the Fund may not always result in cost reimbursement, it may generate an equally effective benefit—reducing overall response costs.

§ 6.05 Other Federal and State Common Law Claims for Cost Recovery

[1] Resource Conservation and Recovery Act

Given the restrictive interpretation by courts of recoverable response costs under CERCLA, private litigants often seek additional statutory causes of action, either as alternatives or as supplements to a CERCLA claim. One such alternative theory of cost recovery is found in the Resource Conservation and Recovery Act (RCRA).[162] Section 7002 of RCRA contains two remedial subsections that provide rights of action for private citizens seeking to clean up historical contamination sites.[163]

Originally thought to be a panacea for private litigants interested in cleaning up contaminated sites or in mitigating contamination,[164] recent decisions appear to cast doubt on the utility of RCRA as an alternative or supplement to CERCLA.[165] The issue of whether damages can be obtained

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[162]Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901-6987 (1988)). Private parties may also be able to import causes of action or standards of care from other environmental statutes and regulations promulgated thereunder. Such statutes may include the Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001-11050 (1988); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671 (1988); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988); and the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1988). Furthermore, state mini-CERCLA statutes and underground storage tank statutes may provide additional causes of action. *See, e.g.,* Utah Underground Storage Tank Act, Utah Code Ann. §§ 19-6-401 to 19-6-427 (1992).

[163]RCRA §§ 7002(a)(1)(A)-(B), 42 U.S.C. §§ 6972(a)(1)(A)-(B) (1988).

[164]*See, e.g.*, Acme Printing Ink Co. v. Menard, Inc., 812 F. Supp. 1498, 1510 (E.D. Wis. 1992) ("no policy or language within [section 7002] which prevents a party from seeking remedies which are to its benefit as well as the benefit of others"); Zands v. Nelson, 779 F. Supp. 1254, 1260 (S.D. Cal. 1991) (injunctive relief is available regardless of plaintiff's status) (*Zands I*).

[165]*See, e.g.*, Fallowfield Dev. Corp. v. Strunk, 1993 U.S. Dist. LEXIS 6233, at *43-44 (E.D. Pa. May 13, 1993) (§ 7002(a)(1)(B) provides no basis for monetary recovery and it would be inequitable to grant attorneys' fees under RCRA); Kaufman & Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468, 1476-77 (N.D. Cal. 1993) (denying a claim for restitution); Gache v. Town of Harrison, 813 F. Supp. 1037,

in RCRA citizen suits appears, at best, unsettled. Recent decisions indicate that RCRA provides a narrow remedial formula for private parties, and that damages are not part of the equation. For this reason and others,[166] pursuing a RCRA action will often be most effective as a supplement to a concurrent action under sections 107 and 113 of CERCLA.

The benefits of citizen suits under section 7002 are several. For example, injunctive and declaratory relief are available; attorneys' fees and litigation costs are recoverable under certain circumstances; NCP consistency issues are not involved; the scope of liability in some circumstances may be broader than that under CERCLA; and the definition of "solid waste" includes petroleum, which is expressly exempt under CERCLA's definition of "hazardous substances." By the same token, RCRA suits have their disadvantages. For example, RCRA provides no apparent opportunity to recover economic damages; RCRA claims are subject to a higher standard of proof than CERCLA claims; defenses are broader than in CERCLA claims; and government action bars subsequent RCRA claims.

[a] Available Remedies under RCRA

Since CERCLA litigants are limited to recovering response costs,[167] the clear benefit of the RCRA citizen suit is the availability of injunctive relief,[168] although minor disagreement may exist as to the circumstances under which an

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1045 (S.D.N.Y. 1993) (denying recovery of "costs of remediation"); Commerce Holding Co., Inc. v. Buckstone, 749 F. Supp. 441, 445 (E.D.N.Y. 1990) (compensatory relief for private parties is inconsistent with the purposes of RCRA).

[166] In considering alternative or supplemental causes of action, private plaintiffs should concern themselves with the effects of res judicata and collateral estoppel. Numerous courts have applied these doctrines to bar claims brought by private parties at a later date which arise from the same factual basis as the initial claim. *See, e.g.*, Aliff v. Joy Mfg. Co., 914 F.2d 39, 42-43 (4th Cir. 1990); Shapiro v. Alexanderson, 741 F. Supp. 472, 476 (S.D.N.Y. 1990).

[167] *See supra* notes 74-99 and accompanying text.

[168] RCRA provides that if a plaintiff establishes a cause of action under subsection (B), then a court is empowered to "restrain any person who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" which may present an imminent and substantial endangerment to human health or the environment. 42 U.S.C. § 6972(a)(1)(B) (1988).

injunction should issue.[169] Equally clearly, RCRA does not provide a private right of action for response costs or for economic, compensatory, or punitive damages.[170] This limitation on available relief under RCRA appears based, in part, on the applicability of the "private attorney general" theory in RCRA citizen suits. This theory provides that, in order to obtain a specific remedy via a citizen suit, a plaintiff's aims must be consistent with, and in furtherance of the public good, rather than being purely self-interested.[171]

Historically, courts considering the availability of injunctive relief in RCRA suits have done so without deciding whether a plaintiff was acting as a "private attorney general," even though the requested relief would directly benefit that plaintiff.[172] In *Acme Printing Ink Co. v. Menard, Inc.*,[173] the court dismissed the "private attorney general" theory, stating that it was "aware of no policy or language within [section 7002] which prevents a party from seeking remedies which are to its benefit as well as the benefit of others."[174]

In contrast, other courts have invoked the private attorney general concept to limit the remedies available under RCRA.[175] In *Commerce Holding Co. v. Buckstone*,[176] the court acknowledged that injunctive relief is available under section 7002, but found that the statute "does not provide a private action for damages."[177] In rejecting the plaintiff's equitable prayer for remediation costs, the *Commerce*

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[169] *See infra* note 181.

[170] *See, e.g., Commerce Holding*, 749 F. Supp. at 445.

[171] *Id.* (citing Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 337 (4th Cir. 1983)).

[172] *See, e.g.*, Zands v. Nelson, 779 F. Supp. 1254, 1261 (S.D. Cal. 1991) (injunctive relief is available regardless of a plaintiff's status); Acme Printing Ink Co. v. Menard, Inc., 812 F. Supp. 1498, 1510 (E.D. Wis. 1992) (finding no policy or language in § 7002 to prevent a party from "seeking remedies which are to its benefit as well as the benefit of others").

[173] 812 F. Supp. 1498 (E.D. Wis. 1992).

[174] *Id.* at 1510.

[175] *See, e.g., Commerce Holding*, 749 F. Supp. at 445 (neither damages nor civil penalties may be assessed in a citizen suit).

[176] 749 F. Supp. 441 (E.D.N.Y. 1990).

[177] *Id.* at 445.

Holding court, relying on the private attorney general theory,[178] concluded that, because the private party would "be the direct beneficiary of the substantive relief," the requested relief did not "comport with the statute's purpose of allowing private parties to bring suit if 'genuinely acting as private attorneys general.'"[179] Despite the fact that the *Commerce Holding* court based its decision on questionable authority,[180] subsequent court decisions have followed the rationale of *Commerce Holding*.[181]

Closer scrutiny of the *Acme Printing* and *Commerce Holding* lines of cases reveals a much narrower conflict between them. On the one hand, the *Acme Printing* line of cases appears to stand solely for the principle that injunctive relief is available under the Act. *Acme Printing* provides no clear indication that the court thought economic damages are permissible. On the other hand, the *Commerce Holding* court expressly states that while injunctive relief is available under RCRA, a damages remedy could not be implied from

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[178] *Id.*

[179] *Id.* (quoting *Lamphier*, 714 F.2d at 337).

[180] Commentators are quick to point out that *Lamphier* was decided before the separate remedy in § 7002(a)(1)(B) was added by the 1984 amendments to RCRA. The court also relied on Walls v. Waste Resource Corp., 761 F.2d 311, 316 (6th Cir. 1985), *rev'd*, 823 F.2d 977 (1987), which also appears to be an interpretation of the pre-1984 statute. While the pre-existing remedy, subsection (A), is clearly more conducive to suits by environmental groups, the language of subsection (B) suggests that economic recovery should be permitted under RCRA. *See* Peter J. Niemiec, "RCRA: New Directions in Private Remedies," paper presented at the 13th Annual RCRA/CERCLA and Private Litigation Update, American Bar Association, Section of Natural Resources, Energy, and Environmental Law, Committee on Solid and Hazardous Waste, Washington, D.C. (Dec. 9-10, 1993).

[181] Those courts following the *Commerce Holding* rationale initially appeared to restrict the availability of injunctive relief as well. For example, in Gache v. Town of Harrison, 813 F. Supp. 1037, 1044 (S.D.N.Y. 1993), the court stated that, despite the statute's plain language, "[a] violation of RCRA does not mean that a permanent injunction necessarily follows" and held that in deciding whether to issue an injunction under § 7002, the court must consider general equitable standards. *Id.* These standards include irreparable harm, the adequacy of legal remedies, and a balancing of relative hardships. *Id.* Finding environmental injury, by its nature, to be irreparable, the court in *Gache* granted injunctive relief. *Id.* While the consideration of such general equitable standards had also been suggested in Lincoln Properties, Ltd. v. Higgins, Civ. No. S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *56-57 (E.D. Cal. Jan. 18, 1993), that court took a less exacting approach, finding that if the plaintiff shows only "some irreparable injury," the court need not balance hardships. Read together, *Gache* and *Lincoln Properties* do not appear to present a significant obstacle to obtaining an injunction under RCRA.

the statute's language.[182] Thus, while the debate between the two lines of cases may thrive in theory, there is little practical controversy in fact: no court has yet awarded a RCRA citizen-suit plaintiff restitutionary damages.[183]

[b] Recovery of Litigation Costs

RCRA expressly authorizes the award of litigation costs, including reasonable attorneys' and experts' fees, to the prevailing or substantially prevailing party "whenever the court determines such an award is appropriate."[184] In contrast, under CERCLA, some jurisdictions have allowed recovery for attorneys' fees, while others have not.[185] Notwithstanding the express language of RCRA, at least one jurisdiction has exercised its discretion and denied attorneys' fees under RCRA, finding that it would be inequitable to allow costs and fees under RCRA when CERCLA does not allow the same elements of recovery.[186] However, to heighten the incentive to prospective plaintiffs to initiate cleanup procedures, the more progressive view on this issue is for courts to exercise their discretion liberally.

[c] Consistency with the NCP

As discussed above, private parties seeking to recover cleanup costs under CERCLA must show that the costs were consistent with the NCP.[187] In the RCRA context, there is no mention of NCP consistency in either the statute or any of the cases that have considered liability under section 7002(a)(1)(B). The significance of this fact is clear—RCRA litigants are spared the time and expense of having to

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[182] *Commerce Holding*, 749 F. Supp. at 445 ("While injunctive relief is available under [section 7002], the statute does not provide a private action for damages.").

[183] *See* Niemiec, *supra* note 180, at 4-6; *see also Commerce Holding*, 749 F. Supp. at 445 (purpose of § 7002 is to allow parties to bring suit as "private attorneys general" rather than pursuing private remedies); Fallowfield Dev. Corp. v. Strunk, No. 89-8644, 1993 U.S. Dist. LEXIS 6233, at *43 (E.D. Pa. May 13, 1993) (holding that subsection (B) provides no basis for monetary recovery); Kaufman & Broad-South Bay v. Unisys Corp., 822 F. Supp 1468, 1476-77 (N.D. Cal. 1993) (denying a claim for restitution).

[184] RCRA § 7002(e), 42 U.S.C. § 6972(e) (1988).

[185] *See supra* notes 87-91 and accompanying text.

[186] *See Fallowfield*, No. 89-8644, 1993 U.S. Dist. LEXIS 6233, at *49-50.

[187] *See supra* notes 47-61 and accompanying text.

litigate the issue of whether RCRA response costs are consistent with the NCP.[188] However, the apparent benefits may be nullified, since cost recovery under RCRA appears limited to litigation costs and attorneys' fees.[189]

[d] Petroleum Exclusion

As noted above,[190] response costs are not recoverable under CERCLA if they are incurred in the cleanup of contamination that is exclusively petroleum.[191] In contrast, the definition of "solid waste" under RCRA encompasses discarded petroleum products, or the release of petroleum products into the environment.[192] In cases involving petroleum contamination, private plaintiffs may seek recourse under RCRA that is not available under CERCLA. However, such recourse appears limited to injunctive relief and litigation costs. Thus, state common law claims may provide a broader avenue of relief.

[e] Causation and Scope of Liability

To prevail in a claim under section 7002(a)(1)(B) of RCRA, a private plaintiff must demonstrate that the solid or hazardous wastes may present an "imminent and substantial endangerment" to human health and the environment.[193] Although courts have generally construed the language broadly,[194] some courts have cautioned against an overly-broad interpretation.[195] As part of the section 7002 claim,

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[188] However, a private plaintiff seeking recovery of RCRA response costs under §§ 107 or 113 of CERCLA would be subject to NCP consistency requirements.

[189] *See supra* notes 167-86 and accompanying text.

[190] *See supra* § 6.02[2].

[191] *See, e.g.*, Wilshire Westwood Assocs. v. Atlantic Richfield Corp., 881 F.2d 801, 810 (9th Cir. 1989); *see also supra* notes 62-64 and accompanying text.

[192] Zands v. Nelson, 797 F. Supp. 805, 809 (S.D. Cal. 1992) (*Zands II*); Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) (*Zands I*).

[193] RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (1988).

[194] *See, e.g.*, Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2638 (1992); United States v. Conservation Chem. Co., 619 F. Supp. 162, 196 (W.D. Mo. 1985).

[195] *See, e.g.*, United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1109 (D. Minn. 1982) (construing identical "imminent and substantial endangerment" language under § 7003, the court noted that emergency authority should not be used where the harm is remote, completely speculative, or de minimis in degree);

private plaintiffs must further establish that defendants "contributed to" the environmental contamination.

Although liability under section 7002(a)(1)(B) is strict[196] and joint and several where the harm is indivisible,[197] courts have construed the "contributed to" language to expressly require a causal connection between a defendant's conduct and the "imminent and substantial endangerment."[198] Establishing this element of a section 7002 claim will typically involve complex fact issues that will often be subject to dispute and, therefore, may not be amenable to summary adjudication. Thus, any tactical advantages gained by early imposition of liability against defendants, as in the case with a section 107 claim under CERCLA, may not be available under the citizen suit provisions of RCRA.

In comparison to section 7002(a)(1)(B), the scope of liability under section 107 of CERCLA appears broader with respect to current owners and operators and past owners and operators at the time of disposal, because those persons are clearly liable without regard to any inquiry over "contributing to" environmental contamination. On the other hand, liability for generators and transporters under section 7002(a)(1)(B) appears to be at least as broad as the liability under section 107 of CERCLA.[199]

[f] Defenses and Statute of Limitations

In contrast to CERCLA, RCRA provides no express statutory defenses. Surprisingly, courts have been equally silent with

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United States v. Vertac Chem. Corp., 489 F. Supp. 870, 885-86 (E.D. Ark. 1980), *aff'd sub nom.* United States v. Hercules, Inc., 961 F.2d 796 (8th Cir. 1992) (to determine whether or not an "imminent and substantial endangerment" exists, there needs to be an assessment of risk).

[196] *See, e.g., Zands II*, 797 F. Supp. at 809; United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1400-01 (D.N.H. 1985), *aff'd in part*, 900 F.2d 429 (1st Cir. 1990).

[197] Lincoln Properties, Ltd. v. Higgins, No. S-91-760 DFL/GGH 1993 U.S. Dist. LEXIS 1251, at *23 (E.D. Cal. Jan. 18, 1993).

[198] *Zands II*, 797 F. Supp. at 809-10; United States v. Hardage, 116 F.R.D. 460, 466 (W.D. Okla. 1987); United States v. Bliss, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987).

[199] At least one court has found that RCRA's "contributing to" standard requires less involvement than CERCLA's "arranged for disposal" standard. *See* United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1384 (8th Cir. 1989).

respect to available defenses. Given the equitable principles that pervade government claims under section 7003,[200] and given that injunctive relief and "contributory" liability under section 7002 are based on equitable considerations, equitable defenses should arguably be permitted under section 7002. Furthermore, the citizen suit provisions under RCRA are silent on the subject of statute of limitations. In *Bodne v. Geo A. Rheman Co.*,[201] the court applied 28 U.S.C. § 2462, a federal statute governing actions for civil penalties, as the relevant statute of limitation for RCRA citizen suits. That statute provides for a five-year statute of limitations from the date when the claim first accrued.[202] Thus, depending on the particular circumstances, this five-year statute of limitations period, if applicable, may be more favorable than the statute of limitations for cost recovery actions relating to removal activities or contribution actions under CERCLA, but less favorable than the six-year statute of limitations for cost recovery claims relating to remedial activities under CERCLA.[203]

[g] Procedural Issues

In contrast to private cost recovery claims and contribution claims under CERCLA, claims under the citizen suit provisions of section 7002(a)(1)(B) are subject to certain notification and jurisdictional requirements.[204] Furthermore, the statute prohibits actions under section 7002(a)(1)(B) if the government

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[200] *Hardage*, 116 F.R.D. at 465; United States v. Conservation Chem. Co., 619 F. Supp. 162, 201 (W.D. Mo. 1985).

[201] 811 F. Supp. 218 (D.S.C. 1993).

[202] The question of when the statute of limitations accrues in a RCRA action does not appear to have been addressed squarely by the courts.

[203] If a remedial action is initiated within three years after the completion of a removal action, costs incurred in the removal action may be recovered in the cost recovery action relating to the remedial action. Thus, in those circumstances the statute of limitations applicable to a CERCLA removal action may be more favorable than the statute of limitations applicable to a RCRA citizen suit.

[204] RCRA § 7002(b), 42 U.S.C. § 6972(b) (1988). Section 7002(b) of RCRA prohibits the filing of any citizen suits under § 7002(a)(1)(B), unless 90-day notification is first provided to the administrator of EPA, the state in which the applicable site is located, and to potential defendants. At least one court has dismissed an action under § 7002 for failure to comply with these notification requirements. Vermont v. Staco, Inc., 31 Env't Rep. Cas. (BNA) 1814, 1819 (N.D. Pa. 1990).

has undertaken certain response measures specified in the statute. Interestingly, however, the court in *Acme Printing* held that a consent decree entered into pursuant to section 122 of CERCLA does not bar a citizen suit under section 7002(a)(1)(B).[205] This decision, if followed by other courts, would subject settling parties to citizen suit claims under section 7002 despite the contribution protection provisions under CERCLA.

Clearly, the citizen suit provisions under RCRA provide some additional relief beyond that relief offered by cost recovery and contribution claims under CERCLA. To the extent that the citizen suit provisions provide no restitutional relief to private plaintiffs, however, the statute's ultimate utility appears limited to a role adjunct to other federal and state causes of action. Nevertheless, the threat of injunctive relief and recovery of litigation costs, including attorneys' fees, may provide important negotiating leverage on behalf of private plaintiffs, particularly in the early stages of a CERCLA matter.

[2] Contractual Claims for Cost Recovery

In addition to cost recovery claims under CERCLA and RCRA, private parties may pursue cost recovery for environmental cleanups based on indemnification and hold harmless provisions in asset, stock, or property transfer agreements. Section 107(e)(1) of CERCLA expressly preserves the right of private parties to allocate, or to release one another from, CERCLA liability;[206] however, in those instances the private parties remain accountable to the government for the cost of responding to a release or threatened release of hazardous substances.[207]

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[205] Acme Printing Ink Co. v. Menard, Inc., 812 F. Supp. 1498, 1507-08 (E.D. Wis. 1992).

[206] CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1) (1988).

[207] Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1459 (9th Cir. 1985) (parties are jointly and severally liable with respect to the government but are free to contractually allocate risks of CERCLA liability as they may see fit); Olin Corp. v. Consolidated Aluminum Corp., 807 F. Supp. 1133, 1137-39 (S.D.N.Y. 1992), *aff'd in part*, 5 F.3d 10 (2d Cir. 1993) (private parties may contract out of, or allocate, liability with other private parties, but may not contract out of liability to the government under § 107(e)(1); Jones-Hamilton Co. v. Kop-Coat, Inc., 750 F. Supp. 1022, 1025-27 (N.D. Cal. 1990), *aff'd in part and rev'd in part*, 959 F.2d 126 (9th Cir. 1992) (private parties may contract out of liability vis-a-vis other private parties, but may not by contract avoid CERCLA liability vis-a-vis the government).

In contrast to cost recovery and contribution claims under CERCLA, defendants need not be responsible parties under CERCLA in order to be held liable for CERCLA response costs in an indemnity action. However, the indemnification or hold harmless provision must clearly allocate environmental risks among the parties to the agreement.[208] Boilerplate indemnity clauses will probably not withstand judicial scrutiny.[209] Depending on the scope of the indemnification or hold harmless provision, an indemnification claim may seek broader relief, such as economic damages or consequential damages, than otherwise offered under CERCLA and RCRA. Unlike contribution claims under CERCLA or state common law, which shift liability among responsible parties, the indemnity claim may seek to transfer the entire liability to another responsible party. In determining the effectiveness of an indemnification or hold harmless provision, state law rather than federal common law generally governs.[210]

Moreover, an indemnification claim may provide added strategic leverage if the contractual indemnity includes recourse for private plaintiffs to recover litigation costs and attorneys' fees. Furthermore, indemnification claims are not subject to the rigors of establishing "necessary costs of re-

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[208] *See* U.S. Steel Supply, Inc. v. Alco Standard Corp., No. 89-C-20241, 1992 U.S. Dist. LEXIS 13722, at *20 (N.D. Ill. Sept. 9, 1992) (shift of CERCLA liability "is permissible only when the contractual language clearly and unequivocally indicates that it is the parties' intent to transfer that liability"); Hatco Corp. v. W.R. Grace & Co.-Connecticut, 801 F. Supp. 1309, 1321 (D.N.J. 1992) (for an agreement to indemnify against CERCLA liabilities, an intent to that effect must be clearly expressed). *But see Jones-Hamilton*, 750 F. Supp. at 1027-28 (indemnification agreement encompassing "all losses, damages, and costs resulting from any violation of law held sufficient to release indemnity from CERCLA liability even though agreement did not specifically mention CERCLA or CERCLA-type liability.").

[209] *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

[210] *See, e.g.*, *Mardan*, 804 F.2d at 1459 (concluding, based on New York law, that settlement agreement and release barred purchaser's cost recovery claim under § 107 of CERCLA); Kaufman & Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468, 1472-73 (N.D. Cal. 1993) (following *Mardan*, contract releasing CERCLA liability should be construed under state law). *But see* Mobay Corp. v. Allied Signal, Inc., 761 F. Supp. 345, 351-52 (D.N.J. 1991) (observing that uniform CERCLA law would prevent differences in state laws from affecting incentives for voluntary cleanup, that application of state law to contract releases could delay cleanups, and that application of a uniform federal law would not disrupt existing relationships predicated on state law, the court concluded that federal common law governs interpretation of whether a contract releases CERCLA liability).

sponse," NCP consistency, or factual and legal causation. Unlike cost recovery and contribution actions under CERCLA, these claims are subject to and may be defeated by broad equitable defenses. On balance, however, contractual agreements with other potentially responsible parties often provide substantial cost recovery opportunities and, therefore, should be carefully considered.

In addition to indemnification and hold harmless provisions, private parties, typically sellers, may contractually allocate CERCLA liability to a buyer by crafting a specific release or "as is" provision.[211] Even where courts conclude that a release or "as is" clause does not effectively shift liability under CERCLA,[212] such provisions may be considered when apportioning CERCLA liability among responsible parties.[213] Survival provisions or restrictions on express warranties and representations in an agreement are likely to be of less utility. Such provisions have generally been construed narrowly by courts to bar breach of contract claims, and not to encompass liability under CERCLA.[214]

[3] State Common Law Tort Claims

Because recovery in CERCLA section 107 actions is limited to necessary response costs that have been incurred consistent

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[211] *See, e.g.*, Commerce Redev. Agency v. American Home Prods., Inc., No. 91-4426-AWT, 1993 U.S. Dist. LEXIS 15478, at *30 (C.D. Cal. Mar. 26, 1993) ("as is" clause releases all claims except fraud claims against a seller of real property for defects in the condition of the property and operates to impose the risk of unknown defects upon the buyer); Zoufal v. Amoco Oil Co., 91-CV-70895-DT, 1993 U.S. Dist. LEXIS 4920, at *14-16 (E.D. Mich. Mar. 19, 1993) ("as is" clause is valid because the current owner leased the gas station for ten years prior to its purchase and, therefore, had superior knowledge of the site).

[212] *See, e.g.*, Weyerhaeuser Corp. v. Koppers Co., 771 F. Supp. 1406, 1413 (D. Md. 1991) ("as is" clause in a contract was insufficient to transfer CERCLA liability between parties because such transfer language must be express); Wiegmann & Rose Int'l Corp. v. N.L. Indus., 735 F. Supp. 957, 960-62 (N.D. Cal. 1990) (allowing an otherwise responsible party to avoid CERCLA § 107 liability based on an "as is" clause would clearly circumvent the intent and language of CERCLA); International Clinical Lab., Inc. v. Stevens, 710 F. Supp. 466, 469 (E.D.N.Y. 1989) ("as is" clause bars only an action for breach of warranty, but does not bar a cost recovery action under CERCLA).

[213] *International Clinical*, 710 F. Supp. at 466 (equitable factors such as an "as is" clause may be considered by the court in exercising its authority to apportion responsibility for response costs among the parties).

[214] *See, e.g.*, Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1002 (D.N.J. 1988).

with the NCP, private litigants are sometimes left to seek state common law remedies in order to recover damages and costs that are not, or may not be, recoverable under CERCLA.[215] Potential state common law claims include, for example, nuisance, trespass, negligence, fraud, negligent misrepresentation, and strict liability.[216]

Private plaintiffs routinely include these types of common law claims as part of their CERCLA suit.[217] However, given the strict liability remedy available under CERCLA, private plaintiffs often pursue state common law claims aggressively only when they have incurred, or expect to incur, either damages that cannot be classified as response costs, such as economic or consequential damages resulting from contamination, or response costs that may not be necessary and consistent with the NCP.[218] In most instances, the state common law claims will be supplementary to a plaintiff's federal statutory claims under CERCLA.

[a] State Common Law Theories of Recovery

There are several potential state common law causes of action available to recover damages resulting from environmental contamination. Each theory has varying advantages and

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[215] Despite occasional claims that state common law causes of action are preempted by federal and state environmental legislation, including CERCLA, the courts are generally faithful to the plain language of the statute, which states that the statute does not preempt any other statutory or common law claims. *See, e.g.*, Mid Valley Bank v. North Valley Bank, 764 F. Supp. 1377, 1386 (E.D. Cal. 1991); Allied Towing Corp. v. Great E. Petroleum Corp., 642 F. Supp. 1339, 1351-52 (E.D. Va. 1986).

[216] Other state common law causes of action which are less frequently pleaded include conversion, negligence per se, nuisance per se, and waste. Private plaintiffs that successfully prove state common law waste may be entitled to judgment for treble damages. *See, e.g.*, Utah Code Ann. § 78-38-2 (1992).

[217] State common law claims may be filed in state court or as pendent claims to CERCLA suits in federal court under CERCLA § 114. *See, e.g., Allied Towing*, 642 F. Supp. at 1351-52 (courts should carefully exercise their discretion in allowing state law claims as pendent to RCRA suits, but finding the right to invoke pendent jurisdiction in CERCLA and RCRA suits "untrammeled"); New York v. Shore Realty Corp., 759 F.2d 1032, 1050 (2d Cir. 1985) (since "[t]he public nuisance claim for abatement and the CERCLA claims clearly 'derive from a common nucleus of operative fact' and the state 'would ordinarily be expected to try them all in one judicial proceeding,'" the court allowed pendent state law claims) (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)).

[218] *See supra* note 36-61 and accompanying text.

disadvantages, depending on the factual circumstances giving rise to the claim. Several such theories of recovery and their attendant benefits and disadvantages are discussed below, followed by a general discussion of the relative advantages and disadvantages of using state common law theories as supplements to, or substitutes for, cost recovery or contribution actions under CERCLA.

[i] Nuisance

Nuisance is defined as any substantial and unreasonable nontrespassary interference with another's use or enjoyment of land.[219] In contrast to most other tort claims, nuisance is not principally concerned with the nature of the conduct causing the damage, but with the nature and relative importance of the interests interfered with or invaded.[220] Thus, for example, the interference with property interests arising from the migration of contaminated groundwater to one person's property from the land of another gives rise to a nuisance action.[221] Unlike other state common law theories, some courts have held that actual contamination need not occur before a plaintiff may bring an action under a nuisance theory.[222] Thus, depending on the jurisdiction, the mere threat of contamination may be sufficient to allow a plaintiff's recovery. This may prove to be a major advantage of suing for nuisance, as opposed to other tort theories, if the applicable forum's law adopts the threat of contamination rule.

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[219] *See* Turnbaugh v. Anderson, 793 P.2d 939, 942 (Utah Ct. App. 1990); Johnson v. Mount Ogden Enters., Inc., 460 P.2d 333, 336 (Utah 1969); *see generally* Branch v. Western Petroleum, Inc., 657 P.2d 267, 276 (Utah 1982) ("[w]hen the conditions giving rise to a nuisance are also a violation of a statutory prohibition, those conditions constitute a nuisance per se"); Solar Salt Co. v. Southern Pac. Transp. Co., 555 P.2d 286, 289 (Utah 1976) (defining public nuisance as affecting "an interest common to the general public, rather than peculiar to one individual, or several") (quoting W. Page Keeton & Wm. Lloyd Prosser, *Prosser and Keeton on Torts* § 90, at 645 (5th ed. 1984)) [hereinafter Prosser].

[220] *Branch*, 657 P.2d at 274.

[221] *See id.*

[222] *See, e.g.*, Exxon Corp. v. Yarema, 516 A.2d 990 (Md. Ct. Spec. App. 1986) (plaintiff could recover for nuisance when gasoline had leaked from storage tanks on defendant's property, even though plaintiff's property was upgradient of the tanks and was not contaminated). *But see* Pratt v. Hercules, Inc., 570 F. Supp. 773, 802 (D. Utah 1982) (applying Utah and federal law) ("there can be no nuisance arising solely from the existence of harm arising from a possible future explosion or accident").

To compensate for the loss or injury sustained as a result of the nuisance, all damages, whether real or personal, and whether temporary or permanent, are recoverable.[223] For permanent injuries to the land, the measure of damages is the diminution of the property's value[224] as well as any special damages resulting from the nuisance.[225] In the case of a temporary nuisance, damages for loss of the use of the property are ordinarily recoverable.[226] Furthermore, in the case of a public nuisance, a court may issue an order enjoining the nuisance, whereas injunctive relief is not available to private plaintiffs under CERCLA.[227]

The availability of a nuisance suit may be limited, however, by some state statutes precluding nuisance actions against manufacturers whose facilities have been in operation for a certain number of years, if those facilities were not nuisances when they began operation.[228] In addition, nuisance claims are generally subject to a barrage of common law equitable defenses.[229]

[ii] Trespass

A suit for trespass is appropriate when a defendant has intentionally used a plaintiff's real property without authorization and without a legal privilege to do so.[230] The off-site

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[223] *See generally* Prosser, *supra* note 219, § 89, at 637-43.

[224] *See, e.g.*, Spaulding v. Cameron, 239 P.2d 625, 628 (Cal. 1952); Prosser, *supra* note 219, § 89, at 637-38.

[225] *See Solar Salt*, 555 P.2d at 290; Adams v. Arkansas City, 362 P.2d 829, 836 (Kan. 1961).

[226] *See* Alexander v. Arkansas City, 396 P.2d 311, 314-15 (Kan. 1964).

[227] *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1049-52 (2d Cir. 1985) (denying an injunction under CERCLA, but allowing an injunction under a state common law nuisance theory).

[228] *See, e.g.*, Utah Code Ann. § 78-38-5 (1992) (barring nuisance claims against manufacturing facilities in operation for more than three years).

[229] *See* Branch v. Western Petroleum, Inc., 657 P.2d 267, 276 (Utah 1982); *Restatement (Second) of Torts* § 840C (1977). The elements of assumption of risk are knowledge of the danger and voluntary consent to assume it. Meese v. Brigham Young Univ., 639 P.2d 720, 724 (Utah 1981); *see Pratt*, 570 P.2d at 793-94 (plaintiffs are not entitled to recover the loss of speculative profits because plaintiffs knowingly took a calculated risk when they purchased agricultural land adjoining a manufacturing operation to develop it as residential property).

[230] *See* Prosser, *supra* note 219, § 13, at 70; Plotkin v. Club Valencia Condo. Ass'n, Inc., 717 P.2d 1027, 1027 (Colo. Ct. App. 1986); *see also* Collier v. City of Portland,

migration of wind-blown tailings or contaminated groundwater or surface water may, for example, trigger a claim for trespass.

Actual physical invasion by a defendant is not required, but rather a defendant's act must result in an invasion of tangible matter on the property.[231] Some courts no longer require a physical invasion of visible proportion.[232] While the facts giving rise to a trespass claim may seem indistinguishable from those giving rise to a nuisance claim, the decision to characterize the intrusion as either a nuisance or a trespass can have substantial consequences, especially in the context of statutes of limitations, because some states' statutes allow different periods for nuisance and trespass.[233]

Ordinarily, a defendant is liable for trespass even though it acted in good faith and believed it had a legal right to enter the land.[234] Conversely, consent of the owner is an absolute defense to a plaintiff's claim of trespass.[235] Courts generally allow recovery for the diminution of value of the land in trespass cases.[236]

[iii] Negligence

Negligence is defined as conduct that "falls below the standard established by law for the protection of others against unreasonable risk of harm."[237] While courts have generally

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644 P.2d 1139, 1141 (Or. Ct. App. 1982) (trespass to real property is an intentional entry upon the land of another by one not privileged to enter).

[231] *See* Prosser, *supra* note 219, § 13, at 71.

[232] *See, e.g.*, Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959), *cert. denied*, 362 U.S. 918 (1960) (invasion of invisible gases and particulates constitutes trespass).

[233] *See, e.g., id.* at 791 (issue of whether invasion was a nuisance or a trespass was critical because the statute of limitations had run for nuisance but not for trespass).

[234] Luoma v. Donohoe, 588 P.2d 523, 526 (Mont. 1978).

[235] *See* Prosser, *supra* note 219, § 18, at 112.

[236] *See* Pitts v. Pine Meadow Ranch, Inc., 589 P.2d 767, 769 (Utah 1978).

[237] *Restatement (Second) of Torts* § 282 (1965); *see* Williams v. Melby, 699 P.2d 723, 728 (Utah 1985). If claims asserted against a defendant contain solely elements of intentional conduct such as trespass and not negligence, defendant may encounter difficulties in obtaining insurance coverage which, in turn, may delay settlement. Thus, it may be advisable for a plaintiff to assert a claim based on non-intentional conduct to enhance a defendant's chances of coverage.

not articulated the precise standard of care that mine operators or owners owe to their neighbors to protect them from pollution,[238] state law often provides that the standard of care in any particular case should depend on the "circumstances of [the] case and on the extent of foreseeable danger involved."[239] If there has been no lack of due care on the part of a defendant, then recovery will not be available.

Commonly asserted defenses to a negligence claim include assumption of the risk,[240] contributory negligence, and comparative negligence.[241] Such defenses may be available in environmental claims involving, for example, a dispute between current and former landowners concerning the cleanup of soil or ground water contamination. Most jurisdictions do not recognize a cause of action in negligence for purely economic loss when there has been no damage to persons or property.[242] This potential limitation on recoverable damages under a negligence theory might apply in the case of a plaintiff whose property value declines as the result of threatened, but not actual, contamination from a neighboring industrial or mining site. Depending on the jurisdiction, such a plaintiff may be unable to recover in negligence for the diminution of value of its property, although other common law theories such as nuisance may permit recovery.[243]

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[238] Cases that address the standard of care owed by mine operators deal principally with personal injuries suffered in abandoned mining shafts during the early 1900's, rather than with liability for environmental contamination. *See, e.g.*, Richardson v. El Paso Consol. Gold Min. Co., 118 P. 982, 986 (Colo. 1911). The standard of care imposed on mine operators in those cases was generally a duty of reasonable care. *See, e.g., id.*

[239] *Williams*, 699 P.2d at 727 (quoting DCR, Inc. v. Peak Alarm Co., 663 P.2d 433, 435 (Utah 1983)).

[240] *See* Prosser, *supra* note 219, § 68, at 484-98.

[241] *See* Prosser, *supra* note 219, § 68, at 468-79; *see also* Utah Code Ann. § 78-27-38 (1992) (providing that plaintiff may only recover from a defendant or group of defendants whose fault *exceeds* that of the plaintiff).

[242] *See, e.g.*, Hale v. Groce, 744 P.2d 1289, 1290 (Or. 1987) (stating that a person is not ordinarily liable for negligently causing a stranger's purely economic loss without injuring that stranger's person or property, even where the harm was foreseeable). *But see* Mattingly v. Sheldon Jackson College, 743 P.2d 356, 359-61 (Alaska 1987) (allowing recovery in negligence for purely economic losses, but only because the losses were "particularly foreseeable" to defendants).

[243] *See, e.g., supra* note 222 and accompanying text.

[iv] Fraud

Fraud is another potential state common law theory under which a plaintiff may recover damages that are not compensable under CERCLA, especially in cases involving a plaintiff's purchase of property from a prior owner that falsely represented or omitted to disclose a material fact concerning contamination, actual or threatened, on or off the site.[244] The measure of damages for fraud is the difference between the value of the land as is and the value the land would have had if the representations had been true.[245] Defenses to fraud include failure to establish one or more of the elements of the claim (e.g., knowing falsehood, reasonable reliance, etc.); waiver or estoppel;[246] and a plaintiff's actual or constructive knowledge of the facts.[247] Contributory negligence is not a defense to fraud.[248]

[v] Negligent Misrepresentation

This cause of action involves the careless or negligent misrepresentation of a material fact by a person having a pecuniary interest in the transaction and having a superior opportunity to know the material facts.[249] The elements of fraud need not be independently established in a claim of negligent misrepresentation.[250]

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[244] *See generally* Atkinson v. IHC Hosps., Inc., 798 P.2d 733, 737-38 (Utah 1990), *cert. denied*, 498 U.S. 1090 (1991); Taylor v. Gasor, Inc., 607 P.2d 293, 294 (Utah 1980) (discussing elements of fraud).

[245] *See* Dugan v. Jones, 615 P.2d 1239, 1249 (Utah 1980).

[246] *See id.* at 1247; *see also* Chester v. McDaniel, 504 P.2d 726, 727-28 (Or. 1972).

[247] *See* Dillon-Malik, Inc. v. Wactor, 728 P.2d 671, 673 (Ariz. Ct. App. 1986) (actual knowledge is a defense); Snow's Auto Supply, Inc. v. Dormaier, 696 P.2d 924, 930 (Idaho Ct. App. 1985) (same); Young v. Hecht, 597 P.2d 682, 688 (Kan. Ct. App. 1979) (constructive knowledge is a defense).

[248] *See* Berkeley Bank for Coops. v. Meibos, 607 P.2d 798, 804 (Utah 1980) (contributory negligence is not a proper defense in the case of intentional misrepresentation, but it is a proper defense to negligent misrepresentation); *see also* Pacific Maxon, Inc. v. Wilson, 619 P.2d 816, 817 (Nev. 1980), *modified*, 714 P.2d 1001 (Nev. 1986); Kang v. Harrington, 587 P.2d 285, 290 (Haw. 1978).

[249] *See* Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc., 713 P.2d 55, 59 (Utah 1986); *see also* Ellis v. Hale, 373 P.2d 382, 385 (Utah 1962) (an essential element of a negligent misrepresentation claim is that there was a special duty of care running from the representor to the representee).

[250] *See Price-Orem*, 713 P.2d at 59.

Contributory negligence is an available defense to a defendant.[251] Accordingly, a plaintiff may not heedlessly accept a defendant's statements as true, but must exercise reasonable care to protect its own interest—that is, the care that would be exercised by an ordinary, prudent person in that plaintiff's circumstances.

[vi] Strict Liability

Strict liability may be imposed where an injury is occasioned by an abnormally dangerous or, in some states, an ultrahazardous activity, even in the absence of negligence or culpable conduct by a defendant.[252] The line of decisions allowing recovery under strict liability for environmental contamination is long and distinguished,[253] although state courts vary in their position on whether a successor landowner may recover from prior owners in strict liability.[254] As between sellers and buyers of real property, state court decisions often rely on the allocation of risk of environmental contamination as articulated by the parties in a purchase agreement.[255] Nevertheless, the potential reach of strict

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[251] *See Meibos*, 607 P.2d at 804 (negligence is a proper defense to a claim of negligent misrepresentation, but it is not a proper defense in the case of intentional misrepresentation).

[252] Prosser, *supra* note 219, § 78, at 555. Courts have found certain conditions and activities surrounding mining operations to be abnormally dangerous. For example, blasting has long been an activity to which strict liability attaches. *See* Colton v. Onderdonk, 10 P. 395, 397 (Cal. 1886); *see also* McGregor v. Barton Sand & Gravel, Inc., 660 P.2d 175, 182 (Or. Ct. App. 1983) (storage of water created a potential for harm of exceptional magnitude which could not be averted by exercise of utmost care); *but see* Williams v. Amoco Prod. Co., 734 P.2d 1113, 1122-23 (Kan. 1987) (drilling and operation of a natural gas well is not an abnormally dangerous activity).

[253] *See* William B. Johnson, Annotation, "Common-law Strict Liability & Tort of Prior Landowner or Lessee to Subsequent Owner for Contamination of Land with Hazardous Waste Resulting from Prior Owner's or Lessee's Abnormally Dangerous or Ultra Hazardous Activity," 13 *A.L.R. 5th* 600 (1993); *see generally* T & E Industries, Inc. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991) (current owner of contaminated property was not limited to contract remedies, but could maintain a tort action against the prior owner of property based on strict liability for having engaged in abnormally dangerous activities).

[254] *See, e.g.*, Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 101-02 (D. Mass. 1990) (applying Massachusetts law) (dismissing a gas station owner's strict liability claim against a prior owner for contamination because the harm caused by the defendant was to its own property rather than that of another).

[255] *See, e.g.*, Hanlin Group, Inc. v. International Minerals & Chem. Corp., 759 F. Supp. 925, 934 (D. Me. 1990) (applying Maine law) (existence of a purchase

liability in environmental contamination cases can be broad. In *T & E Industries, Inc. v. Safety Light Corp.*,[256] for example, the court held that a defendant seller was strictly liable to a purchaser of radium-contaminated property based on the abnormally dangerous activity of a distant predecessor in title.[257]

Assumption of, or consent to, a risk is available as a defense to strict liability.[258] However, contributory negligence is not a defense.[259]

[b] Advantages of State Common Law Claims

Primary among the relative advantages of pursuing state common law claims is the ability of private plaintiffs to recover response costs that may not be "necessary costs of response" or consistent with the NCP under CERCLA. As discussed above,[260] establishing these particular elements in a CERCLA cost recovery or contribution claim can pose difficulties to a private plaintiff, particularly in those circumstances where voluntary cleanups have been conducted with either limited or no government oversight. In these circumstances, a plaintiff may have made a calculated decision to bypass certain requirements under the NCP at the risk of foregoing recovery under CERCLA and to rely on state common law theories for its ultimate cost recovery.

Another benefit of pursuing applicable state common law theories of recovery is the broader range of remedies avail-

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agreement between the current and prior owners does not by itself eliminate the current owner's strict liability claim); *Wellesley Hills*, 747 F. Supp. at 102 (dismissing plaintiff's claim because plaintiff had assumed the risk of bearing the costs of cleanup which it knew of at the time of purchase); Allied Corp. v. Frola, 730 F. Supp. 626, 630 (D.N.J. 1990) (applying New Jersey law) ("as is" clause in a land sale contract did not extinguish the current owner's strict liability claims for damages resulting from the prior owner's processing of coal tar).

[256] 587 A.2d 1249 (N.J. 1991).

[257] *Id.*

[258] *See* Prosser, *supra* note 219, § 79, 565-67 (strict liability does not apply when the person harmed has reason to know of the risk that makes the activity dangerous and participates in the activity); *see also Wellesley Hills*, 747 F. Supp. at 101-02.

[259] *See* Branch v. Western Petroleum, Inc., 657 P.2d 267, 276 (Utah 1982).

[260] *See supra* § 6.02[1][e]-[f].

able to a plaintiff.[261] Under CERCLA, the measure of recovery is narrow,[262] extending only to response costs; the statute does not permit private plaintiffs to recover economic damages to property, profits, or natural resources, nor does it allow private plaintiffs to recover for any legitimate "response costs" incurred without at least substantial compliance with the NCP.

In contrast, a common law nuisance action, for example, offers a much broader range of relief, including (1) recovery of all damages without regard to whether they are of a temporary or permanent nature, and (2) the compensation for the diminution in value of land and for loss of use of land for the period of temporary injury. Likewise, the negligence action offers recovery for economic damages resulting from a defendant's negligence, as long as there has also been damage to a plaintiff's property. Successful prosecution of a strict liability action can result in an award of economic damages and even punitive damages.[263]

This added arsenal of legal claims and remedies gives a private plaintiff greater leverage in negotiating with defendants, in that a plaintiff wields all of the legal weapons necessary to recover *all* of its losses stemming from the contamination and cleanup, rather than just the necessary and NCP-consistent cleanup costs. The added leverage that results from the higher expected value of the claim may give defendants added incentive to settle quickly and thereby reduce their potential liability.

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[261] *See, e.g., supra* notes 219-59 and accompanying text that discuss various common law remedies. To appreciate the breadth of the common law rights of action, compare the common law measures of recovery to the "necessary and consistent" language that limits recoverable response costs in § 107(a) of CERCLA.

[262] *See supra* text accompanying notes 215-18.

[263] *See* Prosser, *supra* note 219, § 3, at 13-14; *see generally* David G. Owen, "Punitive Damages in Products Liability Litigation," 74 *Mich. L. Rev.* 1257 (1976). Punitive damages may also be recovered in nuisance actions; *see, e.g.*, Ruppel v. Ralston Purina Co., 423 S.W.2d 752 (Mo. 1968); Lutz v. Independent Constr. Co., 332 P.2d 269, 272 (Kan. 1958).

An added benefit of suing under state common law theories of recovery is the availability of a jury trial.[264] There is no right to a jury trial in CERCLA claims,[265] although federal courts have the discretion to employ a jury as an advisory panel under the Federal Rules of Civil Procedure. A court is more likely to use an advisory jury when a jury's presence is further necessitated by the pendency of state common law claims. In such cases a jury acts as factfinder on the state common law claims and advisor on the equitable CERCLA claims.[266] In contrast, the legal nature of state common law tort claims usually enables litigants to obtain a jury trial.[267]

[c] Disadvantages of State Common Law Claims

The relative disadvantages of state common law claims include complex burdens of proof relating to causation; causation requirements that are not amenable to summary judgment; a broader range of common law defenses that may be used to defeat, or substantially mitigate, the value of the claim; and, potentially, more restrictive statutes of limitations.

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[264] This "benefit" might just as well be characterized as a "disadvantage" since the CERCLA plaintiff may often wish to avoid a jury trial while defendants may exercise their power to invoke the right. *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 749 (8th Cir. 1986) (upholding the district court's denial of defendants' jury-trial demand because plaintiff only sought to recover equitable restitution) (citing Ross v. Bernhard, 396 U.S. 531 (1970)); Tri-County Business Campus Jt. Venture v. Clow Corp., 792 F. Supp. 984, 997 (E.D. Pa. 1992) (denying plaintiff's motion to strike defendant's jury demand as to plaintiffs' negligence, misrepresentation, and strict liability claims).

[265] *See* Mid Valley Bank v. North Valley Bank, 764 F. Supp. 1377, 1390 (E.D. Cal. 1991) (citing United States v. Louisiana, 339 U.S. 699 (1950) (Seventh Amendment has no application to suits in equity)). Since the CERCLA suit to recover costs of cleanup provides an essentially restitutionary remedy, the parties are not entitled to a jury trial under the Seventh Amendment. *Id.* (citing Porter v. Warner Holding Co., 328 U.S. 395 (1946) (where a private cause of action seeks reimbursement, the suit is in restitution, which is an equitable remedy), and United States v. Northernaire Plating Co., 685 F. Supp. 1410, 1413 (W.D. Mich. 1988), *aff'd*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990) (CERCLA suit lies in equity and, therefore, the Seventh Amendment is inapplicable).

[266] *See* Gopher Oil Co. v. Union Oil Co. of Cal., 757 F. Supp. 998, 1010 (D. Minn. 1991) (noting that use of a jury, already present to hear plaintiff's common law fraud claim, as an advisory jury provided "substantial assistance to the court"); *see also* Fed. R. Civ. P. 39(c).

[267] *See generally* United States v. Louisiana, 339 U.S. 699 (1950).

Under CERCLA, liability is strict without regard to causation. In contrast, pursuing state common law claims necessarily involves satisfying the complex burdens of factual and legal causation. Common law tort claims must be supported by evidence proving that a defendant's actions were the factual and legal cause of a plaintiff's harm.[268] The standard causation analysis involves answering two questions: first, whether the alleged conduct was the cause-in-fact of a plaintiff's injury; and, second, whether the conduct was the legal cause of, or a substantial factor in causing, a plaintiff's injury.[269] In determining whether a defendant's conduct was a substantial factor in causing a plaintiff's injury, a number of issues must be considered. These issues include all other factors that contributed to producing the harm, and the extent to which those factors did produce the harm; and the lapse of time between a defendant's conduct and a plaintiff's injury.[270] When a particular harm is attributable to more than one cause and there is a reasonable basis for determining the contribution of each cause to the harm, damages may be apportioned among the various causes.[271]

A private plaintiff must prove a number of facts to satisfy its burden of proof on causation in a state common law environmental contamination claim. First, a plaintiff will have to prove that there was an actual release of hazardous substances on a defendant's property. Second, a plaintiff must prove that the substance found on, beneath, or above its property came from a defendant's site. Third, a plaintiff must prove that, were it not for the release of the substance from a defendant's site, there would have been no environmental contamination impacting that plaintiff's property.

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[268] Prosser, *supra* note 219, § 41, at 263.

[269] *See* Mitchell v. Pearson Enters., 697 P.2d 240, 246 (Utah 1985), in which the Utah Supreme Court applied the "substantial causative factor" analysis in determining whether causation was established in a negligence case. Legal causation is the policy determination of whether liability should attach to conduct that was the cause-in-fact of an injury. Braegelmann v. County of Snohomish, 766 P.2d 1137, 1139 (Wash. Ct. App. 1989).

[270] *See Restatement (Second) of Torts* § 433(a), (c) (1965).

[271] *Id.* § 433A.

Fourth, a plaintiff may have to rebut a defendant's assertion that the contaminants found on that plaintiff's property were largely the product of that plaintiff's or another party's release and that, even if that defendant's release contributed marginally to the amount of contamination, it was actually that plaintiff's release or the other party's release that was the intervening cause of measurable contamination on that plaintiff's property. A defendant may further assert that its alleged release has only a minimal effect on the level of contamination and, thus, the alleged release was not a substantial, causative factor in a plaintiff's harm.

Depending on the nature of the tort claims and particular facts of the case, proving causation may be even more burdensome. In claims involving economic damages, for example, a plaintiff may have to rebut other contributing factors such as that plaintiff's weak financial condition; that plaintiff's dwindling market share; the effect of a general downturn in the economy on that plaintiff's business; or the effect of a downturn in land values on a diminution in property value claim. Accordingly, the burden of establishing causation in state common law claims can be substantial, especially when compared with the relatively simple and straightforward strict liability standard for CERCLA claims.

As a result of the more complex chains of causation required to be proven in state common law claims, such issues are often less amenable to disposition by summary judgment. The task of proving factual and legal causation can give rise to volumes of new and relevant issues of fact. As more relevant facts become genuinely disputed by the parties, a court is more likely to require formal adjudication of the claims. The effect is that the determination of disputed links in the causation chain will often necessitate disposition of the claim through trial or, at least, only after significant discovery. Accordingly, one of the principal advantages of state common law claims—a plaintiff's increased negotiating leverage—may be compromised, and defendants may not be inclined to consider serious settlement negotiations until later, rather than sooner, in the litigation process.

In several respects, sorting out the causation issues in state common law claims is comparable to applying equitable

factors in the damages phase of CERCLA claims under sections 107 and 113. However, in contrast to state common law claims, courts are generally receptive to bifurcating the issues of liability and damages in CERCLA claims and finding defendants jointly and severally liable in the initial liability phase of cost recovery litigation. This early determination of defendants' liability often strategically benefits private plaintiffs.

With respect to defenses, while section 107 and 113 claims under CERCLA are subject to very limited affirmative defenses, state common law theories are susceptible to any number of equitable defenses, including laches,[272] assumption of risk,[273] and contributory negligence.[274] The scope of equitable defenses may make the pursuit of state common law remedies a less attractive proposition, depending on the particular facts of the case.

Another possible disadvantage of state common law claims pertains to statutes of limitations. Under CERCLA section 107 and 113 claims, private litigants face statutory limitation periods ranging from three to six years depending on the nature of the claim. In common law actions, state law will generally provide the applicable statute of limitations period, and this period may vary widely, depending on the tort and the forum state. A further advantage of the CERCLA statutory limitation periods is that the time clearly does not begin to run until a removal and/or remedial action has been completed or, in the case of a section 113 contribution claim, until after a judgment, consent order, or judicially-approved settlement has been entered. In comparison, state law statutory periods, which are generally shorter in duration, may begin to run on the date of the release of hazardous

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[272] *See, e.g.*, Anchor Sav. & Loan Ass'n v. Dysart, 368 P.2d 293, 294 (Kan. 1962).

[273] *See, e.g.*, Branch v. Western Petroleum, Inc., 657 P.2d 267, 276 (Utah 1982) (allowing assumption of risk as a defense to nuisance). *See also* Prosser, *supra* note 219, § 68, at 484-98 (discussing assumption of risk as a defense to negligence).

[274] *See, e.g.*, *Branch*, 657 P.2d at 276 (contributory negligence is not a defense to nuisance or strict liability); Berkeley Bank for Coops. v. Meibos, 607 P.2d 798, 804 (Utah 1980) (contributory negligence is a proper defense to a claim of negligent misrepresentation, but it is not a proper defense in the case of intentional misrepresentation).

substances, unless the state has adopted the "discovery rule," which may act to toll the running of the limitations period for certain tort claims,[275] or unless a court characterizes the contamination as a continuing act such that the statutory period has not yet accrued.[276]

§ 6.06 Environmental Coverage Litigation

In addition to cost recovery litigation under CERCLA and other federal statutory and state common law theories, environmental coverage litigation has emerged as fertile ground to recover environmental response costs. Understanding the availability of insurance coverage and taking advantage of the financial resources potentially available under policies of insurance may benefit a company significantly in its efforts to meet its environmental obligations. However, environmental coverage litigation is complex and is often protracted, fiercely contended, and expensive. In many of these cases, an insured and insurer have much more at stake than the resolution of who should pay for environmental liabilities at a subject site. An insured may be seeking to establish its coverage position respecting several other hazardous waste sites, while an insurer may be guarding against coverage liability to other insureds with identical policies.[277]

Coverage for environmental claims is most often sought under the bodily injury and property damage liability provisions of standard comprehensive general liability (CGL) policies.[278] These policies, drafted by the insurance industry to provide broad liability coverage to an insured, transfer

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[275] *See, e.g.*, Sevy v. Security Title Co., 857 P.2d 958, 961 (Utah Ct. App. 1993); Klinger v. Kightly, 791 P.2d 868, 871 (Utah 1990).

[276] *See, e.g.*, Mangini v. Aerojet-General Corp., 281 Cal. Rptr. 827 (Cal. Ct. App. 1991).

[277] For an insightful discussion of strategic considerations in environmental coverage litigation, see Thomas H. Milch, "Strategic Considerations When Choosing A Forum," *The Brief* 19 (Summer 1993).

[278] First introduced in approximately 1940, the standard CGL policies have undergone significant, substantive revisions in 1966, 1973, and 1986. Generally speaking, the 1966 revision changed the standard policy from an "accident-based" to "occurrence-based" policy. In 1973 the "pollution exclusion" clause was added. Finally, in 1986 the pollution exclusion was rewritten and became more restrictive under the so-called "absolute pollution exclusion."

the risk of loss to an insurer, absent specific exclusion. Environmental coverage disputes involve generally "occurrence-based" policies.[279] These policies provide coverage against liability, whenever imposed or threatened to be imposed, as a result of bodily injury or property damage that occurs during the effective policy period. Thus, recently discovered environmental damage arising from past occurrences may trigger coverage under older policies. As the insurance industry continues to substantially restrict the scope of coverage under CGL policies, these older policies may provide the most likely means for recovery of environmental claims.

The language of the standard CGL policies and the fact-specific nature of most environmental coverage disputes raise several legal issues upon which coverage turns. The most significant coverage issues raised by environmental claims include:

(1) Whether an insurer has a duty to defend an insured and if so, when the defense obligation commences;

(2) Whether the claim involves an "occurrence" as defined in the policies at issue;

(3) Whether coverage is "triggered" under a particular policy;

(4) Whether environmental claims constitute "property damage;"

(5) Whether the term "damages" in the policy includes coverage for cleanup costs; and

(6) Whether any pollution exclusion, as discussed at § 6.06[7], *infra*, removes coverage for claims involving environmental damage.

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[279] "Occurrence" policies provide coverage for liability for bodily injury or property damage arising during the policy term, regardless of the year in which a claim alleging liability for such damage is brought. These policies are to be distinguished from "claims made" policies. Under those policies coverage is effective if the claims alleging liability are made within the policy period, or any extending reporting period under the policy, and result from an occurrence that took place after the retroactive date stated in the policy declarations.

Other important issues that appear less commonly include the interpretation of the owned-property and alienation-of-property exclusions, and the extent to which the policy drafting history is discoverable, admissible, and relevant to coverage issues. Significantly, an insured must prevail on all coverage issues or else coverage will be denied. Thus, litigation of coverage issues is an all-or-nothing proposition for an insured.

The diversity and patchwork of decisions in different states and courts on these critical coverage issues make evaluation and prosecution of environmental coverage claims complex. Although a discussion of these substantive issues is beyond the scope of this paper, a brief discussion of strategic considerations respecting environmental coverage claims is warranted.[280]

[1] Coverage Evaluation

A comprehensive coverage evaluation should be conducted of all CGL policies that may relate to any period during which alleged environmental damage may have occurred.[281] This evaluation should include a search for copies, or secondary evidence, of all potentially applicable policies. Secondary evidence might include correspondence, claims files, management reports, ledger entries, and premium receipts. If the primary policies (the policies which provide for defense and first layer indemnity coverage) cannot be located, and a company purchased excess or umbrella insurance coverage, the schedules in the excess and umbrella policies may disclose relevant underlying coverage.[282]

In addition to policies purchased directly by a company, the coverage evaluation should include policies held by or benefiting companies or operations acquired by merger or acquisition.[283] Policies held by a company during a period when alleged contamination occurred, even though the property in

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[280]For a concise discussion of strategic issues relating to environmental coverage issues, see Stephen C. Jones, "Debate Rages Over Insurance Coverage," *Nat'l L.J.* 20, 22 (Feb. 24, 1992).

[281]Jones, *supra* note 280, at 22.

[282]Eugene R. Anderson, *et al.*, "A Policyholder's Primer on Environmental Insurance Recovery," *J. Envtl. L. & Prac.* 5, 8 (Sept.-Oct. 1993).

[283]Jones, *supra* note 280, at 22.

question was not acquired by the company until later, nevertheless may provide coverage for damages related to that property.

[2] Notification of Insurers

A majority of courts have found that an insurer's duty to defend commences with an insured's receipt of a government notice letter of potential liability under CERCLA.[284] Upon determining that a claim may exist, an insured should give written notice of the claim to all of its insurers that may be asked to provide coverage.[285] To preserve all available rights under the policies, notice should be given even if no final decision to pursue coverage has been made.[286] In certain jurisdictions, insureds may forfeit coverage for failure to provide timely notice to insurers.[287] As a practical matter, an insured should not only give written notice of the claim but also demand that its insurer provide a defense under the policy. Given the extraordinary costs of defending typical CERCLA matters, the defense obligation, particularly for de minimis potentially responsible parties, may be the most critical aspect of these policies.

[3] Procedural Issues

As part of the coverage evaluation, counsel should determine whether any strategic advantage can be gained by filing suit first rather than awaiting a declaratory judgment action

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[284] *See, e.g.*, Quaker State Minit-Lube, Inc. v. Fireman's Fund Insurance Co., Civ. No. 91-C-461J, slip op. at 51-52 (D. Utah Mar. 21, 1994) (concluding that EPA potentially responsible parties (PRP) notice letters are "no trifling matter," the court found that such letters constituted a "suit" as defined in the liability policies); Aetna Casualty & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1516-18 (9th Cir. 1991) (the CERCLA process distinguishes PRP notice letters from garden variety demand letters such that PRP notice letters trigger the duty to defend); United States Aviex Co. v. Travelers Ins. Co., 336 N.W.2d 838, 843 (Mich. Ct. App. 1983) (notice of potential liability under CERCLA comes within the meaning of "suit" as used in liability policies).

[285] Jones, *supra* note 280, at 22.

[286] *Id.*

[287] State statutes may provide that late notice may still be effective notice, and that even failure to give notice may not invalidate a claim if an insurer was not prejudiced by the failed notice. *See, e.g.*, Utah Code Ann. § 31A-21-312(1)(b), § 31A-21-312(2) (1992); *see also* State Farm Mut. Auto. Ins. Co. v. Stanley, 966 F.2d 628, 630 (11th Cir. 1992).

brought by insurers.[288] Because of the complexity and expense of litigating environmental coverage claims, insureds should attempt to steer their disputes with insurers toward early settlement. If, however, negotiations fail and the filing of a suit becomes necessary, then timing is an important consideration.

Given the inconsistency of judicial interpretations among the different states and courts on critical coverage issues, selection of the appropriate forum and careful evaluation of choice-of-law principles are of paramount importance. For example, the duty to defend in some jurisdictions may be based exclusively on the allegations against an insured, while, in other jurisdictions, an insurer may be allowed to demonstrate that despite the allegations, the facts giving rise to the claim are not covered.[289] Thus, if defense costs are likely to be significant and the allegations against an insured are more likely to trigger coverage than are the actual facts, then the determination of applicable state law becomes critical. Forum shopping and choice-of-law considerations are perhaps most significant with respect to pollution exclusion policies. The "sudden and accidental" exception to the pollution exclusion may be interpreted in certain jurisdictions to include gradual, long-term releases of hazardous substances, while in other jurisdictions it may not, and coverage will thereby be defeated.

Both an insured and insurer have a substantial interest in adjudicating the suit in a forum of their choice. Thus, forum shopping and choice-of-law issues deserve consideration in formulating coverage litigation strategy.

[4] Drafting History

In pursuing coverage for environmental claims, insureds should recognize the importance of early, thorough discovery. Discovery should focus on policy records, underwriting files, and materials and documents relating to insurance industry drafting history. Although most of the policy drafting history documents have been produced only pursuant to protective orders, which limit their dissemination and use, many of these

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[288] Jones, *supra* note 280, at 22.

[289] Milch, *supra* note 277, at 21.

materials can be made available indirectly through court records or directly through formal discovery procedures.[290]

Numerous courts which have relied on the drafting history have construed policy provisions in favor of an insured.[291] These courts recognize that the drafting history demonstrates that the policy drafters considered and ultimately rejected the interpretations now urged by the insurance industry. For example, the insurance industry, contrary to the position it now articulates, unequivocally stated when it proposed the pollution exclusion that the exclusion served to clarify then-existing coverage by restating that only damages that were expected or intended would not be covered.[292] This evidence of the drafting history supports the interpretations of insureds or, at a minimum, demonstrates that the policy language is reasonably susceptible to the policy interpretations advocated by insureds. Thus, the drafting history can be critical to establishing coverage.

Non-dispositive discovery motions as well as allegations in the coverage complaint can also be useful in providing a court with an appreciation of the significant coverage issues and supporting drafting history. Increasingly, insureds are also raising estoppel arguments regarding, for example, the pollution exclusion, arguing that insurers, or the insurance industry, have previously stated that the pollution exclusion excepted only "intentional" damage and that insurers are now estopped from asserting the contrary.[293]

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[290] *See* Richard W. Fields, "Disputing Coverage for Environmental Claims," *The Brief* 12, 57 (Summer 1993).

[291] *See, e.g.*, New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1198 (3d Cir. 1991), *rev'd on other grounds*, 970 F.2d 1267 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993) (drafting history indicates "the clause was a mere clarification of the 'occurrence' definition"); Morton Int'l, Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993) ("sudden and accidental" language should be applied consistently with industry representations to the New Jersey regulatory authorities that the pollution exclusion merely clarified existing coverage); Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992) (court relied on an affidavit of the West Virginia Insurance Commissioner as to the insurer's original intent in drafting the pollution exclusion clause).

[292] Fields, *supra* note 290, at 56.

[293] *See* Milch, *supra* note 277, at 21. *See also* Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71, 74-75 (E.D. Mich. 1987); Independent Petrochem. Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1345-46 (D.D.C. 1986), *aff'd in part and*

[5] Summary Adjudication

The duty to defend and the duty to indemnify are independent of each other. The duty to defend, unlike the duty to indemnify, often can be resolved on the face of the complaint as a matter of law, and need not await adjudication of the indemnity claims.[294] By definition, then, the defense duty is an issue suited for summary adjudication. In contrast, the duty to indemnify cannot be resolved until final adjudication of the facts in the underlying environmental suit. The same is generally true of any policy defenses that may be asserted; each requires the resolution of certain facts and issues before its application can be determined.[295] Disputed factual issues may include the knowledge and intent of an insured when it engaged in various activities at a site; the timing of the occurrence; the temporal duration of various releases involving hazardous wastes; and the nature and extent of off-site damages and injury to groundwater. For example, it cannot be determined whether the property damage caused on a site was "neither expected nor intended from the standpoint of the insured," as required in the policy's definition of occurrence, until the facts are resolved in the underlying environmental suit.

From a strategic standpoint, establishing a duty to defend early in the environmental coverage case may provide an insured with significant leverage on indemnity issues under the subject policies. Particularly when the underlying cost recovery claims are complex and subject to protracted litiga-

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rev'd in part, 944 F.2d 940 (D.C. Cir. 1991), *cert. denied sub nom.* Certain Underwriters of Lloyd's, London v. Independent Petrochemical Corp., 112 S. Ct. 1777 (1992).

[294] In order to determine whether an insured's duty to defend is triggered in a particular case, courts apply what is referred to as the "comparison test," which involves a comparison of the policy provisions with the allegations of the complaint. The duty to defend is triggered whenever that comparison reveals any claim potentially within the coverage of the policy. The duty can be declined only when there is no set of facts under the allegations of the complaint which would be covered, if proven.

[295] For these reasons, courts have generally held that an insurer has a duty to defend, and have granted summary judgment on that issue, but have declined judgment on the duty to indemnify pending resolution of the disputed factual issues. *See, e.g.*, Centennial Ins. Co. v. Applied Health Care Sys., Inc., 710 F.2d 1288, 1292 (7th Cir. 1983); Idaho v. Bunker Hill Co., 13 Chem. Waste Lit. Rep. 648, 651-52 (D. Idaho 1987); United States v. Conservation Chem. Co., 653 F. Supp. 152, 160 (W.D. Mo. 1986).

tion, insurers may agree to shift dollars, which would otherwise be expended on the defense obligation, to the indemnity obligation in order to facilitate settlement of the underlying claims. Equally significant, establishing an insurer's defense obligation can bolster an insured's negotiating leverage vis-a-vis the other potentially responsible parties in the underlying cost recovery litigation.

[6] Maximizing Coverage

Numerous courts have expressed various theories for determining when, in the context of an environmental coverage claim, an "occurrence" has taken place within the meaning of a standard CGL policy.[296] The task of an insured's counsel is finding the trigger of coverage theory that not only supports coverage, but maximizes, to the extent possible, coverage under the facts of the case. Thus, policy limits and self-insured retentions (deductibles) should be carefully analyzed in order to decide on the best approach for determining how and when property damage triggering coverage under the policies occurred.[297] Depending on the scope of coverage limitations, coverage amounts, and deductibles, the resolution of which years' policies cover which property damage will likely have an important impact on the dollar amounts ultimately recovered by an insured.[298] Advocating, for example, the "injury-in-fact" theory rather than a "manifestation" theory as a trigger of coverage for a pre-pollution exclusion policy can make the difference between recovery and no recovery.

[7] Pollution Exclusion

Of the major coverage issues raised in environmental coverage claims, the so-called "pollution exclusion" has clearly engendered the most debate. The pollution exclusion provision, added to the standard CGL policy in the early seventies, consists of two parts: an exclusion and an exception to the exclusion. The "pollution exclusion" excludes from coverage

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[296] Trigger of coverage theories that have been articulated by courts include the "exposure" trigger, the "actual injury" or "injury-in-fact" trigger, the "manifestation" trigger, and the "continuous" trigger.

[297] Jones, *supra* note 280, at 22.

[298] *Id.*

property damage arising out of the discharge, dispersal, release, or escape of contaminants or pollutants *unless* such discharge, dispersal, release, or escape is "sudden and accidental."

As one might expect, the majority of judicial opinions concerning the pollution exclusion have focused on the exception to the exclusion—the "sudden and accidental" clause. Those cases upholding coverage have consistently interpreted the pollution exclusion to preclude coverage only if an insured "intended or expected" the damage resulting from its operations, and not to exclude coverage merely because the pollution resulted from the regular course of that insured's business.[299] Moreover, in following this rule, these cases have interpreted the term "sudden and accidental" to mean "unexpected and unintended," relying on dictionary definitions of the term "sudden" which imputes no temporal significance to that term.[300]

However, an emerging, and now apparent majority, view gives effect to the pollution exclusion clause.[301] In interpreting the pollution exclusion, these cases focus not on the *harm*, but on the *release* of contaminants into the environment. These cases find coverage excluded by the pollution exclusion if the release of the pollutants into the environment was expected or intended by an insured. Moreover, these cases specifically reject the line of cases that read "sudden and accidental" to mean merely "unexpected or unintended." Instead, these cases find that the term "sudden" is not ambiguous, and that it has a temporal connotation in the sense of instantaneous or abrupt. Thus, coverage is precluded for gradual, long-term releases to the environment.

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[299] *See, e.g.*, National Grange Mut. Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404, 1407-08 (S.D.N.Y. 1986); Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990, 993-94 (N.J. Super. Ct. App. Div. 1982).

[300] *See, e.g.*, Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992); Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987).

[301] *See* Smith v. Hughes Aircraft Co., 10 F.3d 1448, 1452-53 (9th Cir. 1993); Anaconda Minerals Co. v. Stoller Chem. Co., 990 F.2d 1175, 1178 (10th Cir. 1993); Northern Ins. Co. v. Aardvark Assocs., Inc., 942 F.2d 189, 191-93 (3d Cir. 1991).

In view of this recent trend of decisions restricting coverage under the pollution exclusion clause, a comprehensive review of CGL policies that predate the pollution exclusion clause and that may relate to any period during which an alleged occurrence took place, should be conducted. If the underlying litigation involves allegations of pre-pollution exclusion occurrences, the pollution exclusion clause cannot operate as an entire bar of an insurer's defense and indemnity obligation. Thus, even if a court were to give the pollution exclusion clause absolute preclusive effect, those allegations would still contain potentially covered claims.

[8] Coordination of Environmental and Coverage Litigation

Last, but certainly not least, handling of the underlying environmental suit and coverage litigation should be closely coordinated to minimize potential conflicts in positions taken by an insured.[302] For example, findings, decisions, and positions taken with respect to the environmental remediation concerning the temporal nature of the alleged releases may affect later decisions regarding the potential applicability of the pollution exclusion.

Thus, it is critical, to the extent practicable, that factual, legal, and strategic issues and positions articulated for purposes of dealing with insurers be consistent with the issues and positions articulated in negotiations with the government and potentially responsible parties involved in the underlying environmental matters.[303]

§ 6.07 Conclusion

Environmental cleanups typically involve several millions of dollars. Faced with this prospect, private parties often must pursue claims against other responsible parties to recover all or part of the costs of cleanup and damages arising from environmental contamination.[304] Private

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[302] Jones, *supra* note 280, at 22.

[303] *Id.*

[304] Private parties should also consider other alternatives for either financing or minimizing the costs of environmental cleanups such as state sales tax exemptions on pollution control equipment or the issuance of tax-exempt municipal bonds.

parties that understand the complexities associated with pursuing CERCLA cost recovery and contribution claims as well as other statutory, contractual, and tort claims for recovery of environmental costs and damages are in the best position to recover against other responsible parties. A strategic approach that realistically assesses each of the various theories of recovery will enhance the likelihood of success. Strategic considerations such as bifurcating issues of liability and damages and seeking an early summary judgment on liability may narrow the scope of discovery and reduce overall litigation costs in a cost recovery case. Moreover, such strategies, if successful, often generate significant negotiating leverage.

However, pursuing cost recovery is not without risk. Aside from the potential pitfalls associated with each of the various theories of recovery, private parties must manage cost recovery litigation with an eye toward minimizing its impact on ongoing environmental cleanup efforts and potential toxic tort claims that may arise from environmental contamination at a site. Coordinating strategies, discovery findings, and positions taken in the cost recovery litigation with those strategies, findings, and positions taken in the administrative cleanup action and environmental coverage litigation is critical to minimizing these potential impacts and risks. Thus, the ultimate task of counsel is to develop and implement a thoughtful strategic approach to cost recovery that will maximize recovery of environmental costs and damages while minimizing the expenses and risks associated with environmental cost recovery litigation.

Furthermore, the Internal Revenue Service recently ruled that certain environmental cleanup costs are deductible for income tax purposes. *See* Rev. Rul. 94-38, 1994-25 I.R.B. 4 (June 2, 1994). Given the potential magnitude of environmental cleanup costs, this deduction can translate into substantial savings. For example, a corporate taxpayer may be able to subsidize cleanup costs by up to 35% if cleanup expenditures are deducted.