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STANDING FOR POTENTIALLY RESPONSIBLE PARTIES UNDER §§ 107 AND 113 OF CERCLA

*Laidlaw Waste Systems Inc. v. Mallinckrodt Specialty Chemicals*¹

by Edward S. Stevens

I. Introduction

One of the greatest uncertainties in environmental litigation is standing under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).² The issue is not whether a certain person is able to bring suit under the act, but whether that person, specifically a potentially responsible party (PRP), will be able to pursue a contribution action under § 107 of CERCLA, which imposes joint and several liability.³ If the PRP is not granted standing under § 107, the PRP is relegated to an action under § 113.⁴ In *Laidlaw*, the U.S. District Court for the Eastern District of Missouri added itself to the list of courts which allow PRPs to pursue actions under either statute.

This decision represents more than a mere technical or inconsequential aspect of CERCLA liability. Standing under § 107 for plaintiff-PRPs gives such plaintiffs numerous advantages, greatly increasing their chances of obtaining a full recovery. This holding also reflects policy judgments concerning the

cleanup of hazardous substances in the United States. This Note contends that the ruling in *Laidlaw* was consistent with the stated purpose of CERCLA, which is to promote the prompt and efficient remediation of contaminated sites.⁵ This Note, also, analyzes various commentators' proposals to amend CERCLA which attempt to solve the §§ 107/113 problem. Finally this Note discusses ways in which the courts, in the absence of statutory amendment, can follow the lead of the *Laidlaw* court and solve the 107/113 dispute in a way which encourages the voluntary remediation of contaminated sites.

II. Facts and Holding

From October, 1983, to May, 1991, plaintiffs, Laidlaw Waste Systems Inc.,⁶ owned and operated a licensed and permitted sanitary landfill site in Belleville, Illinois.⁷ During this time, the Illinois Environmental Protection Agency (IEPA) issued a supplemental waste stream permit for the site to accept and dispose of celite-darco filter cake ("filter cake"), a nonhazardous substance under § 101 of CERCLA.⁸

Defendants Mallinckrodt Inc. and Mallinckrodt Chemical, Inc. ("Mallinckrodt") and their corporate predecessor Mallinckrodt Specialty Chemicals Company arranged to have Laidlaw transport and dispose of their filter cake, representing to plaintiffs that it was a nonhazardous substance for CERCLA purposes.⁹ During this relevant period of time, plaintiffs accepted and disposed of the material at the Belleville site.¹⁰ Some time later, defendants revealed that their filter cake contained unacceptable levels of barium and chromium and was therefore a hazardous substance as defined in § 101(14) of CERCLA.¹¹

On June 28, 1995, plaintiffs entered into a Consent Order with Illinois.¹² Laidlaw did not admit any violations by entering into the Order.¹³ The Order required plaintiffs to remove and remedy releases or threats of releases at the site.¹⁴ Mallinckrodt's corporate predecessor entered into a similar Consent Order based on an action to recover civil penalties, but not response costs.¹⁵ Plaintiffs then initiated this action in the United States District Court for the Eastern District of Missouri. Laidlaw brought a complaint against Mallinckrodt, seeking declaratory relief under § 107 of CERCLA¹⁶ (Count I); private cost-recovery under § 107 of CERCLA (Count II) or; in the alternative contribution under § 113 of CERCLA¹⁷

¹925 F. Supp 624 (E.D.Mo 1996).

²42 U.S.C. Secs. 9601-75 (1995)

³42 U.S.C. Sec. 9607.

⁴42 U.S.C. Sec. 9613.

⁵Dickerson v. U.S., 834 F.2d 974, 978 (11th Cir. 1987).

⁶*Laidlaw*, 925 F. Supp. at 624. Plaintiffs consist of two corporations. Both are named Laidlaw Waste Management Inc. but one is incorporated in Missouri ("Laidlaw Belleville") and the other is a Delaware corporation ("Laidlaw"). *Id.* at 627.

⁷*Id.* at 628. Laidlaw Belleville owned the site. *Id.*

⁸*Id.*

⁹*Id.* Defendant made similar assertions to the Illinois Environmental Protection Agency. *See* 42 U.S.C. § 9601.

¹⁰*Id.*

¹¹*Id.* *See*, 42 U.S.C. sec 9601(14). The record does not indicate exactly when this disclosure was made.

¹²*Id.*

¹³*Id.* The Order could be used against them in a future proceeding as evidence of prior adjudication.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*See*, 42 U.S.C. sec. 9607.

¹⁷*See*, 42 U.S.C. sec. 9613.

(Count III).¹⁸ Defendants moved to dismiss all of the counts pursuant to Federal Rule of Civil Procedure 12 (b) (6).¹⁹ The motion was treated as one for summary judgment because defendant asserted matters outside the pleadings in support of the motion.²⁰ The motion, therefore, could be granted if all the information before the court showed that there was no genuine issue of material fact and the moving party was entitled to judgment as a matter of law.²¹

Defendants argued that Counts I, II and III should be dismissed because defendant's Consent Order with the Illinois Environmental Protection Agency precluded the cost-recovery and contribution claims.²² CERCLA § 113 (f)(2) states:

Any person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others

by the amount of the settlement.²³

Because the Consent Order between Mallinckrodt and IEPA covered only civil penalties and not response costs, the court held that Laidlaw was not precluded from bringing cost-recovery and contribution claims.²⁴

Finally, defendants argued that plaintiff lacked standing under § 107 of CERCLA because Laidlaw, as owner and operator of the site, was itself a PRP.²⁵ Plaintiff alleged that an action under § 107 is not limited to "innocent" parties.²⁶

The court had to choose between restricting PRP standing to contribution actions or giving PRPs the benefit of joint and several liability under § 107. Although the court recognized that at least two federal circuit courts of appeals have ruled to the contrary,²⁷ the court held that "[t]he plain language of §§ 107 and 113 does not indicate that PRPs are prohibited from bringing claims pursuant to § 107."²⁸ Accordingly, the court permitted plaintiffs as PRPs to continue with their § 107 action.²⁹

III. Legal Background

A. CERCLA Standing Before the 1986 SARA Amendments

The § 113 contribution cause of action did not exist until Congress enacted the Superfund Amendments and Reauthorization Act (SARA) in 1986.³⁰ SARA reauthorized CERCLA and modified many of its §§. Before 1986, the § 107 cost recovery action controlled both general claims and contribution claims. The statute provided liability for "any other necessary costs of response incurred by any other person consistent with the national contingency plan."³¹ The use of the term "any other person" was treated by courts as evidence of legislative intent to permit recovery by private PRPs.³² Courts used this broad language to allow contribution claims under § 107.³³

The courts also determined that the legislative history of the original CERCLA indicated an intent for common law tort principles to govern liability under § 107.³⁴ The courts, using the common law principle that liable parties are jointly and severally liable when the harm is indivisible,³⁵ frequently held defendants jointly and severally liable under § 107.³⁶ The courts placed upon defendants the burden of proving that the injury was divisible.³⁷ This burden was difficult to bear because waste at

¹⁸925 F. Supp. 624 at 626. Laidlaw also brought five additional counts, requesting damages for breach of contract (Count IV), misrepresentation (Count V), nuisance (Count VI), negligence (Count VII) and negligent misrepresentation (Count VIII). The court dismissed the misrepresentation claim (Count V) and found that there were genuine issues of material fact as to Counts IV, VI, VII and VIII.

¹⁹*Id.* F.R.C.P. 12 (b)(6) provides for dismissal when plaintiff has failed to state a claim upon which relief can be granted.

²⁰*Id.* See, *Woods v. Dugan*, 660 F.2d 379 at 380 (8th Cir. 1981).

²¹*Id.*

²²*Id.*

²³42 U.S.C. 9613 (f) (2).

²⁴925 F. Supp. 624 at 631.

²⁵*Id.*

²⁷See, *infra* note 33.

²⁸925 F. Supp. 624 at 630.

²⁹*Id.*

³⁰Superfund Amendments and Reauthorization Act, P.L. 99-499, 100 stat. 1613.

³¹42 U.S.C. sec. 9607 (a) (4) (B).

³²*Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985), *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984). See also, Ann Alexander, *Standing Under Superfund secs. 107 and 113: Avoiding the Error of the Blind Man and the Elephant*, 10 TOXICS L. REP. (BNA) 155 (July 12, 1995) [hereinafter "Standing Under Superfund"].

³³See, *Borough of Sayreville v. Union Carbide Corp.*, 923 F.Supp. 671 (D.N.J. 1996).

³⁴Richard Buckley, *Making a Case for Statutory Amendment to the Comprehensive Environmental Response, Compensation and Liability Act: Solving the Section 107/Section 113 Cause of Action Controversy*, 31 TULSA L.J. 851, 855 (1996).

³⁵See RESTATEMENT (SECOND) OF TORTS 433A (1979) (apportionment permissible if rational basis exists to make division of harm).

³⁶Standing Under Superfund, *supra* note 32 at 159.

³⁷See, *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 at 809 (S.D. Ohio 1983).

the sites was constantly commingled. Therefore, few cases resulted in several liability.³⁸ Trials were bifurcated: courts initially made a decision regarding joint and several liability and then allocated the cleanup costs to each defendant.³⁹

Prior to the enactment of SARA, courts uniformly allowed claims for contribution under § 107 and, despite the common law rule that applied several liability to contribution claims, almost always imposed joint and several liability. This simplicity would not last long; in 1986, via SARA, Congress chose to codify the right to contribution.⁴⁰ This codification created conflicting views in the courts on the availability of joint and several liability under § 107.

B. SARA

In 1986, Congress set out to "confirm" the pre-existing judicial decisions which gave "potentially responsible parties . . . a right of contribution under CERCLA."⁴¹ Congress chose not to amend § 107 to create such a cause of action, but rather enacted an entirely separate provision, § 113 (f).⁴² § 113 (f)(1) reads: "Any person may seek contribution from any other person who is liable or potentially liable under § [107(a)] of this title, during or following any civil action under §

[106] of this title or under § [107(a)] of this title."⁴³ After the passage of § 113, courts struggled to determine whether the original § 107 action was subsumed in § 113 or whether PRPs now had a choice as to which action to pursue.⁴⁴

There are numerous rewards to a PRP who is allowed to pursue a § 107 cost-recovery action. First, the statute of limitations under § 107 is six years, which does not start running until the "initiation of physical on-site construction of the remedial action."⁴⁵ By contrast, the contribution action under § 113 must be brought within three years of either a cost recovery action or an administrative order.⁴⁶ A second advantage of a § 107 cost recovery action is the availability of joint and several liability.⁴⁷ Liability in the contribution action, as with all contribution actions, is only several.⁴⁸ The availability of joint and several liability reduces the likelihood that the plaintiff PRP will be forced to bear the cleanup costs attributable to defunct, bankrupt or otherwise judgment-proof parties.⁴⁹ Several liability on the other hand only holds defendants liable for their share of the cleanup costs.⁵⁰

Another benefit of § 107 to plaintiff PRPs is that only § 113 provides immunity for parties who have settled

with the government.⁵¹ Finally, if the plaintiff is allowed to bring a cost-recovery action, the defendant is permitted to assert only the defenses enumerated in § 107 (b).⁵² Under § 107 (b), defendant can assert that the damages resulted from an act of God, an act of war, or "an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship . . . with the defendant."⁵³ The defendant in the contribution action, however, can assert other equitable, non-statutory defenses.⁵⁴ For these reasons, § 107 is the more desirable cause of action for the plaintiff PRP.

The first federal circuit court of appeals to specifically address whether or not a plaintiff PRP could receive the benefits of a simple cost-recovery action after SARA⁵⁵ was the Seventh Circuit in *Akzo Coatings, Inc. v. Aigner Corp.*⁵⁶ In that case the plaintiff had been one of thirty-five companies ordered by the EPA to cleanup the site, pursuant to § 106.⁵⁷ After the cleanup, plaintiffs brought suit against a PRP that the EPA had not included in its § 106 recovery action.⁵⁸ That court denied plaintiff standing

³⁸Standing Under Superfund, *supra* note 32 at 160.

³⁹*Id.*

⁴⁰42 U.S.C. § 9613 (f).

⁴¹H. R. Rep. No. 167, 99th Cong., 1st Sess., pt. 1, (1985).

⁴²42 U.S.C. 9613 (f)

⁴³42 U.S.C. 113 (f) (1)

⁴⁴*See, supra* note 33 and accompanying text.

⁴⁵42 U.S.C. 9613 (g) (2) (B). Note that for removal actions, the cost recovery suit must be brought within three years of completion of the removal action. 42 U.S.C. 9613 (g) (2) (A).

⁴⁶42 U.S.C. 9613 (g) (3) (A) and (B).

⁴⁷*See, supra* note 31 and accompanying text.

⁴⁸42 U.S.C. 113(f).

⁴⁹David Barnhizer, *Recent Development: Joint and Several Liability and Contribution Under CERCLA Sections 107 (a) (4) (B) and 113 (f) (1)*, 18 HARV. ENVTL. L. REV. 563 at 570 (1994).

⁵⁰42 U.S.C. 113(f).

⁵¹*See, supra* note 23 and accompanying text.

⁵²42 U.S.C. 107 (b) (1), (2), (3).

⁵³*Id.*

⁵⁴*See, Barnhizer, supra* note 49, at 565.

⁵⁵*But see, Amoco v. Borden*, 889 F.2d 664 (5th Cir. 1989). The point was apparently not disputed. The Fifth Circuit stated that, once liability is established (between PRPs), § 113 must be applied. *See also, In Re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991).

Other courts used language suggesting the same result without specifically holding so.

⁵⁶30 F.3d 761 (7th Cir. 1994).

⁵⁷*Id.* at 763.

⁵⁸*Id.*

under § 107, stating that plaintiff's "claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. Akzo's suit accordingly is governed by § 113(f)."⁵⁹ The *Akzo* court did not, however, hold that § 107 was limited to actions by governmental authorities. It suggested that "a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands" might still be able to bring a § 107 cost-recovery action.⁶⁰ The Seventh Circuit greatly restricted what the type of plaintiff to have standing under § 107 after the enactment of SARA.

The First Circuit confronted the same issue in *United Technologies Corp. v. Browning-Ferris Industries*.⁶¹ Because the § 113 statute of limitations had expired and the § 107 statute had not, resolution of the PRP standing issue was outcome-determinative.⁶² In reaching its conclusion, the court relied heavily on Congress' use of the term "contribution" in § 113.⁶³ By finding that Congress intended that the term be used in its conventional sense — a claim by and between jointly and severally liable parties — the court held that any CERCLA claim falling within that

definition was governed by § 113.⁶⁴ The court also stated that cost-recovery actions are available only to "innocent" parties.⁶⁵ The court listed only federal, state and local governments as examples of innocent parties.⁶⁶ Therefore, the First Circuit defined a contribution claim as not just a claim between PRPs, but rather *any* claim between PRPs.⁶⁷

Many United States District Courts, however, have disagreed with these courts and found a valid cause of action to exist for PRPs under § 107.⁶⁸ For example, the court in *Chesapeake & Potomac Tele. Co. v. Peck Iron & Metal Co.*⁶⁹ stated:

Nothing in the statute supports the assertion that only the United States Government or an 'innocent' plaintiff can bring a cost recovery action under § 107 (a). To the contrary, the statute specifically provides that covered persons shall be liable to both the United States Government, among others, and to 'any other person' who incurs response costs.⁷⁰

In response to defendants' argument that plaintiff should not be rewarded for winning the race to the courthouse, the court only held defendants jointly and severally liable for the costs attributable to defendants. In other words, the §

107 action did not relieve plaintiff of its already apportioned liability, it merely held the defendants, as a group, jointly and severally liable amongst themselves.⁷¹ Plaintiffs would, in the contribution phase of the proceeding, still be assigned some of the "orphan shares," those portions of the cleanup costs that were attributable to judgment-proof defendants.⁷² The court admitted that other courts which do not saddle plaintiffs with a portion of these "orphan shares," encourage "private parties to clean up hazardous waste sites, to risk their own capital initially, knowing that by prevailing in a § 107 action they will be reimbursed perhaps in excess of what might be shown in a § 113 action to have been their equitable share."⁷³ The court recognized the potential value of such incentives, but nonetheless elected to reduce plaintiffs' potential windfall.

Another United States District Court which allowed a § 107 action by PRPs, however, did not similarly restrict the plaintiff's windfall. The court in *Pneumo Abex Corp. v. Bessemer*⁷⁴ followed *Chesapeake Bay* with respect to plaintiff's standing under § 107, but declined to saddle plaintiffs with any orphan shares in its allocation of recovery costs.⁷⁵ The court defined an

⁵⁹*Id.* at 764.

⁶⁰*Id.* Commentators point out that actions of this type are so rare that the *Akzo* court might as well have limited cost-recovery actions to governmental plaintiffs only. Standing Under Superfund, *supra* note 32 at 168.

⁶¹33 F.2d 96 (1st Cir. 1994).

⁶²*Id.* at 98.

⁶³*Id.*

⁶⁴*Id.* at 99.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷See also, *U.S. v. Colorado & Eastern Railroad Company*, 50 F.3d 1530 (10th Cir.1995) (on similar facts, following *United Technologies*).

⁶⁸*Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231 (C.D. Pa. 1996), *Pneumo Abex Corp. v. Bessemer*, 921 F. Supp. 336 (E.D. Va. 1996), *Charter Township of Oshtemo v. American Cyanamid Co.*, 910 F. Supp. 332 (W.D. Mich 1995), *U.S. v. SCA Services*, 849 F. Supp. 1264 (N.D. Ind. 1994), *Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575 (D.Conn. 1994), *Transportation Leasing Co. v. California*, 861 F. Supp. 931 (C.D. Cal 1993), *Chesapeake and Potomac Telephone Co. of Virginia v. Peck Iron & Metal Co.*, 814 F. Supp. 1269 (E.D. Va. 1992), *U.S. v. Kramer*, 757 F. Supp. 397 (D.N.J. 1991), and *Burlington Northern Railroad Co. v. Time Oil Co.*, 738 F. Supp. 1339 (W.D. Wash. 1990).

⁶⁹*Id.*

⁷⁰*Id.* at 1277.

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 1278 (quoting *U.S. v. Kramer*, 757 F. Supp. 397 at 416).

⁷⁴921 F. Supp. 336 (E.D. Va. 1996).

⁷⁵*Id.* at 347.

orphan share as "any portion of liability that is not attributable to Plaintiffs or an available PRP."⁷⁶ Although the court did not explain its reason for not following *Chesapeake Bay*, it is now apparent that even in the jurisdictions that allow plaintiff-PRPs a cause of action under § 107, there is a split of opinion concerning plaintiff's ability to receive the full benefit of joint and several liability under § 107.

Courts have reached varying results concerning the availability of cost-recovery actions under § 107 after the SARA amendments. Every federal circuit court of appeals to address the issue has decided that Congress's enactment of a separate contribution provision was evidence of legislative intent to have all claims among PRPs governed by that contribution provision. These courts still disagree, however, on just what type of non-governmental plaintiff can still bring a cost-recovery action.⁷⁷ The several district courts that have ruled to the contrary, although somewhat inconsistent among themselves,⁷⁸ make the number of cases on each side of the issue about even.

What is really at dispute in this controversy is the allocation of orphan shares. Although the *Browning-Ferris* court had to deal with the divergent statutes of limitations, and contribution protection can be very important to a defendant who has settled with the government, plaintiffs are continually attempting to proceed under § 107 in

the hope that they can minimize their liability for orphan shares. Some of the opinions mentioned above are explicit in their resolution of this dispute, while others fail to give parties and practitioners clear guidance on the issue.

IV. Instant Decision

In *Laidlaw v. Mallinckrodt*, the U.S. District Court for the Eastern District of Missouri held that a PRP may bring either a cost-recovery action or one for contribution against other PRPs. In reaching this conclusion, the court first identified both plaintiffs' and defendant's potential liability under CERCLA.⁷⁹ Because *Laidlaw* was the owner and operator of the facility, and *Mallinckrodt* had contracted for the disposal of hazardous waste, both were considered potentially liable parties under CERCLA.⁸⁰ The court noted that if plaintiffs' § 107 action was allowed to proceed, defendants would be held jointly and severally liable, absent a showing of divisibility of injury.⁸¹ The court stated that several liability rarely occurs in cost-recovery actions because divisibility is a "a very difficult proposition to establish."⁸²

The court first considered defendants' argument that only an innocent party may bring an action under § 107.⁸³ The court focused on the Eighth Circuit Court of Appeal's decision in *Control Data v. S.C.S.C. Corp.*⁸⁴ Although the central issue in *Control Data* was whether the

defendant was responsible for the contamination, the court asserted that once a defendant's liability is established, "the focus shifts to allocation. Allocation is a contribution claim controlled by 42 U.S.C. 9613."⁸⁵ Recognizing that a federal district court outside of the Eighth Circuit interpreted *Control Data* to mean that § 113 governs any cost-recovery suit by a PRP,⁸⁶ the court declined to follow the lead of the district court because it found that the Eighth Circuit Court of Appeals did not directly address the standing issue in *Control Data*.⁸⁷ Especially convincing to the court was the fact that the plaintiff in *Control Data* did not bring a claim under § 107 for cost-recovery.⁸⁸ Also persuasive to the *Laidlaw* court was the fact that the *Control Data* court, in support of the statement quoted above, did not cite any existing case law from other jurisdictions which denied PRPs standing under § 107.⁸⁹

The court also relied on another Eighth Circuit Court of Appeals decision and one United States Supreme Court decision.⁹⁰ These cases influenced the court, not by their reasoning or the language in their holdings, but rather through what the two courts failed to say. In *General Electric v. Litton*,⁹¹ the Eighth Circuit permitted a cost-recovery claim by a plaintiff who had previously entered into a Consent Decree with a state agency, against a PRP. The issue of standing was not contended by either

⁷⁶*Id.*

⁷⁷See, *supra* note 55 and accompanying text.

⁷⁸See, *supra* note 68 and accompanying text. Considering the size of the jurisdictions that the courts of appeals govern, it becomes apparent that a majority of courts deny plaintiff-PRPs standing under § 107.

⁷⁹925 F. Supp. 629.

⁸⁰42 U.S.C. 9607 (a)(1)-(4).

⁸¹*Id.* at 626.

⁸²*Id.* (quoting *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930 (8th Cir. 1995).

⁸³925 F. Supp. at 629

⁸⁴*Control Data*, 53 F.3d 930.

⁸⁵*Id.* at 935.

⁸⁶925 F. Supp. at 629. *Gould v. A & M Battery and Tire Service.*, 901 F. Supp. 906 at 913 (M.D.Pa. 1995).

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*General Electric Co. v. Litton Indus. Automation Systemes, Inc.*, 920 F.2d 1415 (8th Cir. 1990), *Key Tronic v. U.S.*, 511 U.S. 809 (1994).

⁹¹925 F. Supp. at 630.

party, and the court did not address the issue in its opinion.⁹² Similarly, in *Key Tronic v. U.S.*,⁹³ the United States Supreme Court ruled on the availability of attorney's fees under CERCLA.⁹⁴ The standing issue was not disputed, but the case involved a plaintiff who had disposed of hazardous wastes in a landfill.⁹⁵ Plaintiff asked for contribution under § 113, and additional response costs under § 107.⁹⁶ The Supreme Court did not object to the PRP cost-recovery suit, but only held that § 107 did not allow the recovery of attorney's fees.⁹⁷ In dicta, the Supreme Court stated that the two §§ provide for "somewhat overlapping" remedies.⁹⁸ The *Laidlaw* court reasoned that, were the Eighth Circuit and the Supreme Court to oppose cost-recovery claims by PRPs, they would have addressed that issue in their opinions.⁹⁹

The court then went on to ascertain the plain meaning of the two statutory §§.¹⁰⁰ As noted above, the court failed to find anything in the two statutes that indicated that PRPs could not bring a § 107 action.¹⁰¹ § 107 allows recovery of necessary response costs incurred "by any other person."¹⁰² The court agreed with another district court that this language "implied that Congress intended the liability of the provision to sweep broadly."¹⁰³ Furthermore, the court found no requirement in § 107 that the plaintiff be "innocent."¹⁰⁴

The court did not address whether a plaintiff would be apportioned some of the orphan shares from unavailable defendants.¹⁰⁵ Because the court was ruling on a motion to dismiss for failure to state a claim, that issue probably would not arise until the apportionment phase of the proceedings, occurring later in the trial.¹⁰⁶

Accordingly, because of the absence of statutory language to the contrary, the higher courts' failure to object to similar claims, and unpersuasive rulings by the other federal courts of appeals, the court held that PRPs can bring cost-recovery actions against other PRPs under § 107.

V. Comment

This comment proposes two ways in which the courts can more fairly and effectively handle suits among PRPs. The goal of both concepts is to encourage the swift remediation of sites and promote certainty among parties and practitioners concerning liability for orphan shares, thereby facilitating the efficient resolution of litigation. The first involves a statutory amendment to CERCLA, and the second proposes ways that the courts, in the absence of statutory amendments, can effectuate the legislative intent of CERCLA. Several commentators have suggested ways to accomplish the aforementioned goals. Some of their proposals are

discussed in this Section.

A. Statutory Amendment Proposals

One commentator asserts that Congress should never have added § 113 in 1986.¹⁰⁷ Because the SARA amendments only added more confusion to the issue, this commentator argues that the entirety of § 113 be repealed.¹⁰⁸ In its place, Congress should insert a provision, presumably in § 107, comparable to the open-ended provision for privilege in the Federal Rules of Evidence.¹⁰⁹ This provision would direct the courts to apply common law principles of contribution to cost recovery actions under § 107.¹¹⁰ One consequence of the deletion of § 113 would be that parties who have settled with the government would no longer receive the contribution protection contained in the statute.

This proposal is flawed in two respects. The commentator contends that the deletion of contribution protection will help ensure that polluters pay their fair share of the cleanup costs.¹¹¹ But if PRPs have no incentive to settle with the government and the EPA, with already limited resources, must litigate more enforcement actions under § 106, the net result will be that even fewer sites get cleaned up. The polluters may end up paying their fair share but it comes at the cost of judicial and administrative efficiency. The enforcement action, which could be

⁹²*Id.*

⁹³511 U.S. 809 (1994).

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.* See, *supra* note 31 and accompanying text.

¹⁰²*Id.*

¹⁰³*Id.* (quoting *Companies for Fair Allocation*, 853 F. Supp. 575 at 579).

¹⁰⁴*Id.*

¹⁰⁵See, *supra* note 73 and accompanying text.

¹⁰⁶However, had the court given some indication of its position on the apportionment of orphan share liability, it may have helped the parties ascertain their respective bargaining positions for purposes of a settlement.

¹⁰⁷Buckley, *supra* note 34, at 871.

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*Id.*

avoided if PRPs had incentives to settle, may take up to a few years.

A second problem with this proposed amendment of CERCLA is that it fails to resolve the issue that most needs attention, orphan share liability. Apparently, if all actions by plaintiff PRPs are governed by § 107, and this section in turn applies common law contribution principles, liability will be several. Plaintiffs will absorb all of the orphan shares. This puts a great deal of discretion in the hands of the EPA who will decide against which PRP to bring a § 106 action, knowing that its choice will create a windfall for unnamed PRPs, and may push the named ones into bankruptcy. This is incongruent with one goal of CERCLA, making responsible parties pay their fair share, which the commentator purports to effectuate through the deletion of § 113.¹¹²

A second commentator has proposed that CERCLA be amended by repealing § 113 in its entirety, specifically granting joint and several liability under § 107, and inserting the following language in § 107 (a) (4) (D): "In an action under this §, the United States, a State or any person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement may seek cost recovery from any person who is liable or potentially liable under this § who has not so resolved its liability. The actions for recovery under this Act are limited to the actions enumerated under this §."¹¹³

This proposal allows only PRPs who have settled to pursue cost recovery actions. The only possible defendants in such an action are recalcitrant PRPs, PRPs who have refused to settle. This proposal would provide a PRP with enormous incentives to settle, and would accordingly reduce the number of CERCLA claims that actually make it to trial. The idea is that

a PRP who has funds that it wants to protect will settle, and avoid being saddled with orphan share liability.

One problem with this scheme is that it would push all PRPs to settle, and unless the government overestimates a party's liability to compensate for orphan shares, the government will not recover the orphan share liability from any party. The only type of PRP that would not settle would be an insolvent one, or one who believes that the government's offer attributed entirely too much liability to them. Furthermore, the government would again have absolute control over a PRP's fate. A PRP would have no bargaining power because the government could choose not to settle, or to offer it an unreasonable settlement, and then that PRP, after being held liable to a private-PRP in a § 107 action, would be left without any cause of action. Under the current scheme, the government knows that a PRP might, in some jurisdictions, just accept several liability or, in other jurisdictions, risk being held jointly and severally liable and later pursue a § 113 action. Courts to reward settling PRPs and penalize recalcitrant PRPs in allocating orphan share liability, this proposal provides PRPs with incentives to settle, thereby reducing litigation and facilitating the prompt remediation of hazardous sites. When this is coupled with the spreading of orphan share liability among all solvent PRPs, PRPs can better assess the costs and benefits of their actions. They can accept responsibility and enter into a settlement or refuse to settle, knowing that the court is statutorily authorized to apportion them a greater amount of orphan share liability.

A final suggested statutory amendment to CERCLA is superior to the previous two in several respects. Under this proposal, § 107 would remain unaltered, and § 113 would not be ~~eliminated~~.¹¹⁴ § 113 (f) (1) would be

amended in the following way (amending language in italics):

[THESE AMENDMENTS BEGIN AFTER THE FIRST TWO COMPLETE SENTENCES OF § 113 (f) (1), WHICH SHOULD BE RETAINED.] In resolving contribution claims under this § *or cost recovery claims under § 9607 (a) (4) (B) of this title*, the court may allocate response costs among *potentially responsible parties* using such equitable factors as the court determines are appropriate, *provided that the court shall distribute liability for "orphan shares" (uncollectible shares attributable to persons lacking the ability to pay for their equitable share of response costs) among all solvent PRPs according to their respective equitable shares, and provided further that in determining equitable shares with respect to distribution of liability at NPL sites, the court should look favorably on potentially responsible parties that have resolved their liability with the United States or a State in an administrative or judicially approved RD/RA Consent Decree and look harshly upon potentially responsible parties that failed to resolve their liability with the United States or a State in an administrative or judicially approved RD/RA Consent Decree after being given a reasonable opportunity to do so.* [THE LAST SENTENCE OF § 9613 (f) (1) SHOULD BE RETAINED].¹¹⁵

This proposed amendment encourages settlements and the prompt remediation of sites because it does not eliminate § 113 and its accompanying contribution protection. While doing this, it does not take the contribution

¹¹²*Id.*

¹¹³Ivy Barton-Wagner, *Setting CERCLA Straight: A Solution to the Dispute Over Actions by Liable Remediators Under § 107 and § 113*, 14 TEMP. ENVTL. L. & TECH. J. 207 at 222 (1995).

¹¹⁴Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 G. WASH. L. REV. 1043 at 1097 (1994).

¹¹⁵*Id.*

protection to an extreme like the previous proposal. The settlement is not determinative of standing in a cost recovery action. The language "any other person" is retained and Congress's original intent of both sweeping liability and broad standing is effectuated.

This proposal also prevents the EPA from making ridiculous settlement offers. A recalcitrant PRP is only punished when that PRP has refused to settle after "being given a reasonable opportunity to do so." This is preferred because the efficient remediation of sites depends on both the PRP and the EPA acting rationally and with more commensurate bargaining power. The EPA will still have a slight advantage because it knows that the distribution of orphan shares is dependent on the PRP entering into a settlement, but the EPA also could run the risk of a court deciding that its offer was unreasonable. Such a determination would mean that the non-settling PRP would not be treated like a recalcitrant PRP, and would not bear a disproportionate share of orphan share liability.

Finally, this proposal addresses the most prominent problem with the current scheme, orphan share liability. This proposal refuses to take liability for orphan shares to an extreme. Recall that the court in *Pneumo Abex* gave a plaintiff PRP standing under § 107 and refused to saddle the plaintiff with any of the orphan share liability.¹¹⁶ While this provides a PRP with enormous incentives to settle, it is both harsh and unfair for the recalcitrant PRP to be responsible for the entirety of the orphan share liability. Conversely, courts that deny a plaintiff PRP standing under § 107 and give that plaintiff only several liability give the same recalcitrant PRPs a windfall in the form of immunity from orphan share liability. This proposal strikes a compromise. By

authorizing the court to allocate orphan share liability among all solvent PRPs, plaintiffs who are considering a settlement with the EPA are assured that they will not be left "holding the bag" for liability that would normally be attributable to insolvent or otherwise judgment-proof polluters.¹¹⁷ Secondly, because this aspect of the proposal avoids putting all orphan share liability on recalcitrant PRPs, it will force fewer PRPs faced with significant cleanup costs into bankruptcy.

The proposal is explicit in the allocation of orphan share liability in that it directs the courts on just how to allocate liability among PRPs at National Priorities List (NPL) sites.¹¹⁸ By authorizing courts to reward settling PRPs and penalize recalcitrant PRPs in allocating orphan share liability, this proposal provides PRPs with incentives to settle, thereby reducing litigation and facilitating the prompt remediation of hazardous sites. When this is coupled with the spreading of orphan share liability among all solvent PRPs, PRPs can better assess the costs and benefits of their actions. They can accept responsibility and enter into a settlement or refuse to settle, knowing that the court is statutorily authorized to apportion them a greater amount of orphan share liability.

One problem with this proposal is that it differentiates between NPL sites and non-NPL sites. There should be no difference in the incentives involved in entering into a settlement concerning an NPL site and settlement at non-NPL sites. There is nothing concerning a greater risk to health and the environment (factors considered in placement on the NPL), that warrants disparate treatment. A statutory amendment to § 113 may do better to treat the parties involved in settlements at both NPL and non-NPL sites exactly the same.

These proposed statutory

amendments to CERCLA obviously depend on Congress's taking the initiative to solve the orphan share liability problem. In the absence of action by Congress, or until that legislation is passed, there is a way in which courts (that are not bound by precedent stating unambiguously that actions among PRPs are governed solely by § 113) can effectuate the swift and efficient remediation of sites.

B. A Proposal to Solve the Orphan Share Problem in the Absence of Statutory Amendment

While many commentators have focused on solving the § 107/§ 113 problem through statutory amendments, the same result can be reached if the courts look at the plaintiff's motivation in seeking an action under § 107. While many courts have taken an all or nothing approach—an action among PRPs is either controlled by § 107 or it is governed by § 113—this has led to results that are not in accordance with congressional intent. Once the plaintiff's motive is ascertained, the court should attempt to reach a result consistent with the policies and legislative intent surrounding CERCLA. Numerous courts have tried to ascertain congressional intent as a whole, finding that Congress either intended § 107 or § 113 to govern claims between PRPs. The better approach is to determine legislative intent for *each particular claim*.

For example, if the plaintiff's motivation is to circumvent the shorter statute of limitations that governs contribution actions under § 113, plaintiff should be denied standing under § 107. On this particular issue, legislative intent is clear because Congress specifically enacted two separate statutes of limitations. Courts like *Browning-Ferris* may already be doing this, but in so ruling, they have not stated that the particular case

¹¹⁶See, *supra* note 73 and accompanying text.

¹¹⁷Organ, *supra* note 114, at 1098.

¹¹⁸The National Priorities List is a ranking of CERCLA sites most in need of remediation taking into account "the relative degree of risk to human health and the environment . . ." 42 U.S.C. 9605 (c).

demands that § 113 control, but have rather stated that § 113 controls all such claims.¹¹⁹

When plaintiffs seek an action under § 107 for the imposition of joint and several liability, courts should follow the lead of *Chesapeake & Potomac Tele. Co.*¹²⁰ That court allowed the plaintiff-PRP to pursue an action under § 107 and receive joint and several liability. The court did not, however, allocate all orphan share liability to the defendants. This prevented the first party to the courthouse from receiving a windfall. Arguably, the court in *Chesapeake & Potomac Tele. Co.* did not provide PRPs with enough incentives to settle, like a reduced portion of orphan share liability, but the mere imposition of joint and several liability avoids the perverse incentive that would arise if all orphan share liability were borne by the plaintiff. It is on the issue of orphan share liability that a statutory amendment could better cure the ills of the present scheme than mere judicial activism could. However, until CERCLA is amended, courts need not make the all-or-nothing decision with respect to standing and orphan share liability.

In this respect, the decision in

Laidlaw was a correct one. The record showed no evidence of a settlement concerning issues disputed in the lawsuit, and the statute of limitations was not at issue. To avoid the harsh and inequitable result that arises from the imposition of mere several liability, the court chose to allow the § 107 action to proceed. What the court did not explain in the opinion however, is how liability for orphan shares was going to be apportioned later in trial. Had this been discussed, the parties may well have been able to negotiate a settlement and voluntarily dismiss the suit. Nonetheless the course taken by the *Laidlaw* court is the correct one, given the need to spread orphan share liability among responsible parties, while avoiding the perverse incentives to settling or remediating PRPs that accompanies several liability under § 113. This result also avoids the inconsistency that results from jurisdictions which limit actions under § 107 to "innocent" parties, and the varying definitions of "innocent" that accompany them.¹²¹

VI. Conclusion

The split of authority concerning standing under CERCLA §§

107 and 113 is of great magnitude given the importance of the issues involved: settlement protection, orphan share liability, and the potential exclusion of actions by the statutes of limitations. Because courts reach such varying results on the issue of standing, many PRPs are uncertain as to just what the law is in their jurisdiction and how courts will apply CERCLA to the facts of their controversies. This means that fewer and fewer claims are resolved prior to litigation because parties must actually litigate their disputes. Until certainty, and hopefully uniformity, are achieved, the judicial system will continue to be ineffective when determining CERCLA liability.

Resolution of the orphan share liability problem is especially crucial to this controversy. PRPs need incentives to settle with the government and they also need to know that their settlement will be given effect. This Note has shown ways in which cases like *Laidlaw* can be better decided, either through an amendment to CERCLA or through judicial interpretations of CERCLA that promote both equitable and judicially efficient results.

¹¹⁹See, *supra* notes 61-67 and accompanying text.

¹²⁰See, *supra* notes 68-73 and accompanying text.

¹²¹See, *supra* notes 66-67 and accompanying text.