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Assessing Costs under CERCLA: Sixth Circuit Requires Specificity in Complaints Seeking Prejudgment Interest. United States v. Consolidation Coal Co.

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CASENOTE

ASSESSING COSTS UNDER CERLCA: SIXTH CIRCUIT REQUIRES SPECIFICITY IN COMPLAINTS SEEKING PREJUDGMENT INTEREST

United States v. Consolidation Coal Co.[1]

I. INTRODUCTION

In *U.S. v. Consolidation Coal Co.*, the Sixth Circuit simultaneously proved the breadth of a court's discretion in allocating CERCLA cleanup costs and the lack of discretion in assessing prejudgment interest. Courts are allowed such broad discretion in allocating cleanup costs that the allocation can even take on what appears to be a punitive nature without rising to the level of an abuse of discretion. Conversely, when assessing prejudgment interest, courts are provided little discretion and are bound by the specific statutory language. Therefore courts must strictly apply the statutory requirements relating to prejudgment interest. In practice, the wide discretion provided for allocating cleanup costs under CERCLA significantly limits the available arguments for avoiding liability, while the specificity requirement for prejudgment interest compels practitioners to strictly adhere to the statutory language.

II. FACTS AND HOLDING

The United States brought an action against all potentially responsible parties (PRPs), seeking contribution for the past and future costs of cleanup at the Buckeye Reclamation Landfill in Belmont County, Ohio, under the Comprehensive Environmental Response Compensation and Liability Act[2] ("CERCLA").[3] PRPs Consolidation Coal Company ("Consol") and Triangle Wire & Cable, Inc., as a third-party plaintiffs, brought an action under Section 113 of CERCLA, seeking a declaration of liability and an equitable allocation of the response costs against Neville Chemical Company ("Neville").[4]

The Buckeye Reclamation Landfill, or the land on which the landfill is now located, received deposits of various types of waste starting in the early 1930s.[5] Coal mining operations were prevalent in the area from the 1930s through the 1950s, and, as a result, the landfill contains material left over from those operations.[6] This material, called "gob," is composed of coal, rock, clay, and other geological materials, such as arsenic, chromium, and lead.[7] This material was left on the property prior to the area becoming a landfill.[8] Subsequent to becoming a landfill, there were deposits of significant amounts of industrial and municipal waste.[9] Some 45,000 tons of industrial waste were disposed of in a smaller area of the landfill known as the "waste pit."[10] As

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[1] *U.S. v. Consolidation Coal Co.*, 345 F.3d 409 (6th Cir. 2003) [hereinafter *Consolidation*].
[2] 42 U.S.C § 9607(a) et seq. (2000).
[3] *Consolidation*, 345 F.3d at 409.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 411-12.
[9] *Id.* at 412
[10] *Id.*

for the municipal waste, between 755,000 and 955,000 tons were disposed of at the landfill between 1970 and 1991.[11]

All three types of waste contain hazardous substances and contribute to the current need for cleanup, but the parties involved in the present action appear to be concerned primarily with the industrial waste.[12] In fact, the parties stipulated their respective contributions to the 45,000 tons of industrial waste, of which Neville's share was determined to be 4.78 percent.[13]

In late 1983, after investigations by both federal and state environmental agencies, the United States Environmental Protection Agency (EPA) placed the landfill on the list of Superfund sites, indicating an immediate need for remediation.[14] The EPA then notified a number of parties identified as having disposed of waste at the landfill as being potentially responsible parties (PRPs).[15] The PRPs were asked to conduct a remedial investigation and a feasibility study to help determine potential remediation plans for the site.[16] Neville was notified of its potential liability, but declined to participate in the requested investigations.[17] The cooperating PRPs went forward without Neville, and entered into an administrative consent order with the EPA that required the completion of the requested investigations as well as the performance of an endangerment assessment.[18] As a result of the studies and investigations, the EPA ultimately determined that the construction of a solid waste landfill cap was the appropriate plan for the remediation of the landfill.[19] This proposed construction would cost an estimated $48 million to $52 million.[20] The EPA again notified all PRPs of their potential liability, this time including their potential respective portions of this cost.[21] This resulted in many of the non-cooperating PRPs joining the remediation process, thereby requiring a second administrative consent order.[22] Neville again opted not to join in the remediation process.[23]

In 1994, Consol filed a complaint for declaratory judgment in federal district court in the Southern District of Ohio[24] in part to determine liability and allocation of costs under CERCLA. Thereafter, the United States filed a complaint for the recovery of the costs already incurred and a declaration of liability for future costs of the cleanup.[25] The cases were consolidated and realigned so that the United States was the sole plaintiff in both cases.[26] Ten of the defendant PRPs filed a third-party complaint for contribution against 64 third-party defendants, including Neville Chemical.[27] Throughout this procedural posturing, the participating PRPs continued negotiations with the EPA over possible modifications to the proposed remediation plan.[28] Neville Chemical continued its refusal to participate in any stage of the remediation.[29]

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *See U.S. v. Consolidation Coal Co.*, 184 F. Supp. 2d 723 (S.D. Ohio 2002).
[25] *Consolidation*, 345 F.3d at 412.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*

As a result of the continuing negotiations with the EPA, the proposed remediation plan was modified.[30] The new plan had an estimated cost of about one-half of the originally proposed solid waste landfill cap.[31] Finally, in March 1998, the court entered a consent decree between the United States and the participating PRPs requiring the performance of the revised remediation plan.[32] Consol and Triangle Wire continued to pursue their action for contribution against Neville.[33]

The district court ultimately ruled in favor of Consol and Triangle Wire, assessing Neville a 6 percent share of the past and future response cost of the landfill.[34] Neville appealed both the general finding of liability and the assessment of a 6 percent equitable share of the response costs.[35]

The United States Court of Appeals for the Sixth Circuit upheld the district court's ruling as to liability and the assignment of the 6 percent equitable share.[36] However, the Sixth Circuit remanded the case for further proceedings as to the district court's calculation of prejudgment interest, which was awarded to Consol and Triangle Wire under 42 U.S.C. § 9607(a).[37]

III. LEGAL BACKGROUND

A. Liability under CERCLA

The federal government implemented CERCLA "in response to the serious environmental and health risks posed by industrial pollution."[38] As evidenced by the legislative title, CERCLA is "a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites."[39] CERCLA gives the President (via the Administrator of the EPA) extensive power to enforce its provisions.[40] CERCLA requires any site that is contaminated by toxic waste be cleaned up quickly by, or at the expense of, "those responsible for the hazardous condition."[41] "These actions typically require private parties to incur substantial costs in removing hazardous wastes and responding to hazardous conditions."[42] Anyone subject to liability for CERCLA cleanup orders is known as a potentially responsible party, or PRP.[43] CERCLA gives EPA the power to address contaminated sites without first having to go through judicial review of issues relating to liability or the adequacy of the cleanup remedy.[44]

CERCLA "allow[s] the EPA to undertake direct removal or remedial action to protect the public health or welfare or the environment when it determines that release of a hazardous substance poses an imminent and substantial danger."[45] CERCLA contemplates two distinct kinds of clean-up actions arising under its statutory

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[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 415.
[37] *Id.*
[38] *General Elec. Co. v. Whitman*, 257 F. Supp. 2d 8, 12 (D.D.C. 2003) (quoting *U.S. v. Bestfoods*, 524 U.S. 51, 55 (1998)).
[39] *Id.* (quoting *Key Tronic Corp. v. U.S.*, 511 U.S. 809, 814 (1994)).
[40] *Id.*
[41] *Id.* (quoting *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 (8th Cir. 1995)).
[42] *Id.* (quoting *Key Tronic*, 511 U.S. at 814).
[43] *Id.*; *see* 42 U.S.C. § 9607(a).
[44] *Id.*
[45] *Id.* at 12-13 (quoting *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 290-91 (6th Cir. 1991)).

framework: removal actions and remedial actions.[46] Removal actions are actions which occur before any remedial action, and consist of short-term actions to halt any immediate risks posed by hazardous wastes and often involve actions to study, monitor, evaluate, clean up and otherwise "prevent, minimize, or mitigate damage to the public health or welfare or the environment."[47] Remedial actions are more permanent remedies the EPA takes to clean up contamination, defined under the statute as actions "taken instead of or in addition to removal actions."[48] Remedial actions include investigation, testing, storage, abatement, confinement, repair, excavation, dredging, relocation, incineration, "and any monitoring reasonably required to . . . protect the public health and welfare and the environment."[49]

Any hazardous waste site that poses the greatest danger to public health and the environment is listed on the National Priorities List (NPL).[50] Any site found on the NPL is "considered [one of] the leading candidates for cleanup financed by the Superfund program."[51] Before the EPA is able to propose remedies for site cleanup and abatement, it gathers information and data, investigates remedies, and explores alternative options.[52] Furthermore, before the EPA chooses any remedy, the public, the community, neighbors, interested parties, and all PRPs have multiple opportunities to comment on the proposed remedy, in writing and in person.[53]

After cleanup of a site, CERCLA provides two causes of action available to a party who wishes to recover the costs incurred as a result of the cleanup effort.[54] The first is a recovery action governed by Section 107(a), 42 U.S.C. § 9607(a).[55] To establish a prima facie case for cost recovery under Section 107(a), a plaintiff

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[46] *Id.* at 13 (citing 42 U.S.C. §§ 9601(23)-(24)).
[47] *Id.* (quoting 42 U.S.C. § 9601(23)).
[48] *Id.* (quoting 42 U.S.C. § 9601(24)).
[49] *Id.*
[50] *Id.*
[51] *Id.* (quoting *Wash. State Dept. of Transp. v. EPA*, 917 F.2d 1309, 1311 (D.C. Cir. 1990)).
[52] *Id.* (citing 40 C.F.R. §§ 300.430, 300.5 (2003)).
[53] *Id.* (citing 40 C.F.R. § 300.430(f)).
[54] *Centerior Serv. Co. v. Acme Scrap Iron & Metal*, 153 F.3d 344, 347 (6th Cir. 1998).
[55] *Id.* Section 107(a) provides

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

must establish four elements: (1) the site is a facility; (2) a release or threatened release of hazardous substance has occurred; (3) the release has caused the plaintiff to incur necessary costs of response; and (4) the defendant comes within one of the four categories of PRPs.[56] Section 107(a) liability is generally joint and several on any defendant, regardless of the defendant's fault.[57] Congress amended CERCLA in 1986, enacting the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), which provided a right of contribution to private parties to recover costs associated with cleanup of hazardous waste.[58]

Among the provisions that SARA added to CERCLA was Section 113(f), which provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.[59]

The language of this section instructs that parties seeking contribution under Section 113 must look to Section 107 to establish the basis and elements of the liability of the defendants.[60] Unlike with Section 107, however, liability under Section 113 is not joint and several, but several only, and the provision grants the district court discretion to allocate response costs among liable parties.[61]

Courts have broad discretion in determining the appropriate CERCLA contribution allocations using "such equitable factors as the court determines are appropriate."[62] Although not required, many courts determining allocation have consulted the six so-called "Gore factors."[63] Those factors are (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (ii) the amount of the hazardous waste involved; (iii) the degree of toxicity of the hazardous waste involved; (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.[64] Other factors courts have considered include: "(1) the costs caused by the conduct of each party; (2) the benefits received from using a particular waste disposal practice; (3) the parties' knowledge of, and acquiescence in, the activities that caused contamination; (4) whether a property owner acquired the property at a reduced price; (5) whether the property owner purchased the property with knowledge of its

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42 U.S.C. § 9607(a).

[56] *Centerior Serv. Co.*, 153 F.3d at 347-48.

[57] *Id.* at 348.

[58] *Id.*

[59] 42 U.S.C. § 9613(f)(1).

[60] *Centerior Serv. Co.*, 153 F.3d at 350.

[61] *Id.* at 348.

[62] *Consolidation*, 345 F.3d at 413.

[63] Use of the Gore factors is not required for at least two reasons. First, the plain language of Section 113 provides that the Court may consider "such factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Second, the Gore factors were considered by Congress but were not included in the final bill. *See Consolidation Coal Co.*, 184 F. Supp. 2d at 743, n. 21.

[64] *Id.* at 743.

contaminated condition; (6) whether the property owner may benefit from an increased property value following the remediation; (7) the parties' financial resources; (8) the existence of any indemnity agreements; and (9) the existence of any agency relationship among the parties."[65] Neither of these lists is intended to be exhaustive or exclusive, and "in any given case, a court may consider several factors, a few factors, or only one determining factor . . . depending on the totality of the circumstances presented to the court."[66]

B. Prejudgment Interest

Section 107 of CERCLA mandates an award of prejudgment interest.[67] The statute specifies exactly when the interest begins to accrue as being "the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned."[68] Courts have held that a complaint seeking to recover response or clean-up costs under CERCLA meets the written demand requirement of Section 107(a).[69] Once the "triggering" date for prejudgment interest is established, courts often delay computation of prejudgment interest until after it determines the amount of response costs for which the defendant is liable.[70] In sum, the court's discretion in allocating costs is quite broad, but the requirements for satisfying the written demand requirement for prejudgment interest are not nearly as liberal.

IV. INSTANT DECISION

In the instant case, the Sixth Circuit upheld the district court's imposition of liability against Neville Chemical and held that the allocation of 6 percent of the cost to Neville was not an abuse of discretion.[71] The Sixth Circuit did, however, remand the case back to the district court for further proceedings over the prejudgment interest awarded to Consol and Triangle Wire.[72]

As to general liability, the district court found that Neville Chemical was liable as a responsible party under CERCLA.[73] The district court held that Neville Chemical was liable to Consol and Triangle Wire because all four elements necessary for liability were met:[74] (1) the Buckeye Reclamation Landfill is a "facility" within the meaning of CERCLA; (2) a release of hazardous substance occurred there; (3) the release caused Consol and Triangle Wire to incur response costs; and (4) Neville Chemical falls into one of the four categories of PRPs provided in the statute.[75] The Sixth Circuit held that the district court's finding of liability followed sound logic and was therefore not an abuse of discretion.[76] Furthermore, the Sixth Circuit noted that Neville Chemical never contested the district court's decision that it met all four elements of liability.[77]

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[65] *See id.* at 744, n. 21 (quoting Robert P. Dahlquist, *Making Sense of Superfund Allocation Decisions: The Rough Justice of Negotiated and Litigated Allocations.* 31 Envtl. L. Rep. 11098, 11099 (2001)).
[66] *Consolidation*, 345 F.3d at 413-14.
[67] 42 U.S.C. § 9607(a).
[68] *Id.*
[69] *AlliedSignal, Inc. v. Amcast Intern. Corp.*, 177 F. Supp. 2d 713, 758 (S.D. Ohio 2001).
[70] *Id.*
[71] *Consolidation*, 345 F.3d at 416.
[72] *Id.*
[73] *Id.* at 413.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

In upholding the allocation of 6 percent of the cost of cleanup to Neville Chemical, the Sixth Circuit noted that nothing in Neville's arguments against the allocation satisfied the applicable standard of review.[78] In order to overrule the district court's decision, the Sixth Circuit was required to have a "definite and firm conviction that the trial court committed a clear error of judgment."[79] The court stated that all of Neville's arguments against the 6 percent allocation illustrated nothing more than the company's disagreement with the particular equitable factors the district court chose to use and how the court applied them.[80] After reviewing the arguments, the Sixth Circuit held that these disagreements did not satisfy the requisite standard of review.

Finally, regarding the award of prejudgment interest, the Sixth Circuit held that the district court failed to comply with a statutory requirement in making the award to Consol and Triangle Wire.[81] The Sixth Circuit stated that CERCLA mandates an award of prejudgment interest.[82] The statute specifies exactly when the interest begins to accrue as being "the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned."[83] The Sixth Circuit found that the district court erred by calculating the interest based solely on the date of the expenditure, without considering if that date was actually the later occurring of the two dates.[84] In fact, the Court points out that the district court did not even make a finding as to if and when Consol and Triangle Wire made a written demand for a specified sum from Neville Chemical.[85] While Consol and Triangle Wire argue that two separate communications should have been effective as meeting the written demand requirement, the Sixth Circuit concluded that the award of prejudgment interest was in error absent a finding by the district court as to when the statutory prerequisites for such interest were met.[86] As such, the Court vacated the award of prejudgment interest and remanded the case to the district court for a recalculation of the prejudgment interest award.[87]

V. COMMENT

U.S. v. Consolidation Coal Co. clearly establishes that a court's discretion in allocating cleanup costs under CERCLA is quite broad. In fact, the discretion is so broad that the allocation can take on what appears to be a punitive nature yet not rise to the level of being an abuse of the court's discretion. There are such a variety of factors that can be considered in determining what is equitable in terms of respective cleanup costs that a court can structure an allocation schedule in innumerable fashions.

In this case, the district court clearly placed more emphasis on Neville Chemical's lack of cooperation in the CERCLA cleanup process than any other factor. The district court found that "Neville did not meaningfully cooperate in any phase of the CERCLA process in this case, although it was given ample opportunity to do so."[88] Because of this "persistent, pervasive, and unjustified" lack of cooperation, the district court doubled the company's share of response costs from 3 to 6 percent.[89] The district court followed a logical mathematical progression to arrive at the 3 percent allocation, but proceeded to throw that precise logic out the window in

[78] *Id.* at 415.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 415-16.
[85] *Id.* at 416.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 415.
[89] *Id.*

deciding to double Neville's share of the response costs. The district court justified its decision to double the allocation based on an attempt to prevent a potential windfall to Neville because of Neville's lack of participation in the cooperating PRPs' successful renegotiation of the remediation plan.[90] While the court succeeded in preventing such a windfall, the true motive behind doubling the allocation certainly appears to be punitive. While perhaps not explicitly approved under CERCLA, such a punitive motive does, however, serve a valid purpose in encouraging all PRPs to cooperate throughout the remediation process. As such, the Sixth Circuit correctly upheld the additional allocation as being within the district court's discretion.

In order to overturn the district court's decision, the Sixth Circuit must have had "a 'definite and firm conviction that the trial court committed a clear error of judgment.'"[91] This is such a stringent standard of review, that most, if not all, district court decisions could ultimately be found to fall within discretion.[92] As in this case, all a district court must do to meet the standard is couch the true motive or intent behind an allocation in an argument using a few of the equitable factors established in previous CERCLA litigation. Provided that a district court is not blatantly punitive, or otherwise overtly abusive of its discretion, appellate courts will be forced to uphold most allocations of response costs, regardless of the true motive of the district court.

As for calculating prejudgment interest, the district court's discretion is much more limited. The CERCLA statutes clearly express the criteria for satisfying the demand requirement as being the later of the date payment of a specified amount is demanded in writing, or the date of the expenditure concerned.[93] In this case, the district court only looked to when the expenditure actually occurred, without regard for the statute's requirement that interest be based on the later occurring of the two dates.[94] The district court made no finding as to when Consol and Triangle Wire made written demand for a specified sum from Neville Chemical.[95] Based on the statutory language, the district court was required to make such a finding and had no discretion to fail to do so.

Consol and Triangle Wire attempted to show that the demand requirements were satisfied. The parties argue that a letter sent to Neville on February 21, 1986, constituted a demand letter, however, this letter was nothing more than an invitation for Neville to join into the investigation of potential responsibility for cleanup.[96] In the alternative, the parties argued that the third-party complaint constitutes written demand of a specified sum.[97] In simpler litigation, this complaint likely would have been sufficient. However, in this case, the complaint was made by third-party plaintiffs and was brought against a significant number of third-party defendants.

Given the complex nature of the complaint involved in this case, the complaint was not sufficiently specific to satisfy the demand requirement. The language in the statute requiring specificity appears to apply to the amount being demanded. In this case, the district court expanded the specificity requirement beyond a mere statement of the amount demanded; in addition, the complaint must state the party of which payment is demanded. That is, had Neville been the only defendant named in the third-party complaint, the district court would likely have found the complaint sufficiently specific to meet the demand requirement. While not expressly stated in the statute, requiring specific notice to an individual party is not only logical, but also

[90] *Id.*
[91] *Id.* (quoting *Kalamazoo River Study Group v. Rockwell Intl. Corp.*, 274 F.3d 1043, 1047 (6th Cir. 2001)).
[92] *See Kalamazoo River*, 274 F.3d at 1047, where it was found to be within the district court's discretion to allocate zero response costs to a party despite an established holding of potential responsibility for that party.
[93] *Consolidated*, 345 F.3d at 415.
[94] *Id.* at 415-16.
[95] *Id.* at 416.
[96] *Id.*
[97] *Id.*

promotes judicial economy. As such, the Sixth Circuit correctly vacated the prejudgment interest award and remanded the case to the district court for recalculation.

VI. CONCLUSION

Given the serious nature of the environmental concerns addressed by CERCLA, courts are provided a wide latitude in determining and assessing costs to the appropriate parties. *U.S. v. Consolidation Coal Co.* brightly illustrates the breadth of the courts' discretion in making such determinations. The courts, however, are not entitled to unfettered discretion in areas, such as calculating prejudgment interest, where the statutory language is sufficiently precise. When the language and intent of the statute is clear, courts are bound to strictly apply the law. As such, courts must strictly enforce the prejudgment interest provisions, including the written demand requirement.

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