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1994]

THE ROLE OF STATE "LITTLE SUPERFUNDS" IN ALLOCATION AND INDEMNITY ACTIONS UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

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I. INTRODUCTION

The first generation of litigation arising under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")¹ established the general rule of joint and sev-

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1. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), §§ 101-404, 42 U.S.C. § 9601-9675 (1988 & Supp. IV 1992). Generally, the statute authorizes the federal government to impose liability upon parties involved with or related to a release or threatened release of a hazardous

eral liability to the United States with limited defenses.² The next generation of cases will focus more closely on difficult issues related to contribution, and indemnity and allocation of liability among potentially responsible parties ("PRP"s). One major issue which must be resolved in these cases involves the role of the liability and defense rules established under the many state "little Superfunds."³

substance. Specifically, § 107 sets forth the criteria for attaching liability, possible defenses and exemptions, and standards for determining costs. See CERCLA § 107, 42 U.S.C. § 9607.

2. See, e.g., *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 994 (D.S.C. 1984), *aff'd sub nom. United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 440 U.S. 1106 (1989); *United States v. Conservation Chem. Co.*, 589 F. Supp. 59, 62-63 (W.D. Mo. 1984); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1255-57 (S.D. Ill. 1984); *United States v. Wade*, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983).

3. The majority of states now have some version of a Superfund law. They vary significantly. Most of these state little Superfund laws establish a cleanup fund, authorize state sponsored cleanups, authorize issuance of cleanup orders and initiation of cost recovery actions against owners, operators, generators and transporters, and provide the same limited defenses as CERCLA. Some laws lack one or more of these elements; many include additional defenses or limitations on liability. Some state laws are codified as a single, free-standing title. Others have attempted to integrate CERCLA-like provisions into their general solid and hazardous waste laws and codify various defenses into various laws which deal specifically with the entities who are granted the defense.

The following states have enacted some type of little Superfund: Arkansas, the Arkansas Remedial Action Trust Fund Act, ARK. CODE ANN. §§ 8-7-501 to -522 (Michie 1987); California, the California Hazardous Substance Account Act, CAL. HEALTH & SAFETY CODE §§ 25300-25395 (West 1992 & Supp. 1994); Connecticut, CONN. GEN. STAT. §§ 22a-133a to -133j (West 1993 & Supp. 1994); Delaware, the Delaware Hazardous Substance Cleanup Act, DEL. CODE ANN. tit. 7, §§ 9101-9120 (1992); Georgia, the Georgia Hazardous Site Response Act, GA. CODE ANN. §§ 12-8-90 to -97 (1992); Hawaii, the Hawaii Environmental Response Law, HAW. REV. STAT. §§ 128D-1 to -23 (1992 & Supp. 1993); Idaho, the Idaho Hazardous Substance Emergency Response Act, IDAHO CODE §§ 39-7101 to -7115 (1993); Illinois, ILL. REV. STAT. ch. 415, § 5/22.2 (1993); Indiana, the Indiana Superfund Law, IND. CODE ANN. §§ 13-7-8.7-1 to -8 (West 1993); Iowa, IOWA CODE ANN. § 455B-392 (West 1993); Kansas, KAN. STAT. ANN. §§ 65-3452a to -3455 (1992); Kentucky, KY. REV. STAT. ANN. § 224.01-400 (Baldwin 1991); Louisiana, LA. REV. STAT. ANN. §§ 30:2271 to :2281 (1993 & Supp. 1994); Maine, the Maine Uncontrolled Hazardous Substance Sites Law, ME. REV. STAT. ANN. tit. 38, §§ 1361-1371 (West 1993); Maryland, MD. ENVIR. CODE ANN., §§ 7-201 to -268 (1993); Massachusetts, the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, MASS. GEN. LAWS ANN. ch. 21E, §§ 1-18 (West 1993 & Supp. 1994); Michigan, the Michigan Environmental Response Act, MICH. COMP. LAWS ANN. §§ 299.601 to .610 (West 1984 & Supp. 1993); Minnesota, the Minnesota Environmental Rights Act, MINN. STAT. ANN. §§ 115B.01 - .24 (West 1987 & Supp. 1994); Missouri, MO. REV. STAT. §§ 260.435 to .552 (1993); Montana, MONT. CODE ANN. §§ 75-10-601 to -724 (1993); New Jersey, the New Jersey Spill Compensation and Control Act ("Spill Act"), N.J. STAT. ANN. §§ 58:10-23.1 to .24 (West 1992 & Supp. 1993); New York, the New York Inactive Hazardous Waste Disposal Sites Act, N.Y. ENVTL. CONSERV. LAW §§ 27-1301 to -1321 (McKinney 1994); North Dakota, N.D. CENT. CODE §§ 23-31-01 to -03 (1993); Ohio, OHIO REV. CODE ANN. § 3734.01 to .99 (Anderson 1993); Oregon, OR. REV. STAT. §§ 465.200 to .455, .900, .605 to .680 (1992); Pennsylvania, the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), 35 PA. STAT.

These little Superfunds were enacted to enable states to fulfill their statutory responsibilities under CERCLA. These responsibilities include supplementing federal efforts under CERCLA with additional cleanup and recovering state funds. State laws essentially follow the CERCLA cleanup strategy and mirror CERCLA's liabilities and defenses, such that response costs recoverable under CERCLA are also recoverable under state law. State little Superfunds, however, often include differences in the standards for establishing liability and in the defenses available to PRPs under CERCLA.⁴ These differences are generally incorporated into state little Superfund legislation to promote particular state policies or to address perceived problems with CERCLA.

These differences in liability standards and defenses often lead to conflict. This frequently occurs when parties liable under both CERCLA and a state little Superfund, can bring a contribution action against third parties who are liable for response costs under CERCLA but not under the state law. Conversely, third parties who are not liable under the state law have a counterclaim for indemnity of response costs incurred as a result of the contribution action under CERCLA, and for complete indemnity under a state law action.

In resolving these conflicts, state policy judgments underlying the different defenses and liabilities should be preserved to the maximum extent practicable. Specifically, the alternative state liability scheme should be used to dictate rules of allocation, as long as its application does not interfere with the overarching federal

ANN. §§ 6020.101-.1305 (1992); Rhode Island, Rhode Island Oil Release Response Fund Act, R.I. GEN. LAWS §§ 46-12.7-1 to -9 (1993); South Carolina, S.C. CODE ANN. §§ 44-56-20, -90, -160 to -200 (Law. Co-op. 1993); South Dakota, the South Dakota Regulated Substance Discharges Act, S.D. CODIFIED LAWS ANN. §§ 34A-12-1 to 34A-12-24 (1992 & Supp. 1993); Tennessee, the Tennessee Hazardous Waste Management Act of 1983, 68 TENN. CODE ANN. §§ 212-201 to -312 (1992); Texas, TEX. HEALTH & SAFETY CODE ANN. §§ 361.131-140, .181-202, .271-280, .401-405 and TEX. NAT. RES. CODE §§ 40.001 to .304 (West Supp. 1994); Utah, the Utah Hazardous Substances Mitigation Act, UTAH CODE ANN. §§ 19-6-301 to -325 (1993); Vermont, VT. STAT. ANN. tit. 10, §§ 1280-83, 6615-17 and tit. 12, § 5783 (1993); Washington, the Washington Model Toxics Control Act, WASH. REV. CODE §§ 70.1050.101 to .921 (1991); West Virginia, the West Virginia Hazardous Waste Emergency Response Fund Act, W. VA. CODE §§ 20-5G-1 to -6 (1993); Wisconsin, the Wisconsin Environmental Repair Law, WIS. STAT. ANN. § 144.442 (West 1992). See also the Puerto Rico Environmental Emergencies Fund Act, P.R. LAWS ANN. tit. 12, §§ 1271-76 (Supp. 1990).

4. This article will focus on the Pennsylvania and New Jersey little Superfunds. For a discussion of the differences between Pennsylvania's HSCA and CERCLA, see *infra* notes 62-79 and accompanying text. For a discussion of the differences between New Jersey's Spill Act and CERCLA, see *infra* notes 88-104 and accompanying text.

concerns of promoting rapid cleanup⁵ and replenishing the Superfund,⁶ or undermine the statutory goals of promoting cleanup by the government⁷ and private parties.⁸ This will require that courts consider and balance state and federal objectives. This balance should involve issues of law only and should be resolved at the early stages of a contribution action.

II. CERCLA'S LIABILITY AND DEFENSE MECHANISMS

Prior to 1980, no federal legislation existed which addressed past disposals of hazardous wastes; all existing laws were directed only at regulating current activity. Therefore, Congress enacted CERCLA⁹ to address the hazards created from past disposals. Congress did this by authorizing the government to order or arrange for the cleanup of contamination caused by the unregulated waste disposal practices of the past.¹⁰ To that end, the United States Environmental Protection Agency ("EPA") is permitted either to act on its own behalf and clean up sites at which there was a release or threatened release of a hazardous substance, or to order responsible parties to clean up the site.¹¹ In cases where the government takes action itself, EPA is authorized to utilize Superfund monies¹² and then sue responsible parties for the costs incurred in order to replenish the "Superfund."¹³

5. See *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1289 (D. Minn. 1987).

6. For a discussion of the trust fund established under CERCLA, called the "Superfund," see *infra* note 13.

7. See CERCLA § 104(a), 42 U.S.C. § 9604(a).

8. See CERCLA § 106(a), 42 U.S.C. § 9606(a).

9. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1988 & Supp. IV 1992)).

10. CERCLA § 104(b), 42 U.S.C. § 9604(b). Section 104(b) authorizes the President to remove or arrange for removal of any hazardous substance which is released or poses a threat of release into the environment. *Id.*

11. CERCLA § 104(a) authorizes EPA to undertake remedial action in response to a release or threat of release. CERCLA § 104(a), 42 U.S.C. § 9604(a).

12. See CERCLA § 104(c), 42 U.S.C. § 9604(c).

13. "Superfund" is the national trust fund established to finance the investigation and cleanup of sites at which hazardous substances are released. BRADFORD F. WHITMAN, *SUPERFUND LAW AND PRACTICE* at 1 (1991). CERCLA contemplates the use of Superfund money for either private or government sponsored cleanup of sites where no responsible party can be found. Robert M. Howard, *Government Cost Recovery After the Cleanup: Do the Superfund Amendments Give the EPA a License to Squander?*, 42 BAYLOR L. REV. 53, 66 (1990). It is EPA's obligation to replenish the fund through a combination of privately negotiated settlements with responsible parties later identified or through litigation. *Id.*; see also CERCLA § 122, 42 U.S.C. § 9622.

Section 107(a) of CERCLA identifies four classes of parties potentially liable for response costs caused by a release or threatened release of "hazardous substances" at a particular "facility."¹⁴ These four classes are: (1) current owners and operators of a facility; (2) owners and operators of a facility at the time a hazardous substance was disposed; (3) those who arranged for disposal or treatment of a hazardous substance; and (4) those who transported a hazardous substance.¹⁵

Although CERCLA does not explicitly provide for imposition of joint and several liability, courts have held that section 107 creates joint and several liability to the federal government unless a defendant can demonstrate that the harm is divisible and capable of apportionment.¹⁶ However, virtually every court that has considered the issue has held that any person who incurs response costs has a private right of action to seek reimbursement from other PRPs under section 107.¹⁷ Furthermore, section 113(f) of CERCLA,¹⁸ added by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),¹⁹ provides responsible parties with a federal right of contribution against other responsible parties. As discussed at greater length in Section IV of this article, section 113(f) generally provides that federal law governs contribution actions and au-

14. Howard, *supra* note 13, at 66. CERCLA defines "facility" as:

(A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or

(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located, but does not include any consumer product or consumer use of any vessel.

CERCLA § 101(9), 42 U.S.C. § 9601(9).

The term "hazardous substance," a key term in determining liability, is broadly defined to include any number of hazardous wastes, toxic water pollutants, hazardous air pollutants and other toxic or hazardous pollutants listed under certain specified statutes, or separately designated as a hazardous substance under CERCLA by EPA. CERCLA § 101(14), 42 U.S.C. § 9601(14); *see also* 40 C.F.R. pt. 302.4 (1992) (listing hazardous substances).

15. *See* CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4).

16. *See* United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993) (finding CERCLA liability apportionment issues are fact related and divisibility of harm evidence supports apportionment argument); United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992).

17. *See* Cadillac Fairview v. Dow Chem. Co., 840 F.2d 691 (9th Cir. 1988) (holding additional state or federal law support not required for liability to attach in actions against previous owners of hazardous waste sites). *See also* Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887 (9th Cir. 1986) (granting hazardous-waste site owner right to recover damages and declaratory relief from previous owner).

18. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

19. Pub. L. No. 99-499, § 104, 100 Stat. 1613 (codified as amended in scattered sections at 42 U.S.C. §§ 9601-75 (1988)).

thorizes courts to apply appropriate equitable principles in these actions.²⁰

Defenses to CERCLA liability are limited.²¹ Most defenses are created by exemptions from liability, some of which are created by definitions under CERCLA. For example, by exempting petroleum and petroleum products from the definition of "hazardous substance,"²² CERCLA created the "petroleum exclusion defense."²³ The exclusions relating to fertilizer application, work place exposure, emissions from engine exhausts and releases of nuclear materials from the definition of "release"²⁴ create similar defenses to CERCLA liability.

Additionally, section 107 provides defenses by exempting certain activities from liability. Under this section, no person is entitled to recover response costs or damages resulting from a "federally permitted release,"²⁵ application of a registered pesticide product,²⁶ or actions taken to address an imminent hazard at the

20. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1). Section 113(f)(1) states: "Any person may seek contribution from any other person who is liable or potentially liable In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.*

21. *See, e.g.,* United States v. Kramer, 757 F. Supp. 397, 411 (D.N.J. 1991).

22. "Hazardous substance" is defined as "any element, compound, mixture, solution, or substance designated pursuant to § 9602 of this title The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph" CERCLA § 101(14), 42 U.S.C. § 9601(14).

23. *See* Southern Pacific Transp. Co. v. California, 790 F. Supp. 983 (C.D. Cal. 1991); *Cose v. Getty Oil Co.*, 34 Env't Rep. Cas. (BNA) 1308 (E.D. Cal. 1991), *rev'd*, 4 F.3d 700 (9th Cir. 1993) (holding crude oil tank bottoms to be beyond scope of exclusion); *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531, 539 (N.D.N.Y. 1991) (stating plain reading of exclusionary provision does not warrant extending exclusion to oil contaminated with hazardous substances through use).

24. CERCLA § 101(22), 42 U.S.C. § 9601(22). With some exceptions, a "release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, or dumping, or disposing into the environment." *Id.*

25. *Id.* § 107(j), 42 U.S.C. § 9607(j). Recovery for response costs due to a federally permitted release occurs pursuant to existing law in lieu of the CERCLA liability provision. The CERCLA liability provision has no effect on a person's liability for a hazardous release under other state or federal authority. *Id.*

26. *Id.* § 107(i), 42 U.S.C. § 9607(i). No person may recover under the CERCLA liability provision for costs resulting from federally authorized pesticide discharges. *Id.*

direction of the federal on-scene coordinator or by state and local governments.²⁷

If none of these statutory exemptions is available, the statute limits affirmative defenses to the three defenses specified in section 107(b).²⁸ Under section 107(b), a PRP can avoid liability if the PRP can prove the release or threat of release was caused solely by:

- (1) an act of God;
- (2) an act of war; [or]
- (3) 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, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care . . . and (b) he took precautions against foreseeable acts or omissions of any such third party²⁹

Courts have generally held that the statutory defenses in section 107(b) are intended to exclude all other common law affirmative defenses.³⁰

III. ROLE OF THE STATES UNDER CERCLA

While CERCLA is predominantly a federal program, Congress contemplated and, in many cases mandated, a substantial state role in the program's implementation. EPA is not authorized to conduct a long-term remedial action unless the state in which the affected site is located first enters into a "cooperative agreement" with EPA.³¹ CERCLA requires the state, in the agreement, to assure all future operation and maintenance of the chosen remedial plan and to pay or assure payment of at least ten percent of the costs of remediation.³² EPA may also enter into a cooperative agreement under which the state may carry out all or a portion of the federal

27. *Id.* § 107(d), 42 U.S.C. § 9607(d). Persons cannot be held liable for acting pursuant to the National Contingency Plan or for following orders given by a coordinator appointed under that plan. *Id.*

28. CERCLA § 107(b), 42 U.S.C. § 9607(b). The burden of proof for these defenses requires that there be a demonstration by a preponderance of the evidence. *Id.*

29. *Id.* § 107(b), 42 U.S.C. 9607(b). The district court in *Kramer* enumerated the terms of this provision, interpreting them to their narrowest limits. *United States v. Kramer*, 757 F. Supp. 397, 411 (D.N.J. 1991).

30. *Kramer*, 757 F. Supp. at 410.

31. CERCLA § 104(c)(3), 42 U.S.C. § 9604(c)(3).

32. *Id.* § 104(c)(3), 42 U.S.C. § 9604(c)(3).

responsibilities under CERCLA and then receive federal reimbursement.³³ Further, EPA must regulate to provide “for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State.”³⁴

Under section 107 of CERCLA, a PRP is liable to a state for costs incurred to the same extent a PRP would be liable to the federal government.³⁵ Similarly, when a state reaches a settlement with a PRP, CERCLA provides that PRP with the same statutory protection against contribution actions extended to PRPs settling with the federal government.³⁶ Thus, Congress made it possible for states to recover their costs directly from PRPs, just as the federal government can.³⁷

Congress expressly preserved the right of states and private individuals to recover both response costs and other damages under state law, even where states incurred the costs as a result of fulfilling responsibilities under CERCLA.³⁸ Section 114(a)³⁹ provides that “[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing additional liability or requirements with respect to the release of hazardous substances within such State.”⁴⁰ Section 302(d) reiterates that nothing in CERCLA may “affect or modify in any way the obligations or liabilities of any

33. *Id.* § 104(d), 42 U.S.C. § 9604(d).

34. CERCLA § 121(f)(1), 42 U.S.C. § 9621(f)(1). The regulations must specify: (A) the level of state involvement regarding assessments and site inspections, (B) “[a]llocation of responsibility for hazard ranking system scoring,” (C) state involvement in the National Priority List, (D) long term remedial plans within the state, (E) state review and commentary periods during all major steps in the remedial process. *Id.*

35. CERCLA § 107(a), 42 U.S.C. § 9607(a). Section 107(a) makes PRPs liable to the United States, a state or an Indian tribe for all costs of removal or remedial action not inconsistent with the National Contingency Plan. In cases where a party other than the United States, a state or an Indian tribe incurs response costs, PRPs are liable only for “necessary costs of response incurred by any other person *consistent with the National Contingency Plan.*” *Id.* (emphasis added).

36. *Id.* § 113(f)(2), 42 U.S.C. § 9613(f)(2). A person that resolves its liability with the state in settlement is exempt from further liability on those matters addressed in the settlement. *Id.*

37. *Id.* § 104(c), 42 U.S.C. § 9604(c).

38. *Id.* § 114(a), 42 U.S.C. § 9614(a).

39. CERCLA § 114(a), 42 U.S.C. § 9614(a). CERCLA exists only as a floor, not a ceiling, for environmental protection. However, the Sixth Circuit held that once a consent decree is entered by a federal court, alternative state remedies are barred. *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1418 (6th Cir. 1991) (“[T]he state is limited in its ability to require alternative relief if and when a consent decree is entered into between PRPs and EPA.”).

40. CERCLA § 114(a), 42 U.S.C. § 9614(a). Section 114 prohibits state and federal authorities from recovering redundant response costs from a single PRP. CERCLA § 114(b), 42 U.S.C. § 9614(b).

person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."⁴¹

Congress has affirmatively preserved CERCLA's role as floor regulation of hazardous substances. In *Exxon Corp. v. Hunt*,⁴² the United States Supreme Court held that former section 114(c) of CERCLA⁴³ preempted portions of the New Jersey Spill Compensation and Control Act ("Spill Act")⁴⁴ to the extent that the Spill Act would be used to finance cleanups that also qualified for federal Superfund monies.⁴⁵ Congress reacted by repealing section 114(c), with the specific intent of preserving state power to create state little Superfunds, such as the Spill Act.⁴⁶

In 1991, the Third Circuit addressed this issue in *Manor Care, Inc. v. New Jersey Department of Environmental Protection*.⁴⁷ In response to the *Hunt* decision and the subsequent congressional action, the Third Circuit held that New Jersey was entitled to utilize its authority under the Spill Act to require PRPs to reimburse the state for costs which it incurred pursuant to its required CERCLA obligation.⁴⁸ Specifically, the court upheld New Jersey's Spill Act provision imposing treble damages on PRPs failing to pay state response costs incurred under CERCLA.⁴⁹

Other sections of CERCLA further preserve and enhance the ability of private parties to seek indemnity or damages authorized

41. *Id.* § 302(d), 42 U.S.C. § 9652(d).

42. 475 U.S. 355 (1986).

43. Pub. L. No. 96-510, 94 Stat. 2767, at 2796, § 114(c) (amended by Pub. L. No. 99-499, § 114(a), 100 Stat. 1652 (1986)). Before amendment, this section provided:

Except as provided by this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title. Nothing in this section, shall preclude any State from using general revenues for such a fund or from imposing a tax or fee upon any persons or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

Id.

44. N.J. STAT. ANN. § 58:10-23.1 to .24 (West 1992 & Supp. 1993). The Spill Act imposes a tax to create a dedicated state fund to finance cleanups. *Id.* § 58:10-23.11a.

45. *Hunt*, 475 U.S. at 370.

46. H.R. REP. NO. 255, 99th Cong., 2d Sess. 83-84 (1986), *reprinted in* 1986 U.S.C.A.N. 2835, 2865-66.

47. 950 F.2d 122 (3d Cir. 1991).

48. *Id.* at 127.

49. *Id.*

under state law. Section 107(e) permits PRPs to enter into indemnification agreements, but provides that such agreements are powerless to affect liability to the federal government. This qualification would vitiate CERCLA's goal of replenishing the Superfund.⁵⁰ Section 309 of CERCLA sets forth specific rules for dealing with state statutes of limitation. It voids state statutes of limitation "for personal injury or property damages, which are caused or contributed to by exposure of any hazardous substance, or pollutant or contaminant" to the extent the state limitation period is shorter than that which is provided by CERCLA for recovery of response costs.⁵¹ This section also explicitly preserves longer state statutes of limitation.⁵²

IV. LIABILITY UNDER STATE LITTLE SUPERFUNDS — THE PENNSYLVANIA HAZARDOUS SITES CLEANUP ACT AND THE NEW JERSEY SPILL COMPENSATION AND CONTROL ACT

A large number of states have enacted little Superfunds or have amended existing response legislation to enable them to: (1) effectively fulfill their statutory responsibilities under CERCLA; (2) recover costs incurred fulfilling those statutory responsibilities; and (3) supplement CERCLA by creating a state program for cleanup of sites not included on the National Priorities List ("NPL").⁵³ These statutes tend to closely parallel CERCLA. However, they often include minor differences which may expand or decrease liability. For example, certain classes of parties who are liable under CERCLA may be exempted from liability under a state statute. The state law may provide additional affirmative defenses, or define operative terms differently in order to narrow liability.⁵⁴ The statutes

50. CERCLA § 107(e), 42 U.S.C. § 9607(e); see *Jones-Hamilton Co. v. Beazer Materials & Serv., Inc.*, 959 F.2d 126 (9th Cir. 1992) (contract indemnifying chemical company for damages did not violate CERCLA). Courts have differed in their interpretations of § 107(e), some holding that no indemnity contracts are valid. This line of cases, however, is inconsistent with the clear wording of the statute.

51. CERCLA § 309, 42 U.S.C. § 9658; see *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991) (holding that federal statute of limitations for response to negligence allegations preempted shorter state statute of limitations).

52. CERCLA § 309(a)(2), 42 U.S.C. § 9658(a)(2).

53. For a list of states that have enacted their own Superfund law or "little Superfund," see *supra* note 3.

54. These definitional differences may exclude particular substances from the definition of hazardous substance or an activity from the definition of release. For a discussion of how these definitional provisions affect CERCLA, see *supra* notes 22-27 and accompanying text.

may also create broader liability by, for example, defining hazardous substance more broadly.⁵⁵

This Article focuses on two examples of state little Superfunds: the Pennsylvania Hazardous Sites Cleanup Act ("HSCA")⁵⁶ and the New Jersey Spill Act.⁵⁷ The Pennsylvania Legislature enacted HSCA in response to CERCLA⁵⁸ with the statutorily expressed purposes of providing for state recovery of response costs and supplementing the federal CERCLA program.⁵⁹ Conversely, New Jersey's Spill Act preceded CERCLA and served as a model for the drafters of CERCLA.⁶⁰ The Spill Act has been amended on several occasions since 1980 to make the law more consistent with CERCLA and its amendments.⁶¹

A. The Pennsylvania Hazardous Sites Cleanup Act

The HSCA was enacted to supplement CERCLA by authorizing the state to: (1) address contaminated sites not included on the NPL; (2) undertake cleanups pursuant to CERCLA; and (3) seek recovery of cleanup costs.⁶² Similar to the CERCLA liability scheme, HSCA authorizes the Commonwealth to order parties to

55. See, e.g., New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.1 to .24 (West 1992) (listing petroleum as a hazardous substance).

56. PA. STAT. ANN., tit. 35, §§ 6020.101 to .1305 (1992).

57. N.J. STAT. ANN., §§ 58:10-23.1 to .24 (West 1992 Supp. 1993).

58. PA. STAT. ANN. tit. 35, § 6020.101.

59. *Id.* § 6020.102(12). The General Assembly intended the Act to: (1) authorize departmental investigation, assessment and cleanup of hazardous sites; (2) authorize departmental involvement in real or threatened hazardous releases and contaminated water supplies; (3) provide a fund to support the above activities; (4) impose fees and other penalties for improper waste handling in order to replenish the fund; (5) mold State and Federal cleanup programs into a cooperative effort; (6) facilitate preventative steps to protect health and welfare; (7) establish new hazardous sites and an efficient execution of the program; and (8) provide incentives for responsible persons to take adequate safety measures. *Id.* § 6020.102(12)(i)-(x).

60. *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986).

61. See, e.g., L. 1984, c. 142 (Sept. 6, 1984) (easing Spill Fund aid requirements); L. 1986, c. 143 (Nov. 12, 1986) (changing various tax rates and adding various new substances to be taxed); L. 1991 c. 58 § 1 (adding express private cause of action); L. 1993, c. 139 (June 16, 1993).

62. PA. STAT. ANN., tit. 35, § 6020.102(7), (8). Since CERCLA encourages states to participate in the cleanup of hazardous sites, it is in the best interest of its citizens that Pennsylvania participate in such cleanups. Some hazardous sites that do not qualify for federal cleanup still threaten public health and the environment. Therefore, an independent state cleanup program is necessary to address the problem. *Id.*

remediate a site⁶³ or to remediate a site itself and seek recovery of cleanup costs from responsible parties.⁶⁴

The HSCA liability scheme closely parallels that of CERCLA in other respects as well. The HSCA holds "responsible persons" strictly liable where there has been a release or threatened release of a hazardous substance.⁶⁵ HSCA authorizes causes of action against third parties more broadly than CERCLA, including a citizen suit provision allowing actions directly against responsible parties for injunctive relief.⁶⁶ HSCA also provides for a right of contribution.⁶⁷ Most courts have rightly found that HSCA provides a private cause of action for response costs.⁶⁸

HSCA also presents more viable defenses than CERCLA. HSCA includes the same act of God, act of war and third-party defenses as CERCLA.⁶⁹ In addition to the CERCLA "innocent landowner" defense, HSCA provides defenses to residential homeowners,⁷⁰ builders with residential housing⁷¹ and transporters of municipal waste containing household hazardous waste.⁷² HSCA

63. *Id.* § 6020.1102(a). "The department shall issue orders to persons as it deems necessary to aid in the enforcement of the provisions of this act." *Id.* Orders may require response actions or require the study, modification, or cessation of a response action. *Id.*

64. The department may take any investigative, remedial, or response action which it deems necessary to protect health and environment. *Id.* §§ 6020.501, .505, .507, .701.

65. *Id.* § 6020.701.

66. PA. STAT. ANN. tit. 35, § 6020.1115. "A person . . . threatened with injury or property damage as a result of a release of a hazardous substance may file a civil action against any person to prevent or abate a violation of this act or of any order, regulation, standard or approval issued under this act." *Id.*

67. *Id.* § 6020.705. A person may seek contribution from a responsible party pursuant to the "responsible person" provision of § 701, the "recovery of response costs" provision of § 507, or the "public nuisances provision" of § 1101.

68. See *Toole v. Gould, Inc.*, 764 F. Supp. 985, 992 (M.D. Pa. 1991); *General Electric Envtl. Serv., Inc. v. Envirotech Corp.*, 763 F. Supp. 113, 115 (M.D. Pa. 1991) (drawing analogy between CERCLA cases authorizing private parties to sue violators and comparable HSCA actions to infer right to private cause of action where none is explicitly stated in HSCA); *Fry v. Leech Tool and Die Works, Inc.*, A.D. No. 90-403 (C.P. Crawford Cty. 1991), *petition for relief denied*, No. 18MDW 91 (Pa. Super. 1991); *Manella v. Thompson*, No. 89-01069-09-2 (C.P. Bucks Cty. 1991). *But see Lutz v. Chromatex, Inc.*, 730 F. Supp. 1328, 1330 (M.D. Pa. 1990) (interpreting section that imposed liability on any person allowing violations to bar private causes of action under HSCA). The *Lutz* decision, although styled as an action to recover response costs, was actually an action seeking recovery for personal injury. *Id.* at 1330. HSCA was not intended to provide a cause of action for personal injury. See PA. STAT. ANN., tit. 35, § 6020.701.

69. PA. STAT. ANN. tit. 35, § 6020.703(a).

70. *Id.* § 6020.703(d).

71. *Id.*

72. *Id.* § 6020.703(e).

also provides absolute exemptions from liability for homeowners,⁷³ generators of household hazardous waste,⁷⁴ persons involved in projects to recover methane gas from landfills,⁷⁵ scrap metal generators involved in recycling⁷⁶ and foreclosing lenders.⁷⁷ HSCA creates an additional "defense" by prohibiting the Pennsylvania Department of Environmental Resources from initiating any action under HSCA if an order can be issued to the owner or operator of the site under the Commonwealth's Solid Waste Management Act⁷⁸ or Clean Streams Law.⁷⁹ Therefore, the Commonwealth will first require an owner or operator to conduct a cleanup under the broad authority of the Clean Streams Law or Solid Waste Management Act, making state initiated actions under HSCA relatively rare.

Presumably, these defenses and exemptions reflect important state policy concerns, and are significant in light of the fact that HSCA was enacted only after extensive negotiation and almost a decade of experience under the CERCLA program. Under HSCA, the Commonwealth created an absolute exemption for foreclosing lenders.⁸⁰ Presumably, the state's purpose was to help the banking industry and to make funds more available for development and redevelopment, particularly in the case of older industrial sites which typically exhibit some degree of contamination.⁸¹ The exemption for scrap metal promotes recycling of these materials.⁸² The liability exemption for gas recovery projects at municipal solid waste landfills⁸³ promotes this method of abating a well-known municipal waste hazard while generating gas resources. The exemption for residential homebuilders⁸⁴ and individual homeowners⁸⁵ advances the policy of providing residential housing.

73. PA. STAT. ANN., tit. 35, § 6020.701(b)(2).

74. *Id.* § 6020.701(b)(3).

75. *Id.* § 6020.701(b)(4).

76. *Id.* § 6020.701(b)(5).

77. PA. STAT. ANN., tit. 35, § 6020.703(d). Foreclosing lenders are included in HSCA's definition of "owner or operator." *Id.* § 6020.103.

78. *Id.* §§ 6018.101-1003.

79. *Id.* § 6020.1301.

80. *Id.* § 6020.703(d). For further discussion of this exemption, see *supra* note 77.

81. Legislation is pending which would encourage use of old industrial sites rather than using new "green sites" by further limiting the deterrent effect of liability for contamination caused by past years of industrial use.

82. PA. STAT. ANN., tit. 35, § 6020.701(b)(5).

83. *Id.* § 6020.701(b)(4).

84. *Id.* § 6020.703(d).

85. *Id.*

Finally, the exemptions for generators⁸⁶ and transporters⁸⁷ of household hazardous waste address numerous important policy concerns. The exemptions encourage municipalities to design household hazardous waste collection programs to separate household hazardous waste from other municipal waste and treat it in hazardous waste facilities rather than municipal solid waste facilities. These exemptions also seek to eliminate possible deterrents to local governments collecting and transporting municipal waste. Finally, the exemption seeks to protect the public fiscal situation by assuring that costs of cleanup are not placed on taxpayers.

B. The New Jersey Spill Compensation and Control Act

The Pennsylvania General Assembly had the advantage of almost a decade of experience under CERCLA to guide it when drafting HSCA. In contrast, the original version of the New Jersey Spill Act, enacted in 1977, served as the model for CERCLA, which was passed three years later.⁸⁸

In the Spill Act, the New Jersey Legislature designated the storage and transfer of hazardous substances to be a hazardous undertaking, which constituted a threat to both the environment and economy of the state.⁸⁹ The Spill Act was intended

to control the transfer and storage of hazardous substances and to provide liability for damage sustained within [New Jersey] as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharges.⁹⁰

Like CERCLA, the Spill Act creates a fund⁹¹ which may be used by the New Jersey Department of Environmental Protection and

86. PA. STAT. ANN., tit. 35 § 6020.701(b)(3).

87. *Id.* § 6020.703(e).

88. *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986).

89. N.J. STAT. ANN. § 58:10-23.11a.

90. *Id.*

91. The Fund is maintained by taxing operators of major facilities that handle hazardous substances. The provision gives specifications for what constitutes a "public storage terminal" for the purposes of the tax, and delineates procedure for compliance and enforcement of the tax. See N.J. STAT. ANN. § 58:10-23.11h; see also *Exxon Corp. v. Hunt*, 4 N.J.T.C. 294 (1982), *aff'd*, 462 A.2d 193 (N.J. Super., App. Div. 1983), *rev'd in part on other grounds*, 475 U.S. 355 (1986).

Energy ("NJDEPE") to clean up spills of hazardous substances.⁹² The same statutory provision which authorizes NJDEPE to remove or to arrange for the removal of any discharge of a hazardous substance also authorizes it to issue a directive requiring a third party to do so.⁹³ Any person who fails to comply with such a directive without good cause is subject to treble damages.⁹⁴ Cleanups ordered or arranged for by NJDEPE under the Spill Act must be consistent, to the greatest extent possible, with the National Contingency Plan which guides CERCLA cleanups.⁹⁵

The Spill Act prohibits any discharge of a hazardous substance⁹⁶ and imposes joint and several liability "without regard to fault" upon any person who discharges or is in any way responsible for a hazardous substance release.⁹⁷ Additionally, liability is imposed retroactively.⁹⁸

Cleanup costs are recoverable under the Spill Act through several mechanisms. Although the Spill Act originally created liability only to the Fund, it was amended to impose liability upon responsible persons for all cleanup and removal costs "no matter by whom incurred," thereby creating a private right of action parallel to that under CERCLA.⁹⁹ The Spill Act provides for recovery from the Fund by persons who have incurred cleanup costs, but who are not themselves liable under the Spill Act. The Fund is liable to them "for all cleanup and removal costs and for all direct and indirect

92. N.J. STAT. ANN. § 58:10-23.11g(a). "The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained . . ." *Id.*; see also *id.* § 58:10-23.11f (entitled Discharge of Hazardous Substance; Removal and Cleanup).

93. N.J. STAT. ANN. § 58:10-23.11f(a)(1) ("Whenever any hazardous substance is discharged, the department may, in its discretion, act to cleanup and remove or arrange for the cleanup and removal of such discharge or may direct the discharger to clean up and remove, or arrange for the cleanup and removal of, such discharge."). *Id.*

94. *Id.* Relying upon case law developed under CERCLA, the New Jersey courts have read into the statute a good faith defense to the imposition of treble damages. *Kimber Petroleum v. New Jersey Dep't of Env'tl. Protection*, 539 A.2d 1181, 1185 (N.J. 1988).

95. N.J. STAT. ANN. § 58:10-23.11f.

96. *Id.* § 58:10-23.11c. "The discharge of hazardous substances is prohibited. This section shall not apply to discharges of hazardous substances pursuant to and in compliance with the conditions of a Federal or State permit." *Id.*

97. *Id.* § 58:10-23.11g(c)(1). "Any person who has discharged a hazardous substance, or is any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." *Id.*

98. *Id.* § 58:10-23.11f(b)(3). See *Atlantic City Mun. Util. Auth. v. Hunt*, 509 A.2d 225 (N.J. Super. 1986) (holding provisions retroactive for NJDEPE only).

99. N.J. STAT. ANN. § 58:10-23.11g(c)(1).

damages.¹⁰⁰ Although the Spill Act as originally enacted provided no right of contribution, the same amendments added a right to a private cause of action and created a right to contribution.¹⁰¹

The defenses under the Spill Act are similar to defenses under CERCLA and have been construed in an equally narrow fashion. The Spill Act provides that "an act or omission caused solely by war, sabotage, God or a combination thereof, shall be the only defenses" available.¹⁰² Also like CERCLA, the Spill Act exempts "permitted" releases from liability. However, this exemption extends to releases permitted under state or federal law, rather than federal law alone.

The most significant differences between the liabilities and defenses under the Spill Act and CERCLA arise from their respective definitions of the term "hazardous substances." With respect to CERCLA, the scope of liability under the Spill Act is both expanded and narrowed by its definition.¹⁰³ Unlike the federal definition, the Spill Act expressly includes petroleum, thus allowing for increased cleanup of contamination caused by petroleum, distilled petroleum products and natural gas. On the other hand, the Spill Act specifically excludes sewage and sewage sludge from its definition of hazardous substances. This provides an exemption for publicly and privately owned treatment works and facilities whose sludge may have been disposed of at a hazardous waste site.¹⁰⁴

These differences reflect New Jersey's policy decisions. The Spill Act's omission of CERCLA's petroleum exclusion eliminates a major loophole in the federal regulatory scheme and purportedly protects both human health and the environment.¹⁰⁵ Its sludge ex-

100. N.J. STAT. ANN. § 58:10-23.11g(a). In *New Jersey Dep't of Env'tl. Protection v. Ventron Corp.*, 440 A.2d 455 (N.J. 1981), the New Jersey Supreme Court held that a private right of action against the Fund did not extend to those who were liable under the Spill Act. *Id.* at 464.

101. N.J. STAT. ANN. § 58:10-23.11f(a)(2). This section provides: Whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance.

Id.

102. *Id.* § 58:10-23.11g(d).

103. *Id.* § 58:10-23.11b(k).

104. *Id.*

105. CERCLA's petroleum exclusion cannot be justified by any health or environmental concern. It was probably included as a political expediency to secure the necessary votes from oil producing states. More charitably, it might be looked upon as a vestigial provision that was originally included to assure that oil would not be "double charged" when the Superfund was funded by a tax on petroleum

emption advances the state policy of encouraging the construction and operation of publicly owned treatment works and replacing frequently malfunctioning on-lot systems.¹⁰⁶ The Spill Act exemption represents a state policy judgment that parallels the policy behind the federally-permitted release under CERCLA. At the time of the enactment of the Spill Act, section 405 of the Clean Water Act¹⁰⁷ required that sludge disposal be governed by a comprehensive federal permitting system.¹⁰⁸ New Jersey similarly recognized that sludge could be regulated through water quality protection statutes.

V. THE RIGHT OF CONTRIBUTION UNDER CERCLA

Section 113(f) of CERCLA provides PRPs a right to seek contribution "from any other person who is liable or potentially liable."¹⁰⁹ Section 113(f) further establishes rules governing the effect of settlement agreements on contribution actions, stating that 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."¹¹⁰ Generally, a settlement will not discharge the claims of other parties. The United States retains its right to recover any amount not yet recovered from other potentially liable parties. The rights of settlers are subordinate to those of the United States.¹¹¹

and petrochemical feedstocks—a justification that was eliminated when the tax was broadened in 1986.

106. This policy is reflected in the construction grants and revolving loan fund programs established in Title II of the Clean Water Act. Federal Water Pollution Control Act. 33 U.S.C. §§ 1281-99 (1988 & Supp. IV 1992).

107. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1988 & Supp. IV 1992) (Act was formally titled Federal Water Pollution Control Act but it is now referred to as Clean Water Act) [hereinafter CWA].

108. CWA § 405, 33 U.S.C. § 1345.

109. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1). Section 113(f) 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.

Id.

110. *Id.* § 113(f)(2), 42 U.S.C. § 9613(f)(2).

111. *Id.* § 113(f)(3)(C), 42 U.S.C. § 9613(f)(3)(C).

Prior to the enactment of section 113(f) in the SARA amendments, the majority of courts found a common law right of contribution to exist under CERCLA.¹¹² The courts struggled with a variety of unsettled issues such as: (1) whether a federal common law rule or a state contribution statute should be applied; (2) what effect a settlement should have on the contribution shares of the remaining nonsettlers; and (3) whether a settlement with the government bars later contribution actions against settlers.¹¹³ In light of the last issue in particular, contribution was hotly debated and negotiated in settlements prior to the enactment of SARA.¹¹⁴ The difficulty in resolving these issues was generally perceived as an impediment to settlements.

Accordingly, in the 1986 SARA Amendments, Congress sought first to "clarif[y] and confirm" the right of a person who is found jointly and severally liable under CERCLA and assumes a greater than equitable share of the cleanup costs to seek contribution from other potentially liable persons.¹¹⁵ To encourage settlements, Congress added language assuring contribution protection for settlers and defining a settlor's right to contribution.¹¹⁶ Congress resolved the issue of whether state contribution statutes or federal common law applies by providing that contribution actions "shall be governed by Federal law."¹¹⁷

Congress eschewed specifying the factors a court should consider in a contribution action, providing only that "the court may allocate response costs among liable parties using such equitable

112. See, e.g., *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 227-29 (W.D. Mo. 1985). In a government action to recover response costs for cleanup at a hazardous waste site, the court held that neither CERCLA nor the common law imposed joint and several liability for third-party defendants to third-party plaintiffs for contribution. *Id.*

113. See *United States v. Conservation Chem. Co.*, 628 F. Supp. 391 (W.D. Mo. 1985).

114. For a discussion of Congress' intent to fortify the protection of settlement agreements, see *infra* notes 115-16 and accompanying text.

115. HOUSE ENERGY AND COMMERCE COMMITTEE REPORT 99-253, H.R. DOC. NO. 2817, reprinted in SARA: THE LEGISLATIVE HISTORY 113-41 (Environmental Institute for Waste Management Studies 1987).

116. CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2). SARA's legislative history evidences Congress' strong desire to protect parties who have entered into settlement agreements from later claims of contribution where the matter was addressed in the settlement agreement. 132 CONG. REC. S14905 (daily ed. Oct. 3, 1986). The House Energy and Commerce Committee Report states that § 113 "will help bring an increased measure of finality to settlements" because parties who have entered into a "judicially approved, good faith settlement" are protected in a contribution action. SARA: THE LEGISLATIVE HISTORY, *supra* note 115, at 113-41.

117. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

factors as the court determines are appropriate."¹¹⁸ Utilizing broad discretion to develop a federal common law of contribution, and with the guidance of SARA legislative history, courts have identified certain factors which might be considered.¹¹⁹

Courts have stressed that no particular list of factors or tests can be prescribed for the resolution of contribution issues and have embarked on a case-by-case analysis. The Seventh Circuit indicated that "a court may consider any factors appropriate to balance the equities in the totality of the circumstances."¹²⁰ Thus, courts have considered a wide array of factors which have varied dramatically from case-to-case.¹²¹ No court has specifically addressed the role of state little Superfund rules of liability in these allocation decisions.

118. *Id.* The House Judiciary Committee Report to H.R. 2817 states: New subsection [113(f)(1)] of CERCLA was also amended by the Committee to ratify current judicial decisions that the courts may use their equitable powers to apportion the costs of clean-up among the various responsible parties involved with the site. The Committee emphasizes that courts are to resolve claims for apportionment on a case-by-case basis pursuant to Federal common law, taking relevant equitable considerations into account. Thus, after all questions of liability and remedy have been resolved, courts may consider any criteria relevant to determining whether there should be an apportionment. Relevant criteria for the courts to use in deciding whether to grant apportionment may include: the amount of hazardous substances involved; the degree of toxicity or hazard of the materials involved; the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of the substances; the degree of care exercised by the parties with respect to the substances involved; and the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment. See *United States v. A&F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). Of course, the burden of proof is on the defendant or party seeking apportionment to establish that it should be granted. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983).

HOUSE JUDICIARY COMM. REP. NO. 253, 99th Cong., 2d Sess. 18-19 (1985), *reprinted in* 1986 U.S.C.A.N. 3038, 3041-42.

119. Many courts have pointed to six factors identified in the legislative history of § 113 as bearing upon the liability allocation. These six factors are known as the "Gore factors" because they were included in an amendment which then Senator Gore proposed to the original 1980 CERCLA bill to create a section to govern allocation of liability under § 107. The six factors include the five listed in the House Judiciary Committee Report, *supra* note 118, and the ability of the parties to distinguish their involvement. *Environmental Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508 (7th Cir. 1992); *United States v. R.W. Meyer*, 932 F.2d 568, 576 (6th Cir. 1991); *International Clinical Lab., Inc. v. Stevens*, 30 Env't Rep. Cas. (BNA) 2066, 2068 (E.D.N.Y. 1990).

120. *ENSCO*, 969 F.2d at 509.

121. See, e.g., *ENSCO*, 969 F.2d 503 (applying fault in accident as determinative factor and identifying factors that some courts have considered); *Gopher Oil v. Union Oil Co.*, 955 F.2d 519 (8th Cir. 1992) (allocating liability determined by fraudulent concealment in sale-purchase agreement); *Ellman v. Woo*, 34 Env't Rep. Cas. (BNA) 1969 (E.D. Pa. 1991) (allocating cleanup cost according to per-

VI. THE ROLE OF LIABILITY UNDER STATE LITTLE SUPERFUNDS IN CONTRIBUTION ALLOCATION DECISIONS UNDER CERCLA

The possible role of the state little Superfund laws in contribution and indemnity actions is exemplified by two hypothetical sites, one in Pennsylvania ("PA Site") and the other in New Jersey ("NJ Site").

At PA Site, the federal government brought a cost recovery action under section 107 of CERCLA against a number of parties ("Industrial Generators") who sent industrial waste to a "mixed-waste" landfill. Industrial Generators brought a third-party complaint for contribution against a large number of other PRPs, including some exempt from liability under HSCA ("HSCA Exempts"). Such parties include municipalities who picked up and transported their residents' municipal solid waste ("MSW") to the landfill, the hapless bank that foreclosed on the landfill, and the contractor brought in by the bank to recover the methane gas generated by the landfill. HSCA Exempts, in turn, filed a counterclaim under HSCA against Industrial Generators seeking to recover any response costs for which they may be held liable under CERCLA.

At NJ Site, a municipality itself incurred response costs consistent with the National Contingency Plan in a cleanup action addressing an emergency situation at a landfill within its jurisdiction. The municipality filed suit under the Spill Act to recover its response costs, naming as defendants various generators of industrial waste who sent their waste to the landfill ("NJ Defendants"). NJ Defendants include certain parties ("Petroleum Generators") who sent spent oil and gasoline wastes subject to CERCLA's petroleum exclusion. Since the municipality also sent some sewage sludge to the landfill, NJ Defendants have filed a counterclaim against the

ceived cost of cleaning petroleum for which there was no liability and non-petroleum for which there was CERCLA liability); *United States v. Alcan Aluminum*, 34 Env't Rep. Cas. (BNA) 1744 (N.D.N.Y. 1991) (allocating liability using Gore factors but basing allocation on volume and cooperation of government as only applicable factors).

In *Department of Environmental Protection & Energy v. Gloucester Environmental Management Services, Inc.*, the court indicated in *dicta* that consideration of relative amounts and toxicity of waste pursuant to section 122(a) of CERCLA, should be considered in allocation. Also "such other factors as effectuate the legislative intent such as the profitability of the selected disposal method and the public necessity for such disposal" should be considered. Furthermore, the court indicated that such factors would result in a "very low culpability index for municipal generators of municipal solid waste." *Dep't. of Envtl. Protection & Energy v. Gloucester Envtl. Mgmt. Servs., Inc. (GEMS)*, 821 F. Supp. 999, 1008 n.15 (D.N.J. 1993).

municipality under CERCLA, seeking contribution under section 113¹²² and indemnity under section 107.¹²³

At each of these two hypothetical sites, state and federal laws impose different rules of liability applicable to some of the parties. The response costs at issue are equally recoverable under state and federal law and may be recovered against certain Industrial Generators at both sites. At PA Site, the municipalities, the lender and the gas project contractor are not liable under HSCA, pursuant to which they filed their counterclaim, but may be liable for contribution under CERCLA as transporters/generators, as owners,¹²⁴ and as operators, respectively. At NJ Site, the municipality is not liable under the Spill Act, pursuant to which it filed its lawsuit, but may be held liable under CERCLA, due to the presence of certain heavy metals in the sewage sludge which it sent to the landfill. Petroleum Generators are not liable under CERCLA, and therefore have filed their counterclaim against the municipality.

A. State Counterclaims May Be Asserted in CERCLA Contribution Actions Because CERCLA Does Not Preempt State Claims for Response Costs

The first question to be addressed in determining how to resolve the inconsistencies between state and federal rules of liability and defenses in these cases is whether state causes of action for response costs may be raised as claims or counterclaims. Since the claims clearly can be raised under the state laws, they are prohibited only if CERCLA preempts the state laws. As a general matter, a federal law such as CERCLA will preempt state law only where Congress "preempts state law by stating so in specific terms."¹²⁵ If there is no express preemption, a state law is preempted when it "actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where state law stands as an ob-

122. CERCLA § 113, 42 U.S.C. § 9613.

123. *Id.* § 107, 42 U.S.C. § 9607.

124. *Id.* § 107(a), 42 U.S.C. § 9607(a). EPA's lender liability rule clarifying the security interest exemption now provides broad protection for foreclosing lenders, but not as broad as that provided under HSCA's absolute exclusion. For the purpose of this article, it is assumed that the bank has done more than permissible under the EPA guidelines and has become liable as an owner.

125. *United States v. Union Gas Co.*, 743 F. Supp. 1144, 1155 (E.D. Pa. 1990) (holding preemption can occur by express congressional act, when federal regulations leave no room for additional state regulation, and when state and federal law conflict).

stacle to the accomplishment of the full purposes and objectives of Congress."¹²⁶

The section 113(f)(1) directive that contribution actions be governed by federal law might initially appear to resolve the issue of the role to be played by the state little Superfunds in these allocation decisions. Arguably, because Congress specified that contribution decisions are purely matters of federal law, state rules of liability and defense are preempted by federal law and play no role in allocation decisions. This approach, however, is overly facile.

Investigation of congressional intent and other provisions of CERCLA clearly suggests that neither section 107 nor section 113 was intended to preempt state cost-recovery laws. Rather, state laws must continue to play some role in CERCLA cost-recovery actions. The primacy of federal law established in section 113(f) should not be read to foreclose any role for state rules of liability.¹²⁷ The reference was intended solely to make it clear that, in determining rules of contribution, courts are not to refer to the generally applicable state statutes or case law governing contribution among joint tortfeasors, but were to fashion an allocation according to federal rules specifically applicable to CERCLA actions. This federal law of contribution might include a rule for determining what, if any, consideration should be afforded to state policies incorporated in the state little Superfund Law.

The foregoing interpretation is necessary to reconcile section 113(f)'s directive to apply federal law with the express congressional intent that CERCLA *not* preempt the rules established under state little Superfund acts. Many of these little Superfunds, like HSCA and the Spill Act, provide private causes of action. Section 302(d) of CERCLA specifically provides: "Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants

126. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *accord Union Gas*, 743 F. Supp. at 1155. In *Silkwood*, the appellant's decedent was contaminated by plutonium. Appellant sought recovery for injuries to decedent's person and property. The issue on appeal concerned whether a state court jury award of punitive damages was preempted by federal law. The United States Supreme Court held that the punitive damage award was valid because there was no irreconcilable conflict between state and federal standards and the imposition of the state standard in the damages action did not frustrate the objectives of federal law. *Silkwood*, 464 U.S. at 248.

127. CERCLA § 113(f)(1) reads: "[S]uch claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law." CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

or contaminants"¹²⁸ Similarly, section 114(a) provides that "[n]othing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."¹²⁹ Section 114(b) only prohibits double recovery, i.e. under both state and federal laws.¹³⁰

Abiding by this clear congressional directive, courts have almost uniformly rejected preemption challenges to state laws which provide alternative rules of liability for collection of response costs. In *Manor Care, Inc. v. New Jersey Department of Environmental Protection*¹³¹ for example, the Third Circuit expressly rejected a preemption challenge under CERCLA to New Jersey's issuance of a directive under the Spill Act requiring PRPs to pay the state's share of CERCLA liability at sites remediated under CERCLA. Further, every court to address the issue has held that parties may assert counterclaims based on state law against the plaintiffs in CERCLA contribution actions.¹³²

The only exception to this general rule of non-preemption of state claims has arisen in cases where a state action would contravene an express provision in CERCLA and congressional intent. One example of such non-preemption arises in actions under state law seeking contribution from parties who have resolved their liability with the United States by way of settlement. Here, courts have held that the flat prohibition of section 113(f)(2), which provides that such a party "shall not be liable for claims for contribution regarding matters addressed in the settlement,"¹³³ and strong congressional intent to encourage settlements, warrants finding that this provision prohibits an action based upon state law. Such a finding applies only to the extent that the settlement expressly addressed the issue which is the subject of the state suit.¹³⁴ In these

128. *Id.* § 302(d), 42 U.S.C. § 9652(d).

129. *Id.* § 114(a), 42 U.S.C. § 9614(a).

130. *Id.* § 114(b), 42 U.S.C. § 9614(b).

131. 950 F.2d 122 (3d Cir. 1991).

132. *United States v. Union Gas*, 743 F. Supp. 1144, 1155-66 (E.D. Pa. 1990); *United States v. Hooker Chem. and Plastics Corp.*, 739 F. Supp. 125, 127-29 (W.D.N.Y. 1990); *Central Illinois Pub. Serv. Co. v. Industrial Oil Tank & Line Cleaning Serv.* (Central Illinois), 730 F. Supp. 1498 (W.D. Mo. 1990); *Edward Hines Lumber Co. v. Vulcan Mat. Co. v. Reilly Tar & Chem. Corp.*, 685 F. Supp. 651, 658 (N.D.Ill. 1988), *aff'd*, 861 F.2d 155 (7th Cir. 1988); *see also Lyncott Corp. v. Chemical Waste Management, Inc.*, 690 F. Supp. 1409 (E.D. Pa. 1988).

133. CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

134. *United States v. Pretty Prod., Inc.*, 780 F. Supp. 1488 (S.D. Ohio 1991); *United States v. Alexander*, 771 F. Supp. 840 (S.D. Tex. 1991); *Union Gas*, 743 F. Supp. 1144; *Central Illinois*, 730 F. Supp. 1498.

cases, allowing a state claim would clearly defeat the congressional intent to provide settling parties with a complete release; the state law could not be given effect without defeating the purpose underlying the federal law.

The section 113(f)(1) reference to contribution actions being governed by federal law *can* be reconciled with allowing state counterclaims to proceed. Congress intentionally avoided specifying which rules should govern allocation decisions in federal contribution actions, leaving to courts the decision of what equitable factors should be applied. It can readily be adopted as a federal rule of allocation that state little Superfund rules of liability be considered in CERCLA allocation actions and that these state rules be given dispositive effect in circumstances where their application would not obstruct the federal objectives under CERCLA.

Permitting state counterclaims in CERCLA contribution actions is also necessary to preserve the congressional intent that state cost contribution and cleanup laws not be displaced by CERCLA. This is apparent upon consideration of the NJ Site hypothetical. In that scenario, the New Jersey municipality brought a cost recovery claim based solely on state law, but the defendants, including NJ Defendants who are not liable under CERCLA, brought a counterclaim for contribution and cost recovery based upon the municipality's sludge disposal under authority of CERCLA. Since a CERCLA action must be determined by federal law, holding that a CERCLA counterclaim preempts state law would have the same effect as holding the state law preempted entirely, contrary to express congressional intent.¹³⁵

Finally, since state law claims are expressly preserved, state law counterclaims must be permitted in CERCLA contribution and cost recovery actions in order to prevent clearly inequitable results. If state counterclaims are not allowed and do not play some role in

135. The necessity of preserving state law claims or counterclaims in CERCLA actions becomes clearer considering that, in many cases, the state will issue remedial orders or bring cost recovery actions under state law at landfill sites where state agencies have disposed of wastes containing hazardous substances. To find that federal law governs allocation of liability in such cases would give the defendants a CERCLA "defense" to state law claims. This is not Congress' intent in allowing contribution or cost recovery actions.

At least one court has held that defendants cannot use their right of contribution against federal agencies who disposed of waste at a landfill as a grounds to raise equitable defenses not otherwise available against the federal government under § 107(b). *United States v. Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991). In that case, the court resolved the inconsistency to be resolved by general equitable principles, but not allowing equitable defenses, by finding that contribution liability was several while original liability to the United States is joint and several. *Id.*

establishing rules of allocation, allocation may be determined solely by which party gets to court first. Identical parties in identical situations would be treated differently.

For example, a party who takes remedial action voluntarily under a CERCLA consent order or pursuant to the requirements of a state law other than its little Superfund, such as the Pennsylvania Clean Streams Law¹³⁶ or the New Jersey Water Pollution Control Act,¹³⁷ would be entitled to seek contribution under the state little Superfund without bringing a CERCLA action. If this party is not liable under the state law, it would be entitled to complete contribution. A different rule of allocation should not be applied merely because the plaintiff also raises CERCLA claims or because the defendant raises CERCLA counterclaims. As long as the rule does not conflict with the federal government's interests or undermine the congressional goals promoted in CERCLA, it should be applied.

Indeed, if different rules of allocation apply based on how cleanup commences and who is sued first, a party such as the bank in the PA Site hypothetical might be placed in a worse position than if it were ordered to cleanup under the state law. Even though exempt from liability under HSCA, the bank was initially sued in a third-party claim by the original defendants for contribution under CERCLA, and not by the federal or state government under other federal or state law. Yet the application of different rules would place the bank in a worse position. If the bank were ordered to clean up the site under the Pennsylvania Solid Waste Management Act or the Clean Streams Law, as a non-exempt party it would have a claim for full cost recovery under HSCA. A rule which would put the bank in a worse situation because the state or federal government decided it should not be sued would be inequitable.¹³⁸

136. PA. STAT. ANN., tit. 35, §§ 691.1-1001 (1993).

137. N.J. STAT. ANN. §§ 58:10A-1 to -60 (West 1992 & Supp. 1993).

138. The Third Circuit recently stressed the importance of consistent treatment of the same cleanup activity, regardless of the legal authority pursuant to which it proceeded. *United States v. Rohm & Haas Co.*, 2 F.3d 1265 (3d. Cir. 1993). "We find no support in the text or legislative history of CERCLA for the suggestion that identical oversight activities on the part of the government should be considered a removal if the government invokes CERCLA, but not if other statutory authority is invoked." *Id.* at 1275.

B. Where Different State and Federal Rules of Liability and Defense Apply in a Contribution Action, the State Rules Should Be Given Effect Unless They Are Outweighed by Federal Interests Underlying CERCLA

While both the structure of CERCLA and the relevant caselaw suggest that state little Superfund claims and counterclaims should be allowed in CERCLA contribution actions, they do not clearly outline the precise role of state law. As the PA Site and NJ Site hypotheticals illustrate, this is particularly true where the state law may provide a complete defense. As yet, no court has addressed this question of allocation in a contribution action.¹³⁹

However, congressional intent to preserve state laws and the courts' treatment of analogous situations suggest that the following rule should be applied. State rules of liability and defense should apply as a matter of law unless their application would contravene the paramount federal purposes underlying CERCLA. Such a case occurs when a party settles and is afforded contribution protection under section 113(f)(2) of CERCLA.¹⁴⁰ In some cases, this will require considering the conflicting purposes underlying the respective federal and state provisions and balancing those purposes.

Under this proposed rule, in most multi-party cases where a settlement is not reached, a third party with a complete defense to liability under a state little Superfund should be entitled to raise a counterclaim under the state little Superfund for full indemnification unless a countervailing federal policy exists. In effect, this would provide the party with a complete defense to the contribution action. For example, in the PA Site hypothetical, the municipalities, bank and landfill gas contractor would have a counterclaim under HSCA and a complete defense to the contribution action under CERCLA. This result is reached because preservation of the HSCA defenses promotes the state policies underlying those defenses without adversely affecting any identifiable federal interest under CERCLA. Likewise, at the NJ Site, NJ Defendants' counterclaim against the municipality should fail.

139. The only court presented with the issue managed to avoid reaching it by finding that the state law in the case, the Minnesota little Superfund, *MINN. STAT. § 115B.01 - .24* (1992), provided an identical rule of allocation to that which the court decided was appropriate under CERCLA. *Gopher Oil, Inc. v. Union Oil Co.*, 955 F.2d 519, 526-27 (8th Cir. 1992).

140. CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

In the more unusual cases where state and federal interests conflict and there is no clear federal intent to override the state law (as in the case of contribution protection in a settlement), courts will need to balance the respective state and federal interests. With respect to the Petroleum Generators at the NJ site, however, the court would be faced with parties who have a complete defense under CERCLA and have filed a counterclaim for response costs against another party, which has a complete defense under the Spill Act. Here, a court would need to balance the federal interests underlying the petroleum exemption against the state interests underlying the sludge exclusion. A court might consider the fact that the petroleum exclusion potentially was a political deal to buy the votes of the oil states. It might also take into account that the alleged underlying policy of preventing double payments through the Superfund tax and liability, has been removed by the expansion of the tax to many other non-exempt industries.

On the other hand, the state policy of favoring public treatment of wastewater parallels federal interests expressed through the Clean Water Act. The state's interest in encouraging political subdivisions to provide sanitation services in the form of solid waste and sewage collection and disposal services is well-established and consistent with federal anti-pollution goals in CERCLA. Moreover, Congress' interest in assuring that those who profit from waste generation bear the cost of its cleanup, is not promoted by holding municipalities, who treat wastewater, liable, while exempting oil companies, who profit from the processes which generate petroleum waste. In this case, the weighing of interests would seem to favor the state rule of allocation, which under the proposed rule, would apply as a matter of law.

This proposed rule would apply in contribution actions or section 107 private cost-recovery actions brought by a party which is also liable under CERCLA or a state little Superfund. A private cost-recovery action brought by a party which is, by itself, liable, probably should be treated as a contribution action. The state laws could not be deemed to create a general defense to any CERCLA liability. Where the party seeking cost recovery is not liable, as in the case of most government cost-recovery actions, the rule simply would not apply.

On the other hand, there are many instances where a state or federal agency that disposed of waste in a landfill that is being remediated pursuant to CERCLA, would be subject to a counterclaim under both CERCLA and the state little Superfund. In this

case, although a court would be faced with two liable parties, allowing the state defense would contravene strong federal policies. These policies are replenishing the Superfund, encouraging rapid state and federal government cleanups, and limiting defenses to government cost-recovery actions. Using the suggested balancing approach, the federal interest in not giving state counterclaims the same effect as defenses under CERCLA would outweigh the state interest in allowing the defenses. Thus, a state cross-claim or counterclaim for indemnification would not eliminate liability under CERCLA or limit the United States' ability to recover from that party or other PRPs. Such a rule would not be inconsistent with CERCLA and should survive a preemption challenge under the rationale of *Manor Care* and the cases addressing state counterclaims.

The proposed balancing test is consistent with the approach that courts use, explicitly or implicitly, to resolve other preemption issues involving actual or perceived conflicts between state law principles and CERCLA.¹⁴¹ A frequently litigated area has been the effect upon CERCLA liability of laws addressing states' capacity to sue or be sued. In *Witco Corp. v. Beekhuis*,¹⁴² the court expressly adopted a balancing test, weighing state and federal interests, and determined that CERCLA's statute of limitations did not preempt a Delaware statute limiting the period within which claims could be brought against a decedent's estate.¹⁴³ The court found that the strong and long-standing state interest in settling decedents' estates quickly and finally outweighed the federal interest in assuring that the polluter paid.¹⁴⁴ The federal interest was held to be more attenuated when the polluter was deceased.¹⁴⁵

Another issue is the allowance of a defense in a contribution action which is not available in a government cost-recovery or enforcement action. This proposed role is consistent with cases that

141. For a discussion of preemption of state law, see *supra* notes 125-38 and accompanying text.

142. 822 F. Supp. 1084 (D. Del. 1993).

143. *Id.* at 1089.

144. *Id.*

145. *Id.* at 1090. The inconsistencies in the capacity to sue decisions suggest that courts were implicitly balancing the respective state and federal interests. For example, cases where the state capacity statutes were preempted involved situations where the United States was the claimant and the strong interest in replenishing the Fund was brought to bear. See, e.g., *United States v. Distler*, 741 F. Supp. 643, 646 (E.D. Mich. 1990); *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1495 (D. Utah 1987). The sole Circuit Court of Appeals decision, which found no preemption, involved a private cost recovery action. *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448 (9th Cir. 1987). But see *Soo Line R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472 (D. Minn. 1992).

recognized different principles governing contribution actions and actions by the federal or state governments for cost recovery under section 107 of CERCLA.¹⁴⁶ For example, while courts have uniformly recognized that liability to the federal or state governments under section 107 is joint and several, at least two courts have held that the government's liability for a counterclaim for contribution based on past disposal was several.¹⁴⁷ In *American Cyanamid v. King Industries, Inc.*,¹⁴⁸ the court held that the Uniform Comparative Fault Act should be applied to settlements of CERCLA contribution actions, rather than the statutory rule set forth in CERCLA section 113(f)(2).¹⁴⁹ In adopting the latter rule, the court recognized that different rules should be applied to actions involving private parties, as opposed to where the state and federal governments were merely performing their statutory duties.¹⁵⁰

The proposed rule allowing counterclaims for complete indemnification based on state little Superfund defenses in contribution actions would also be consistent with the statutory balance Congress struck in dealing with private indemnification agreements. Section 107(e) of CERCLA¹⁵¹ permits indemnification agreements among parties, but further provides that such indemnification agreements would have no effect on liability under CERCLA to the United States. A counterclaim under a state little Superfund is, in effect, a claim for statutory indemnification.

Allowing counterclaims for indemnification based on state little Superfund defenses in contribution actions is better justified on public policy grounds than private indemnity agreements. The defenses and exemptions provided by states are intended to promote specific state policies, many of which are consistent with CERCLA's goals of protecting health and the environment. For example, HSCA encourages recycling of scrap metal,¹⁵² landfill gas recovery projects,¹⁵³ continued public sanitation services and promotion of household hazardous waste separation programs through exemptions for these activities.¹⁵⁴ These are reasonable public policies

146. CERCLA § 107, 42 U.S.C. § 9607.

147. *American Cyanamid v. King Indus., Inc.*, 814 F. Supp. 209, 215 (D.R.I. 1993); *United States v. Kramer*, 757 F. Supp. 397 (D.N.J. 1991).

148. 814 F. Supp. 215 (D.R.I. 1993).

149. *Id.*

150. *Id.* at 219.

151. CERCLA § 107(e), 42 U.S.C. § 9607(e).

152. PA. STAT. ANN., tit. 35, § 6020.701(b)(5).

153. *Id.* § 6020.701(b)(4).

154. *Id.* § 6020.701(b)(3).

which promote protection of health and the environment and may even promote the goals underlying CERCLA. Similarly, New Jersey's sludge exemption encourages replacing of frequently malfunctioning on-lot septic systems with publicly owned treatment works. It may also be intended to facilitate the use of land application¹⁵⁵ and landfills in lieu of more environmentally damaging ocean dumping. These public policies are more deserving of protection than those likely to underlie private indemnification agreements and should not be defeated in the absence of a countervailing federal policy.

This proposed balancing test will ensure that these state policies will not be defeated unless they undermine the federal policies embodied in CERCLA. The proposed test further provides assurances that states cannot undermine CERCLA's goals by providing special deals for influential industries. While HSCA's defenses reflect refinements consistent with CERCLA's goals and are based upon long experience with CERCLA, one might conceive of a situation where an industry whose waste disposal practices are expressly targeted by CERCLA could influence a state legislature to provide a special deal. For example, a state little Superfund law providing a special defense to the petrochemical industry would be inconsistent with CERCLA's goals. In this case, the proposed balancing test would weigh against a counterclaim based upon that state defense providing a complete defense in a CERCLA contribution action.

VII. CONCLUSION

As more states enact laws modeled after CERCLA or amend their existing environmental remediation or cost recovery laws to reflect greater experience in implementing federal and state remediation programs, these states will likely include additional liability defenses and exclusions to protect certain interests from the more extreme and arguably unintended effects of CERCLA's broad liability.¹⁵⁶ These state defenses and liabilities are likely to be a

155. EPA has taken the position that land application of sludge constituting the normal application of fertilizer does not constitute "disposal" and therefore does not give rise to CERCLA liability. 58 Fed. Reg. 9248, 9262 (Feb. 19, 1993).

156. In February 1994, a bill was introduced before the Senate to reauthorize and reform CERCLA. Superfund Reform Act of 1994, S. 1834, 103d Congress, 2nd Sess. (1994). The bill's proponents seek to increase the power and involvement of state and local governments in implementing hazardous waste pollution policy. See *id.* §§ 201-07.

Section 201 of the proposed Act permits states to assume management of the "response actions and enforcement activities" of current or proposed NPL sites within its jurisdiction, upon approval of EPA. *Id.* § 201(a). Response actions as

more frequent issue in allocating liability in CERCLA contribution actions, as more sites are remediated and existing litigation enters the contribution and allocation phases.

In light of the congressional intent underlying CERCLA to preserve state law claims arising from environmental contamination and the limited possibility that state law counterclaims will frustrate this intent, counterclaims based on state little Superfunds should normally be permitted. Moreover, since many of the little Superfund defenses and exclusions are based on important state policies, where the counterclaims are asserted by a party who is not liable under the state law, the counterclaim for complete indemnification should act as a complete legal defense to a contribution claim.¹⁵⁷

To determine whether a counterclaim under state law filed by a party with state law defenses would support a claim for complete indemnification, this article has proposed that the courts adopt a balancing test. If allowing full contribution would not contravene

sumed by the state would include, at a minimum, "responding to a release or threatened release of a hazardous substance or pollutant or contaminant; selecting response actions; expending the Fund in amounts authorized by the Administrator to finance response activities; and taking enforcement actions, including cost recovery actions to recover Fund expenditures made by the State." *Id.* Further, the bill would direct EPA to promulgate regulations defining criteria for granting a state's request. *Id.* The bill provides that the regulations would require the state to demonstrate that: (1) it has a process for allocating liability; (2) it provides for public participation consistent with CERCLA; (3) it plans to choose and conduct response actions consistent with CERCLA; and (4) "it provides for notification of and coordination with trustees in a manner that is substantially consistent with [CERCLA]." *Id.*

157. In most cases, these issues could be resolved as a matter of law at the pleadings stage or by way of summary judgment. As is evident from consideration of HSCA and the Spill Act, the existence of the state law defense may be established in the pleadings or with only limited facts. The balancing proposed here normally would involve issues of legislative intent, which are issues of law, not fact.

Failure to address these issues in an early stage of CERCLA litigation could undermine the policies underlying the state defenses. The procedural costs of CERCLA contribution litigation can often approach or even exceed the liability of those whose share is small, which usually includes the categories of parties who may be provided defenses under state little Superfunds. *Cf. New Jersey Dep't of Envtl. Protection & Energy v. Gloucester Envtl. Mgmt. Servs.*, 821 F. Supp. 999, 1008 n.15 (D.N.J. 1993) (stating factors would suggest very low culpability index for municipal solid waste generators). The defenses have been included in state little Superfunds to reduce the uncertainty regarding potentially significant liabilities and to remove the not insignificant deterrent effect raised by the mere threat of involvement in site contamination litigation. For example, lenders are often sensitive to the mere threat of litigation; the mere possibility of litigation may deter loans. This fact underlies the absolute lender defense in HSCA. Lenders' concerns may also be critical to the success of landfill gas recovery projects, which are often developed as project financing. Without clearly, quickly resolvable legal defenses, the state policies could be undermined.

federal policies underlying CERCLA, the state laws could act as a defense. If, however, federal policies underlying CERCLA are implicated by the assertion of the state claim, the respective state and federal interests should be balanced and the state law "defense" permitted only if the state interests outweigh the federal interests. This balancing approach is supported by case law involving other preemption decisions under CERCLA, case law applying different rules for government cost recovery and private contribution actions, and the statutory balancing applicable to private indemnification agreements. More importantly, the balancing test is necessary to define the role of state little Superfunds in light of the clear congressional intent to preserve state causes of action for recovery of damages relating to environmental contamination within the CERCLA program.