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CERCLA Settlements, Contribtion Protection and Fairness to Non-Settling Responsible Parties

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CERCLA SETTLEMENTS, CONTRIBUTION PROTECTION AND FAIRNESS TO NON-SETTLING RESPONSIBLE PARTIES

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I. INTRODUCTION

The federal "Superfund" legislation — more formally known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[1] — imposes substantial liability upon a broad range of entities for the cost of cleaning up sites that have become contaminated by hazardous substances.[2] In the Superfund Amendments and Reauthorization Act of 1986 (SARA),[3] Congress enacted several provisions that were intended to induce liable parties — in the jargon of Superfund, potentially responsible parties (PRPs) — to enter into settlements that resolve their liability to governmental entities for contaminated sites.[4] These provisions include protection of settling parties (settlors) against contribution claims by non-settling PRPs (non-settlors).[5]

The extent to which settlors receive protection against contribution claims by non-settlors is a matter of considerable practical importance. If potential settlors receive no protection, or only limited protection, against contribution claims by non-settlors, they

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1. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-75 (1994)) [hereinafter CERCLA].

2. *See id.* For an overview of the liability provisions of CERCLA, see *infra* notes 16-27 and accompanying text. For a list of the entities that fall under these provisions, see *infra* note 16 and accompanying text.

3. Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C. §§ 9601-75 (1994)) [hereinafter SARA].

4. *See* CERCLA § 107, 42 U.S.C. § 9607 (1994). This Article does not address the effect of settlement of private, as opposed to government, actions under CERCLA. For a discussion of the settlement of private actions, see generally Mark L. Frohman, *Rethinking the Partial Settlement Credit Rule in Private Party CERCLA Actions: An Argument in Support of the Pro Tanto Credit Rule*, 66 U. COLO. L. REV. 711 (1995).

5. For a discussion of these settlement provisions, see *infra* notes 28-40 and accompanying text.

will be less likely to settle.[6] Settlement involves the assumption of cleanup responsibilities or cash payments, or both. In other words, PRPs will be less likely to assume these burdens — usually quite substantial — if, in settling, they are unable to "buy peace" against claims by other PRPs.[7]

In recent years, courts have begun to examine carefully the extent to which CERCLA protects settlors against claims for contribution by non-settlors. The cases involve different types of settlements and different circumstances. Each court, as is appropriate, resolves only the case before it. The consequence, however, is that the decisions have a peculiarly *ad hoc* quality. Some courts, focusing on congressional intent to encourage settlements, have extended broad contribution protection to settlors. Other courts, concerned about the substantive unfairness of a settlement upon non-settlors or the constitutionality of barring contribution claims by non-settlors, have limited the scope of contribution protection. These decisions produced uncertainty. PRPs contemplating settlement were unsure whether, if they settled with the government, they would receive protection against contribution claims by non-settlors. In an attempt to overcome this uncertainty, the United States Environmental Protection Agency (EPA) has issued a memorandum to its regional offices regarding the content of contribution protection clauses in administrative and judicial settlements.[8]

In this Article, I criticize the reasoning underlying those judicial decisions that have narrowly construed the scope of contribution protection for CERCLA settlors and caused the issuance of EPA's memorandum. As I will demonstrate, these decisions are questionable interpretations that fail to consider the legislative history of the contribution protection provisions. Underlying the legal reasoning in these decisions is a judicial reluctance to enforce settlements that appear to have an unfair impact on non-settlors. In addition, some of the decisions are driven by unwarranted concerns

6. *See generally* Lewis A. Hornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. REV. 427 (1994) (providing thorough and sophisticated discussion of the inducements to settlement under a liability scheme involving joint and several liability, such as CERCLA).

7. Of course, settlors also wish to buy peace against any further claims by the government entity with whom they are settling. CERCLA Section 9622(f) specifies the corcumstances under which the United States may provide a settlor with a "covenant not to sue." A discussion of these provisions is beyond the scope of this Article.

8. *See* Environmental Protection Agency, Office of Enforcement and Compliance Assurance, Memorandum entitled "Defining 'Matters Addressed' in CERCLA Settlements" March 14, 1997 (hereinafter referred to as "EPA Memorandum"). *See also* CERCLA § 122(f), 42 U.S.C. § 9622(f).

about the constitutionality of the contribution protection provisions.

Part II of this Article provides an overview of the liability provisions of CERCLA and a general description of the settlement provisions added by the 1986 amendments.[9] Part III describes, in greater detail, CERCLA's three distinct settlement provisions, all of which grant contribution protection to settlors for the "matters addressed" in a settlement.[10] Part IV discusses the judicial role when a court, faced with a contribution claim by a non-settlor PRP against a settlor PRP, must determine the extent to which the non-settlor's claim is barred by one of the contribution protection provisions.[11] Part V examines the interpretive task that a court must address when it determines whether a non-settlor's claim is barred by one of the contribution protection provisions.[12] This Part also critiques the major decisions that have interpreted these provisions.[13] Part VI describes EPA's recent memorandum defining "matters addressed" in CERCLA settlements and discusses the possible effect of the implementation of the guidance set forth in the memorandum.[14] Finally, Part VII concludes this Article.[15]

II. An Overview of CERCLA

Section 107(a) of CERCLA imposes liability upon four categories of entities for the federal or a state government's cost in cleaning up a release of hazardous substances from a site: (1) present owners or operators of the site; (2) past owners at the time of disposal; (3) those who arranged for disposal of a hazardous substance at the site; and (4) those who transported a hazardous substance to the site.[16] The federal courts, through the development of federal

9. For an overview of CERCLA's liability provisions and a general description of the settlement provisions SARA added to CERCLA, see *infra* notes 16-27 and accompanying text.

10. For a detailed description of CERCLA's three distinct settlement provisions, see *infra* notes 28-40 and accompanying text.

11. For a discussion of the role of the court in determining the breadth of contribution protection provisions when a non-settlor PRP assert a contribution claim against a settlor PRP, see *infra* notes 41-51 and accompanying text.

12. For a discussion of courts' interpretations of contribution protection provisions, see *infra* notes 52-309 and accompanying text.

13. For critique of courts' interpretations of contribution protection provisions, see *infra* notes 151-96, 217-42, 303-09 and accompanying text.

14. For a description of EPA's Memorandum on Defining "Matters Addressed" in CERCLA Settlements, see *infra* notes 303-52 and accompanying text.

15. For the conclusion of this Article, see *infra* notes 333-57 and accompanying text.

16. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994). Section 107(a) of CERCLA states, in pertinent part:

common law, have concluded that liability for governmental cleanup costs under section 107(a) is presumptively joint and several — that is, each entity that is liable under one of the categories in section 107(a) is presumptively liable for the total amount of the government's cleanup costs.[17]

The cost of cleaning up a contaminated site usually runs into the millions of dollars.[18] Thus, if EPA incurs $30 million in response costs in cleaning up a site, it may, given the presumptive joint and several liability of each of the PRPs who is liable under section 107(a), seek to recover its response costs against any PRP, or group of PRPs, that it chooses.[19] In SARA, Congress ratified the

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this Section —
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> (1) the owner and operator of a 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 release; and
>
> (D) the costs of any health assessment or health effects study carried out under Section 9604(i) of this title.

Id.

17. *See* John M. Hyson, *"Fairness" and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA*, 21 HARV. ENVTL. L. REV. 137, 150-60 (1997) (providing description and analysis of relevant case law regarding liability under CERCLA).

18. *See* HOUSE SUBCOMM. ON INVESTIGATIONS AND OVERSIGHT OF THE COMM. ON PUBLIC WORKS AND TRANSPORTATION, ADMINISTRATION OF THE FEDERAL SUPERFUND PROGRAM, H.R. REP. NO. 103-35, at 5 (1993) (highlighting that average cost of cleaning up Superfund site ha been estimated to be between $25 million and $30 million).

19. *See* CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1). Section 104(a)(1) of CERCLA authorizes the President, upon the release or threatened release of a hazardous substance, to undertake "removal" or "remedial action" at a site. *Id.* For the definition of "removal," see CERCLA § 101(23), 42 U.S.C. § 9601(23). For the definition of "remedial action," see CERCLA § 101(24), 42 U.S.C. 9601(24).

judicial decisions that had held that such a target PRP (i.e., a PRP sued by EPA) had a right to assert a contribution claim against other PRPs.[20] In resolving such a contribution claim, the court is to allocate the response costs based on the equitable factors it deems appropriate.[21]

At the same time that Congress expressly provided PRPs with a right to seek contribution, Congress also created detailed settlement provisions,[22] and provided that, upon approval of a settlement, a settlor "shall not be liable for claims for contribution regarding matters addressed in the settlement."[23] Furthermore,

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After cleaning up a contaminated site, the United States may bring an action in federal court to recover the response costs it has incurred against one or more parties who are liable under section 107(a). For the text of section 107(a), see *supra* note 16. *See also* United States v. Ottati & Goss, Inc., 900 F.2d 429, 433 (1st Cir. 1990) (describing the Government's enforcement options under CERCLA).

20. *See, e.g.*, United States v. Conservation Chemical Co., 619 F. Supp. 162, 222-30 (W.D. Mo. 1985); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) (both rejecting defendant's argument that Congress did not intend joint and several liability in CERCLA actions). Congress ratified these judicial decisions by creating an express right of contribution in section 113(f)(1) of CERCLA, which states:

> 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.

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

21. *See id.*

22. For discussion of these provisions, see *infra* notes 28-40, 52-112 and accompanying text.

23. *Id.* §§ 113(f)(2), 122(g)(5), 122(h)(4), 42 U.S.C. §§ 9613(f)(2), 9622(g)(5), 9622(h)(4). Section 113(f)(2) of CERCLA states:

> 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. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

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

Section 122 (g)(5) of CERCLA states:

> A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Id. § 122(g)(5), 42 U.S.C. § 9622(g)(5).

Congress provided that a settlement reduced the potential liability of non-settling PRPs by the amount of the settlement.[24]

These provisions have the effect of encouraging PRPs to enter into settlements with EPA. Under these provisions, a PRP — facing potential liability for the full cost of cleaning up the site (because of joint and several liability) and high transaction costs associated with defending contribution claims by other PRPs[25] — will look favorably upon a proposed settlement that holds out the possibility of insulating the settlor against any further claims by non-settling PRPs. Such is the "carrot" of inducement provided by the settlement and contribution protection provisions. But, there is a "stick" of inducement as well. If a PRP does not settle with the government, it runs the risk that other PRPs will settle and that the effect of these settlements will leave the non-settlor subject to liability for all of the government's cleanup costs less only the amount of any settlement. In other words, non-settlors will be liable for any shortfall between the total cleanup costs and the amount of any settlements.[26] Thus, the

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Section 122(h)(4) of CERCLA states:

> A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement shall not discharge any of the potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

CERCLA § 122(h)(4), 42 U.S.C. § 9622(h)(4).

24. *See id.* All three settlement provisions of CERCLA provide that "[s]uch settlement shall not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." *Id.*

25. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (providing that court "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate"). The open-ended quality of the criteria for allocating cleanup costs among PRPs is what causes the litigation of contribution claims to be expensive. For an example of the manner in which courts have construed this language, see *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572 (6th Cir. 1991) (affirming trial court's broad construction of language and use of "any factor it deems in the interest of justice in allocating contribution recovery").

26. *See* CERCLA §§ 113(f)(2), 122(g)(5), 122(h)(4), 42 U.S.C. §§ 9613(f)(2), 9622(g)(5), 9622(h)(4) (all providing that a settlement "reduces the potential liability of the others [i.e., the other non-settling PRPs] by the amount of the settlement."). The vast majority of courts have concluded that the language of these provisions constitutes a "statutory mandate" that "admits of no construction other than a dollar-for-dollar reduction of the aggregate liability" of non-settlors. *See, e.g.*, United States v. Cannons Eng'g Corp., 899 F.2d 79, 92 (1st Cir. 1990).

Prior to Congress's enactment of SARA, CERCLA was silent regarding the effect of a settlement upon the liability of non-settlors. During that time, courts had two approaches from which to choose in fashioning a federal common law. Under the Uniform Contribution Among Tortfeasors Act, a settlement by one party reduces others' liability by the amount of the settlement. *See generally* 12 U.L.A. 185 (1996). Under the Uniform Comparative Fault Act, however, a settlement by one party reduces the others' liability *either* by the amount of the settlement *or* by

settlement and contribution protection provisions of CERCLA provide the government with a mechanism for rewarding settlors (with covenants not to sue and contribution protection) and punishing non-settlors (with the threat of disproportionate liability).

But the effectiveness of the "carrot" — granting contribution protection to settlors — depends upon the scope of contribution protection. In three separate provisions, Congress has provided that contribution protection extends only to "matters addressed in the settlement."[27] This Article will now turn to a more detailed examination of these provisions.

III. Provisions for Settlement and Contribution Protection

In CERCLA (as amended by SARA), Congress expressly provides for three types of settlements. First, Congress authorizes EPA to enter into cleanup settlements under which a PRP or group of PRPs undertakes to carry out all or part of the cleanup selected by EPA.[28] Second, Congress authorizes EPA to enter into cash settlements with so-called "de minimis" PRPs, under which the PRPs make cash payments toward the cost of cleaning up the contaminated site.[29] Third, Congress authorizes government agencies to enter into cash settlements for "costs incurred" by the agency.[30]

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the settlors' proportionate or equitable share, whichever is larger. *See generally* 12 U.L.A. 123 (1996). In *United States v. Conservation Chem. Co.*, a pre-SARA decision, the court, following UCFA, limited the liability of non-settling PRPs to their equitable share. *See* 628 F. Supp. 391, 402 (W.D. Mo. 1985). This decision is contrary to the last sentences of sections 113(f)(2), 122(g)(5) and 122(h)(4) of CERCLA, which appear to adopt the approach of UCATA. *See* CERCLA §§ 113(f)(2), 122(g)(5), 122(h)(4), 42 U.S.C. §§ 9613(f)(2), 9622(g)(5), 9622(h)(4).

Some commentators argue that the legislative history of the contribution protection provisions does not support the conclusion that Congress intended to adopt the UCATA approach. *See* Alfred R. Light, *The Importance of "Being Taken": To Clarify and Confirm the Litigative Reconstruction of CERCLA's Text*, 18 B.C. Envtl. Aff. L. Rev. 1, 33-35 (1990); Barry S. Neuman, *No Way Out? The Plight of the Superfund Non-settlor*, 20 Envtl. L. Rep. 10,295, 10,300-03 (1990); J. Whitney Pesnell, *The Contribution Bar in CERCLA Settlements and Its Effect on the Liability of Nonsettlors*, 58 La. L. Rev. 167, 184-227 (1997).

At least one court has reached the same conclusion as these commentators. *See* United States v. Laskin, No. C84-2035Y, 1989 WL 140230, at *6-7 (N.D. Ohio 1989). For commentary supporting the *Laskin* decision, see generally Elizabeth F. Mason, *Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin's Lead*, 19 B.C. Envtl. Aff. L. Rev. 73 (1991).

27. *See* CERCLA §§ 113(f)(2), 122(g)(5), 122(h)(4), 42 U.S.C. §§ 9613(f)(2), 9622(g)(5), 9622(h)(4).

28. *See id.* § 122(a), 42 U.S.C. § 9622(a).

29. *See id.* § 122(g), 42 U.S.C. § 9622(g).

30. *See id.* § 122(h), 42 U.S.C. § 9622(h).

A cleanup settlement must be set forth in a consent decree to be entered in a federal district court.[31] De minimis and "costs incurred" settlements are effective upon administrative or judicial approval.[32] When a settlement has been approved, the settling party "shall not be liable for claims for contribution regarding matters addressed in the settlement."[33]

Because judicial or administrative approval of a settlement limits the right of non-settlors to bring contribution claims against settlors, Congress set up processes under which non-settlors would receive notice of a proposed settlement and have an opportunity to comment prior to final approval.[34] If the proposed settlement is to be submitted for judicial approval in the form of a proposed consent decree, nonparties must be given an opportunity to comment prior to entry of the decree.[35] Similarly, before an administrative

31. *See id.* § 122(d)(1)(A), 42 U.S.C. § 9622(d)(1)(A).

32. *See* CERCLA §§ 122(g)(4), 122(h)(1), 42 U.S.C. §§ 9622(g)(4), 9622(h)(1). Regarding de minimis settlements, section 122(g)(4) states, in pertinent part, "[a] settlement under this subsection shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement." *Id.* § 122(g)(4) 42 U.S.C. § 9622(g)(4). Regarding "costs incurred" settlements, section 122(h)(1) states, in pertinent part:

> The head of any department or agency with authority to undertake a response action under this chapter pursuant to the national contingency plan may consider, compromise, and settle a claim under Section 9607 of this title for costs incurred by the United States Government if the claim has not been referred to the Department of Justice for further action.

Id. § 122(h)(1), 42 U.S.C. § 9622(h)(1).

33. *See id.* §§ 113(f)(2), 122(g)(5), 122(h)(4), 42 U.S.C. §§ 9613(f)(2), 9622(g)(5), 9622(h)(4). The broadest of these sections is section 113(f)(2), which states 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." *Id.* § 133(f)(2), 42 U.S.C. § 9613(f)(2). Because section 113(f)(2) grants contribution protection to a person who has resolved its liability to the United States in any "administrative or judicially approved settlement," there exists a degree of overlap and redundancy among the three contribution protection provisions. For the full text of sections 113(f)(2), 122(g)(5) and 122(h)(4), see *supra* note 23. For a discussion of the legislative history of these provisions, see *infra* notes 68-112 and accompanying text.

34. *See id.* § 122(i), 42 U.S.C. § 9622(i). Congress obviously considered due process concerns when creating these notice and comment procedures. For a discussion of whether CERCLA's notice and comment procedures satisfy procedural due process requirements, see *infra* notes 260-302 and accompanying text.

35. *See id.* § 122(d)(2)(B), 42 U.S.C. § 9622(d)(2)(B). Section 122(d)(2)(B) of CERCLA states:

> The Attorney General shall provide an opportunity to persons who are not named as parties to the action to comment on the proposed judgment before its entry by the court as a final judgment. The Attorney General shall consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment. The Attorney General may withdraw or withhold its consent to the proposed judgment if the

settlement may become final, there must be public notice of the proposed settlement in the *Federal Register* followed by a thirty-day comment period.[36]

In addition to the procedural protection accorded to non-settlors by the preceding requirements, Congress specified a substantive limitation upon the extent to which administrative settlements may limit a non-settlor's right to obtain contribution from a settlor.[37] Such a limitation has "no force and effect" if it limits the contribution rights of non-settlors and "if the effect of such limitation would constitute a taking without just compensation in violation of the [F]ifth [A]mendment of the Constitution of the United States."[38] Finally, Congress stated that nothing in CERCLA "shall

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comments, views, and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

Id. § 122(d)(2)(B), 42 U.S.C. § 9622(d)(2)(B).

When a settlement is to be entered in federal district court as a proposed consent decree, non-settling PRPs may also have a right to intervene prior to entry of the consent decree. Section 113(i) establishes this right to intervene by stating:

> In any action commenced under this chapter . . . in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

Id. § 113(i), 42 U.S.C. § 9613(i). In *United States v. Union Electric Co.*, the court held that section 113(i) confers upon a non-settling PRP the right to intervene in an action in which other PRPs were seeking approval of a consent decree because the effect of the consent decree might, by virtue of the contribution protection clause in section 113(f)(2), impair the non-settlors statutory right (under section 113(f)(1)) of contribution. *See* 64 F.3d 1152, 1167 (8th Cir. 1995).

36. *See id.* § 113(i), 42 U.S.C. § 9622(i). In addition, section 122(i)(3) states, in pertinent part, that "[t]he head of the department or agency [considering the proposed settlement] shall consider any comments . . . in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate." *Id.* § 122(i)(3), 42 U.S.C. § 9622(i)(3).

37. *See* CERCLA § 308, 42 U.S.C. § 9657.

38. *Id.* § 308, 42 U.S.C. § 9657. Section 308 of CERCLA states, in pertinent part:

> If an administrative settlement under Section 9622 of this title has the effect of limiting any person's right to obtain contribution from any party to such settlement, and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States, such person shall not be entitled, under other laws of the United States, to recover compensation from the United States for such taking, but in any such case, such limitation on the right to obtain contribution shall be treated as having no force and effect.

Id. § 308, 42 U.S.C. § 9657. For a discussion of the effect of this provision, see *infra* notes 252-59 and accompanying text.

be construed to preclude or otherwise affect the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements."[39]

In sum, Congress: (1) provided for three distinct types of settlements; (2) required judicial approval for cleanup settlements while permitting administrative approval for other settlements; (3) accorded settlors (i.e., those with judicially or administratively approved settlements) protection against "claims for contribution" by non-settlors "regarding matters addressed in the settlement;" (4) required notice and an opportunity to comment before any settlement could become effective; (5) specified a constitutional "takings" limitation upon the effectiveness of any limitation of non-settlors' rights to obtain contribution; and (6) stated that nothing in CERCLA precluded the setting aside or modification of consent decrees or settlements in accordance with "general principles of law."[40]

IV. "FAIRNESS" AND THE ROLE OF THE COURT IN DETERMINING THE SCOPE OF CONTRIBUTION PROTECTION

Since SARA, courts have been called upon to consider the scope of contribution protection that is enjoyed by settlors. This question can arise in two contexts — before or after a settlement has been approved. In the former situation, the question arises when a court, or EPA, considers — in response to comments submitted by non-settlors — whether a proposed settlement is substantively fair to non-settlors.[41] Non-settlors may contend that a

39. *Id.* § 122(m), 42 U.S.C. § 9622(m). For a discussion of the legislative history of section 122(m), see *infra* notes 97-103 and accompanying text.

40. *See id.* §§ 113(f)(2), 133(i), 122(a), 122(d), 122(g), 122(h), 122(i), 122(m), 308, 42 U.S.C. §§ 9613(f)(2), 9613(i), 9622(a), 9622(d), 9622(g), 9622(h), 9622(i), 9622(m), 9657.

The text of CERCLA outlines the settlement authority the statute confers. Several courts, however, have concluded that CERCLA does not limit the inherent authority of the Attorney General to settle litigation to which the United States is a party. *See generally* United States v. Hercules, Inc., 961 F.2d 796 (8th Cir. 1992); United States v. ASARCO, Inc., 814 F. Supp. 951 (D. Colo. 1993). At least one court has held that section 113(f)(2) confers contribution protection upon a party to an "inherent authority" settlement. *See id.* at 957.

41. *See generally* United States v. Cannons Eng'g Corp., 899 F.2d 79 (1st Cir. 1990) (describing role of court in reviewing proposed consent decree). In *Cannons Engineering*, the First Circuit stated:

> The Superfund Amendments and Reauthorization Act of 1986 (SARA) authorized a variety of types of settlements which the EPA may utilize in CERCLA actions, including consent decrees providing for PRPs to contribute to cleanup costs and/or to undertake response activities themselves. SARA's legislative history makes pellucid that, when such consent decrees are forged, the trial court's review function is only to "satisfy itself

proposed settlement is substantively unfair because it would leave the non-settlors "holding the bag" for a disproportionate share of the government's cleanup costs. This contention assumes that (1) the non-settlor PRPs are jointly and severally liable,[42] (2) the settlement will leave the non-settlors subject to liability for the balance of the government cleanup costs (the total cleanup costs less the amount of the settlement),[43] and (3) upon approval of the settlement, the settlors will enjoy protection against contribution claims by the non-settlors.[44] Thus, in determining the substantive fairness of a proposed settlement, a court or EPA must consider the scope of contribution protection — that is, the court, or EPA, must consider whether approval of the settlement would bar any claims for contribution against the settlors by non-settlors.[45]

> that the settlement is reasonable, *fair*, and consistent with the purposes that CERCLA is intended to serve."

Id. at 85 (emphasis added) (citations omitted). The First Circuit explained that the "fairness" inquiry has two components: procedural fairness and substantive fairness. *See id.* at 86. Regarding substantive fairness, the court stated:

> Substantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible. The logic behind these concepts dictates that settlement terms must be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done.

Id. at 87 (citations omitted). For a discussion of the *Cannon Engineering* court's description of the substantive fairness inquiry, see Hyson, *supra* note 17, at 192-96.

Section 122(i)(3) of CERCLA describes the role EPA plays in reviewing and approving a proposed administrative settlement. After non-settlors have had an opportunity to submit comments in accordance with section 122(i)(2), EPA is to consider the comments and "may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate." CERCLA § 122(i)(3), 42 U.S.C. § 9622(i)(3). Although these terms do not expressly require that the agency consider the substantive fairness of the proposed settlement to non-settlors, a determination of whether the proposed settlement is "inappropriate" or "improper" seems to subsume such an inquiry.

42. For a discussion of the existence of presumptive joint and several liability under CERCLA, see *supra* note 17 and accompanying text.

43. *See* CERCLA §§ 113(f)(2), 122(g)(5), 122(h)(4), 42 U.S.C. §§ 9613 (f)(2), 9622(g)(5), 9622(h)(4). Settlement "reduces the potential liability of the others [the non-settlors] by the amount of the settlement," not by the amount of the equitable share of the settlors. *Id.* For the text of these sections of CERCLA, see *supra* notes 23-26, 33 and accompanying text.

44. *See id.* §§ 113(f)(2), 122(g)(5), 122(h)(4), 42 U.S.C. §§ 9613 (f)(2), 9622(g)(5), 9622(h)(4). For a discussion of the way in which these sections of CERCLA protect settlors against "claims for contribution regarding matters addressed in the settlement," see *supra* notes 23-26, 33 and accompanying text.

45. *See generally* United States v. Charter Int'l Oil Co., 83 F.3d 510 (1st Cir. 1996) (discussing whether court's approval of settlement bars contribution claims non-settlors assert against settlors). In *Charter International*, the United States and Charter International Oil Company (Charter) had entered into a settlement under

which Charter was to make a cash payment to the United States to cover some of the costs the United States incurred in cleaning up a contaminated site. *See id.* at 514-15. The parties submitted the proposed settlement, in the form of a consent decree, for a district court's approval. *See id.* Pursuant to section 122(d)(2)(B), the other PRPs were provided with an opportunity to comment upon the proposed settlement. *See id.* at 514.

Those PRPs who had previously entered into settlements under which they had agreed to undertake cleanup activities at the site submitted comments. *See id.* In their comments, these PRPs (the Acushnet Group) expressed concern that the proposed settlement between the United States and Charter might be interpreted to afford Charter protection against contribution claims the Acushnet Group might assert. *See id.* Although the United States and Charter had agreed upon a cash settlement, they disagreed regarding the effect of the proposed settlement upon contribution claims other PRPs, including the Acushnet Group, might assert. *See id.* Charter contended that the proposed settlement, if approved, would protect it against the Acushnet Group's contribution claim. *See id.* The United States, however, asserted that the proposed settlement would not bar contribution claims prior settlors, such as the Acushnet Group, might assert. *See id.*

The district court entered the proposed settlement as a consent decree after determining that the settlement did not protect Charter against contribution claims prior settlors might assert. *See id.* Charter appealed the district court's decision, specifically that portion of it in which the court concluded that the settlement did not protect Charter against the Acushnet Group's claim for contribution toward cleanup costs it incurred under a prior settlement. *See id.*

The First Circuit began its analysis by highlighting the three things a court must consider: "that the decree is fair, that it is reasonable, and that it is faithful to the purposes that CERCLA is intended to serve." *Id.* at 515 (citing United States v. Cannons Eng'g Corp., 899 F.2d 79, 85 (1st Cir. 1990) The court then asserted that this assessment entailed "an appraisal of what the government is being given by the PRP relative to what the PRP is receiving." *Id.* Though it was clear that the government was given a cash payment, "[i]t is what is being received which implicates the district court's interpretation of the decree and the issue of contribution protection." *Id.* In short, it remained unclear whether the decree, which embodied the settlement, gave Charter protection against contribution claims that prior settlors might assert.

The issue, as the First Circuit saw it, was whether, in considering approval of the proposed consent decree, the district court must consider the extent to which the decree, if approved, would afford Charter protection against contribution claims other other PRPs might assert. *See id.* The court provided the following reasoning:

> This case . . . involves approval of a consent decree and is not a suit for contribution. The district court believed, as do we, that it was required to resolve only certain aspects of the dispute over "matters addressed" in order to fulfill its responsibilities in evaluating the consent decree. Not every aspect of interpretation of a consent decree (or even the precise contours of "matters addressed") need be resolved in the course of approval of the decree. Rather, the court must address so much of the interpretation of the consent decree *as needed to rule on the decree's fairness, reasonableness, and fidelity to the statute.*

Id. at 515-16 (emphasis added) (footnote omitted).

The holding in *Charter International* is clear and persuasive. In determining the substantive fairness of a decree, in particular its fairness to non-settlors, a court must consider the extent to which a proposed decree would, if approved, eliminate the potential for other PRPs to assert contribution claims and thereby leave them subject to the risk of disproportionate liability. If the court concludes that the proposed decree would not eliminate the possibility of such claims, then the court will less likely conclude that the proposed decree would be substantively unfair to

After a settlement has been approved, the question of the scope of contribution protection arises when a non-settlor files a claim against a settlor. In this second context, it can be expected that the settlor will assert, by way of defense, that the approved settlement bars the claim by the non-settlor. This defense requires the court to decide the scope of contribution protection enjoyed by the settlor. The court must decide, in accordance with the language of the contribution protection provisions, whether the non-settlor's claim involves "matters addressed in the settlement."

There is nothing in the relevant statutory language — "matters addressed in the settlement" — that directs a court to consider the fairness of the underlying settlement in determining the scope of contribution protection.[46] If the settlor PRP is asserting contribution protection based upon a judicially approved settlement, the court addressing this contention should recognize that another court approved the settlement, determining, as part of the approval process, that the settlement was substantively fair.[47]

If the settlor PRP is asserting contribution protection based upon an administrative settlement, the court addressing this contention should recognize that Congress authorized administrative settlements and set up a notice-and-comment process under which an administrative agency, usually EPA,[48] considers and determines any claims of substantive unfairness by non-settlors.[49] Congress did not expressly provide for judicial review of EPA's action in approving administrative settlements and there is some support for the position that Congress has precluded judicial review of administrative settlements.[50] More to the point: there is *nothing* in the lan-

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the other PRPs. If, however, the court concludes that the proposed decree would, if approved, eliminate the potential for other PRPs to assert contribution claims, then the decree would have a greater impact on these other PRPs and in turn possibly lead the court to conclude that the proposed decree is substantively unfair.

46. For the text of the relevant statutory language, see *supra* note 23.

47. *See* CERCLA § 122(d)(2)(B), 42 U.S.C. § 9622(d)(2)(B). As previously stated, those who are not parties to a proposed consent decree have an opportunity to submit comments. *See id.*

48. *See id.* §§ 122(g)(4), 122(i)(1), 122(i)(3), 42 U.S.C. §§ 9622(g)(4), 9622(i)(1), 9622(i)(3).

49. *See id.* §§ 122(g)(4), 122(i)(1), (3), 42 U.S.C. §§ 9622(g)(4), 9622(i)(1),(3). Section 122(g) confers de minimis settlement authority upon "the President." *Id.* § 122(g), 42 U.S.C. § 9622(g). *See* H.R. REP. No. 99-253(I) (1985). Section 122(h) confers "costs incurred" settlement authority upon "[t]he head of any department or agency with authority to undertake a response action under this chapter." CERCLA § 122(h), 42 U.S.C. § 9622(h). Generally, this will be EPA.

50. *See id.* § 122(a)(1), 42 U.S.C. § 9622 (a) (1) (stating that "[a] decision of the President to use or not to use the procedures in this Section is not subject to

guage of the contribution protection provisions that suggests that a court, in determining whether a non-settlor's claim is a "claim for contribution regarding matters addressed" in an administrative settlement, is to undertake judicial review of EPA's determination that the settlement is substantively fair.[51] Judicial review of administrative action is one thing; the determination of whether a claim relates to a "matter addressed" in a settlement is another. But, in spite of this distinction, we will see, in the next two Parts of this Article, that some courts, in determining the scope of contribution protection — in determining whether a non-settlor's claim is a "claim for contribution regarding matters addressed in the settlement" — have considered the substantive fairness of the underlying settlement and the related question of the fairness of barring contribution claims by the non-settlors.

We will also see that some courts have suggested, with little analysis, that, at least in certain circumstances, barring a non-settlor's contribution claims would be unconstitutional. These courts have suggested that, where the underlying settlement is an administrative settlement (approved by EPA), the extinguishment of the non-settlor's claim for contribution would offend procedural due process and might even constitute a taking of property without just compensation.

A court faced with a contribution protection defense must, of course, address a contention by a non-settlor plaintiff that barring the non-settlor's contribution claim would be unconstitutional. But rather than directly addressing such constitutional contentions, some courts, after alluding to constitutional concerns, have used these concerns (at least in part) as a basis for narrowly interpreting the scope of contribution protection afforded by a settlement.

With this general discussion of a court's role in determining the scope of contribution protection as a backdrop, this Article now turns to a more specific and detailed examination of a court's role when, in resolving a settlor's contribution protection defense, the

judicial review."). *See also* Dravo Corp. v. Zuber, 13 F.3d 1222, 1226 (8th Cir. 1994) (concluding that provision precluded effort non-settlor's attempt to obtain judicial review of EPA's decision to enter into "de minimis" settlement). At least one court has found that *Dravo* does not stand for the proposition that section 122(a)(1) precludes judicial review of the terms of an administrative settlement. *See* Avnet, Inc. v. Amtel, Inc., 1994 WL 705433 (D.R.I. 1994). There appears to be no case, however, in which a court has undertaken judicial review of a section 122 administrative settlement.

51. *See* F. James Handley, *CERCLA Contribution Protection: How Much Protection?*, 22 ENVTL. L. REP. 10542 (1992) (recognizing Senator Stafford's concern regarding these settlements not being subject to judicial review).

court must interpret and apply those provisions of CERCLA that grant a settlor protection against "claims for contribution regarding matters addressed in the settlement."

V. Interpretation of the Contribution Protection Provisions

When faced with a settlor's defense that a non-settlor's claim is barred by one of CERCLA's contribution protection provisions, the court must interpret the relevant provision. The task of interpretation must begin, of course, with the statutory text.

A. The Common Text

CERCLA's three contribution protection provisions have common text. All three provisions state that a person "who has resolved its liability to the United States . . . shall not be liable for claims for contribution regarding matters addressed in the settlement."[52] This language presents two questions of interpretation. First, when is a non-settlor's claim a "claim for contribution?" Second, when a court is faced with a non-settlor's claim for contribution, how is the court to determine whether such claim relates to "matters addressed in the settlement?"

1. "Claim for Contribution"

CERCLA protects settlors against "claims for contribution."[53] Non-settlors have sought to circumvent the contribution protection provisions by characterizing their claims as something other than a "claim for contribution." For example, in *Akzo Coatings, Inc. v. Aigner Corp.*,[54] the non-settlor plaintiffs characterized their claim as a claim under section 107(a) of CERCLA for directly incurred response costs — not a claim for contribution.[55] The question of whether one PRP's claim against another PRP is either a contribution claim, or, conversely, a direct cost recovery claim, has troubled the courts. The question has arisen in a number of contexts: (1) when a court is faced with the contention that a defendant PRP is

52. CERCLA §§ 113(f)(2), 122(g)(5), 122(h)(4), 42 U.S.C. § 9613 (f)(2), 9622(g)(5), 9622(h)(4). The language of each of the first sentences of the contribution protection provisions is identical, except that sections 113(f)(2) and 122(h)(4) extend contribution protection to a "person" who has entered into a settlement, whereas section 122(g)(5) extends contribution protection to a "party" who has entered into a settlement. *Id.* This slight difference has no apparent significance. For the full text of these provisions, see *supra* note 23.

53. *Id.*

54. 30 F.3d 761 (7th Cir. 1994).

55. *See id.* at 764.

subject to joint and several liability;[56] (2) when a court is faced with a defense that the plaintiff PRP has not commenced its action within the relevant limitations period;[57] and (3) when, as is relevant to the present discussion, a non-settlor PRP contends that its claim against a settlor PRP is not a "claim for contribution" and thus is not barred by the applicable contribution protection provision.[58]

The developing majority view, as the Ninth Circuit recently stated in *Pinal Creek Group v. Newmont Mining Corp.*, is that "a claim by one PRP against another PRP necessarily is for contribution."[59] Likewise, the Seventh Circuit reached a similar conclusion in *Akzo*.[60] In that case, although the court was split regarding the proper manner in which to determine the "matters addressed" by a consent decree,[61] it unanimously rejected the non-settlor's effort to avoid the settlor's contribution protection defense by characterizing its claim as a direct cost recovery claim under section 107(a).[62]

56. *See generally, e.g.*, Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344 (6th Cir. 1998); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997), *cert. denied* 118 S. Ct. 2340 (1998); Stearns & Foster Bedding Co. v. Franklin Holding Corp., 947 F. Supp. 790 (D.N.J. 1996); Boyce v. Bumb, 944 F. Supp. 807 (N.D. Cal. 1996); S.C. Holdings, Inc. v. A.A.A. Realty Co., 935 F. Supp. 1354 (D.N.J. 1996); T H Agric. & Nutrition Co. v. Aceto Chem. Co., 884 F. Supp. 357 (E.D. Cal. 1995); Kaufman & Broad S. Bay v. Unisys Corp., 868 F. Supp. 1212 (N.D. Cal 1994); Ciba-Geigy Corp. v. Sandoz Ltd., No. Civ.A.92-4491, 1993 WL 668325, at *7 (D.N.J 1993) (all addressing issue of defendant PRP's joint and several liability).

57. *See generally, e.g.*, Sun Co., Inc. v. Browning-Ferris, Inc., 124 F.3d 1187 (10th Cir. 1997); United Tech. Corp. v. Browning-Ferris Indus., Corp., 33 F.3d 96 (1st Cir. 1994) (both considering defendant's argument that plaintiff PRP did not commence its actions within the relevant limitations period).

58. *See generally, e.g.*, United States v. Colorado & E. R.R. Co., 50 F.3d 1530 (10th Cir. 1995); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761 (7th Cir. 1994) (both considering non-settlor PRP's contention that its claims against settlor PRP is not a "claim for contribution" and therefore not barred by applicable contribution protection provision).

59. *Pinal Creek Group*, 118 F.3d at 1301. *See generally*, Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 107 (1997) (highlighting that "many cases treat all claims brought by one PRP against another, regardless of context, as one for contribution and not cost recovery.").

60. *See Akzo*, 30 F.3d at 764-65.

61. *See id.* For a detailed discussion of the split within the *Akzo* court, see *infra* notes 119-96 and accompanying text.

62. *See id.* at 764. In rejecting this contention, the *Akzo* court reasoned:

> That Akzo's claim is one for contribution we have no doubt. Akzo argues that its suit is really a direct cost recovery action brought under Section 107(a) rather than a suit for contribution under Section 113(f)(1) . . . . Yet Akzo has experienced no injury of the kind that would typically give rise to a direct claim under Section 107(a) — it is not, for example, a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands. Instead, Akzo itself is a party liable in some measure for the contamination

2. "Matters Addressed in the Settlement"

The common text of CERCLA's contribution protection provisions does not protect settlors against *all* contribution claims by non-settlors. Rather, the provisions state that settlors shall not be liable for contribution claims "regarding *matters addressed in the settlement.*"[63] As the *Akzo* court stated, "[t]he statute itself does not specify how we are to determine what particular 'matters' a consent decree [or other form of settlement] addresses."[64]

Settlements — whether in the form of an administrative order or a judicially approved consent decree — contain many provisions.[65] To what provision, or provisions, is a court to look in determining the "matters addressed in the settlement"?

Until recently, settlements usually did not contain express contribution protection provisions. At most, the settlement would state that the settlor was entitled to contribution protection in accordance with the relevant contribution protection provision.[66] The ab-

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> at the . . . site, and the gist of Akzo's claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible. That is a quintessential claim for contribution. Section 113(f)(1) confirms as much by permitting a firm to seek contribution from "any other" party held liable under Sections 106 or 107. Whatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. Akzo's suit accordingly is governed by Section 113(f).

Id. (citations omitted).

63. CERCLA §§ 113(f)(2), 122(g)(5), 122(h)(4), 42 U.S.C. §§ 9613(f)(2), 9622(g)(5), 9622(h)(4). For the text of these provisions, see *supra* note 23.

64. *Akzo*, 30 F.3d at 765.

65. *See generally* Revised Model CERCLA RD/RA Consent Decree, 60 Fed. Reg. 38817 (1995), *reprinted in* MICHAEL W. STEINBERG, ET AL., *Practical Analysis of EPA's 1995 Revised Model Consent Decree for Superfund Cleanups, in* SUPERFUND CLEANUP DECISION HANDBOOK 42-62 (Informational Network for Superfund Settlements, Washington, D.C. 2d ed. 1995) [hereinafter Model Consent Decree]. "The principal impetus behind the important substantive changes contained in the revised Model has been a desire to enhance the fairness and increase the number of settlements in which [PRPs] agree to implement government-selected remedies at Superfund sites." *Id.* at 38819. In creating the Model Consent Decree, EPA aimed to encourage a decrease in the amount of time spent drafting individual consent decrees. *See id.* at 38817. The section titled "Additional Response Actions" that the decree contains generated considerable criticism among PRPs who believed that this provision gave EPA a blank check for unknown future costs. *See id.* at 38818.

66. *See* Memorandum at 1-2 (acknowledging this past practice regarding definition of "matters addressed" in CERCLA settlements). The Memorandum states:

> In the past, CERCLA settlements have generally not included a definition of "matters addressed," but instead have at most contained a statement that the "Settling Defendants are entitled to such protection from contribution actions or claims as is provided in CERCLA Section 113(f)(2)" or the equivalent.

Id. at 2.

sence of an express contribution protection provision left courts to ponder over which provisions in a settlement should be examined in order to determine the "matters addressed in the settlement." The settlement might contain a provision that broadly describes the release of hazardous materials at a particular facility.[67] If so, would such a provision support the conclusion that the "matters addressed" in the settlement were broad and included all contamination and releases at the facility? Or was a court, in determining the "matters addressed," to look only to the provisions that described the settlors' obligations? If so, the contribution protection enjoyed by the settlors would be quite limited.

Since the text of the contribution protection provisions does not specify how a court is to determine the "matters addressed" by a settlement, it is appropriate to look to legislative history.

B. Legislative History of the Contribution Protection Provisions[68]

Although courts have noted that the common text of the contribution protection provisions — "matters addressed in the settlement" — provides no clear guidance in defining the scope of contribution protection, the courts have not looked to the legislative history of the provisions in an effort to determine congressional intent regarding how a court is to determine whether a claim for contribution is barred because it relates to a matter addressed in a settlement. As will be seen, the legislative history contains little that deals directly with how a court is to perform this task.

1. House Bill 2817 (H.R. 2817)

The first contribution protection provision appeared in House Bill 2817.[69] That bill (as originally proposed) contained the following provision:

> When a party has resolved its liability to the United States or a State in a *judicially approved good-faith* settlement, such person shall not be liable for claims for contribution or indemnity regarding matters addressed in the

67. *See* Model Consent Decree, *supra* note 69, at 38819. Paragraph one sets forth the "Background" for the decree, including provisions describing the release at a particular facility. *See id.*

68. *See generally* Superfund II: A New Mandate, 1987 B.N.A. 99-119. *See also* Superfund Amendments of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, *and in* Comm. On Env't and Pub. Works, 101st Cong., Legislative History of the Superfund Amendments and Reauthorization Act of 1986, 1535 (Comm. Print 1990) [hereinafter SARA Legislative History].

69. *See* SARA Legislative History, *supra* note 68, at 1578-81.

> settlement. Such settlement does not discharge any of the other parties unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the settlement.[70]

The similarity of this provision to what was enacted, as section 113(f)(2) of CERCLA, is apparent.[71] Though the differences in the second sentences of the two provisions are slight, the differences in the first sentences are significant.

First, House Bill 2817 (as originally proposed) limited contribution protection to a "party" that has resolved its liability in a *judicially approved* settlement.[72] CERCLA section 113(f)(2), in contrast, extends contribution protection to any "person" who has resolved its liability in an "administrative or judicially approved settlement."[73] Second, House Bill 2817 limited contribution protection to "good faith" judicial settlements.[74]

The limitation of contribution protection to those who had entered into "good faith" settlements apparently reflected congressional concern about "sweetheart" settlements — that is, settlements in which EPA offered to settle the United States' CERCLA claim for an amount that was less than the settlor's equitable share of the overall cleanup costs at a contaminated site.[75] Never-

70. *See id.* at 1579 (emphasis added).

71. For the text of section 113(f)(2), see *supra* note 23.

72. *See* SARA Legislative History, *supra* note 68, at 1579.

73. *See* CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2)(1994). The change from "party" to "person" came when Congress amended the general contribution protection provision, section 113(f)(2), to extend contribution protection to those who had entered into administrative settlements. For a discussion of this change, see *infra* note 88.

74. *See* SARA Legislative History, *supra* note 68, at 1579. House Bill 2817 protected settling parties against claims for both "indemnity" as well as contribution. *See id.* The House Judiciary Committee deleted the protection against claims for "indemnity." *See* H.R. REP. NO. 99-253, pt. 3, at 18-20 (1985). The following excerpt from the Committee's report explains the rationale supporting the deletion:

> The Judiciary Committee amendment to new subsection 113(g)(2) of CERCLA also clarifies that entry into a judicially approved settlement with the government protects a party only against the contribution claims of other potentially liable parties, and not against indemnification claims. Contribution is a statutory or common law right available to those who have paid more than their equitable share of an entire liability. Indemnity is a right arising from a contractual or a special relationship between parties. Settlement with the government should not abrogate independently existing rights of persons to indemnity.

Id. at 19. *See also* SARA Legislative History, *supra* note 68, at 2231.

75. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1)(establishing express right of contribution among PRPs and providing that, in resolving contribution claim, court is to use "such equitable factors as the court determines are appropriate."). Thus, in the absence of a settlement, each PRP is subject to liability for its

theless, this limitation was deleted by the House Judiciary Committee, which explained that "[t]he Judiciary Committee amendment . . . deletes 'good faith' as an independent requirement for obtaining immunity from contribution claims. The amendment recognizes that judicial examination and approval of the settlement itself is adequate to protect against improper or 'bad faith' settlements."[76] The Committee further commented that "[b]efore initially approving a consent decree under CERCLA, a court must satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve" and that making "good faith" a separate requirement would create confusion and lessen the likelihood of settlement.[77]

At the same time that the House Judiciary Committee was deleting the "good faith" limitation for judicially approved settlements, the Committee was amending House Bill 2817 by creating two *administrative* settlement provisions. First, the Committee created a "de minimis" settlement provision that is very similar to section 122(g) of CERCLA.[78] Section 122(g)(5) of House Bill 2817 provided for contribution protection.[79] The first two sentences of section 122(g)(5) were identical to the provisions of section 122(g)(5) of CERCLA.[80] But section 122(g)(5) of House Bill 2817 contained an additional, third sentence that provided, "[t]his paragraph does not apply to a settlement that was achieved through fraud, misrepresentation, other misconduct by one of the parties to the settlement, or mutual mistake of fact."[81]

The House Judiciary Committee created a second administrative settlement provision, captioned "EPA Cost Recovery Settlement Authority," that is very similar to section 122(h) of CERCLA.[82] Section 122(h)(5) of House Bill 2817 provided for contribution protection.[83] Like the contribution protection provisions for "de minimis" settlements, the first two sentences of section 122(h)(5)

"equitable share." *See id.* The common name for a settlement for less than this share is a "sweetheart" settlement.

76. H.R. REP. No. 99-253, pt. 3, at 19 (1985).

77. *Id. See also* SARA Legislative History, *supra* note 68, at 2231.

78. *Compare* H.R. REP. No. 99-253, pt. 3, at 30-32 *with* CERCLA § 122(g), 42 U.S.C. § 9622(g)(1994).

79. H.R. REP. No. 99-253, pt. 2, at 31-32.

80. *Compare* H.R. REP. No. 99-253, pt. 3, at 51-52 *with* CERCLA § 122(g)(5), 42 U.S.C. § 122(g)(5).

81. H.R. REP. No. 99-253, pt. 3, at 10 (1985). *See also* SARA Legislative History, *supra* note 78, at 2222.

82. *Compare* H.R. REP. No. 99-251, pt. 3, at 52 *with* CERCLA § 122(h), 42 U.S.C. § 9622(h).

83. *See* H.R. REP. No. 99-253, pt. 3, at 52.

of House Bill 2817 are identical to section 122(h)(4) of CERCLA.[84] But, section 122(h)(5) of House Bill 2817 contained a third sentence that, like the third sentence of section 122(g)(5) of House Bill 2817, provided that "[t]his paragraph does not apply to a settlement that was achieved through fraud, misrepresentation, other misconduct by one of the parties to the settlement, or mutual mistake of fact."[85] The Judiciary Committee's report made it clear that the person seeking contribution from one who had entered into an administrative settlement — whether a de minimis settlement under section 122(g) or a cost recovery settlement under section 122(h) — had the burden of proving that a settlement "was achieved through fraud, misrepresentation, other misconduct by one of the parties to the settlement, or mutual mistake of fact."[86]

In sum, House Bill 2817 (as amended by the House Judiciary Committee) afforded contribution protection to those who had entered into either a judicially approved settlement or one of two types of administrative settlements. Although the Committee expressed concern about sweetheart settlements, it believed that, regarding judicially approved settlements, its concerns would be addressed through the process of judicial review of proposed settlements. Before approving a settlement, the court would determine whether the proposed settlement was "reasonable, fair, and consis-

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84. *Compare* H.R. REP. NO. 99-253 *with* CERCLA § 122(h)(4), 42 U.S.C. § 9622(h)(4).

85. *See* H.R. REP. NO. 99-253, pt. 3, at 11. *See also* SARA Legislative History, *supra* note 68, at 2223.

86. *See id.* at 2222-23. Regarding the effect of "de minimis" settlements under section 122(g), the House Judiciary Committee's report states:

> These settlements will protect the [settling] party against the contribution claims of other persons who are liable under the Act, unless a person seeking contribution *can show* that the settlement was achieved through fraud, misrepresentation, other misconduct, or a mutual mistake of fact
> . . . .

H.R. REP. NO. 99-253, pt. 3, at 32 (emphasis added). *See also* SARA Legislative History, *supra* note 68, at 2244 (noting provision designed for private parties, but also applicable to federal agencies).

Regarding the effect of cost recovery settlements under section 122(h), the report states:

> New subsection 122(h)(5) provides that parties who settle with EPA for past response costs are protected from the contribution claims of non-settling parties, whether or not the administrative settlement is entered as a judicially approved consent decree. *If the plaintiff in a contribution action shows* that the settlement was achieved through fraud or other misconduct, or a mutual mistake of fact between EPA and the settling party, the settlement will not provide immunity from contribution claims.

H.R. REP. NO. 99-253, pt. 3, at 33 (emphasis added). *See also* SARA Legislative History, *supra* note 68, at 2245.

tent with the purposes that CERCLA is intended to serve."[87] With respect to the specified administrative settlements (de minimis and cost recovery), congressional concern about sweetheast settlements was addressed by the provision that denied contribution protection where the party seeking contribution could show that the settlement "was achieved through fraud, misrepresentation, other misconduct by one of the parties to the settlement, or mutual mistake of fact."[88]

2. *House Bill 3852 (H.R. 3852, codified as House Bill 2005 (H.R. 2005))*

House Bill 3852, introduced in December of 1985, was a compromised version of House Bill 2817 that incorporated amendments that had been made by the various committees that had reviewed House Bill 2817. House Bill 3852 contained the following provision:

> 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. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement. *This paragraph does not apply to a settlement which was achieved through fraud, misrepresentation, other misconduct by one of the parties to the settlement, or mutual mistake of fact.*[89]

The emphasized language reflects changes from the analogous provision in House Bill 2817.[90] First, section 113(f)(2) of House Bill 3852 extended contribution protection to those who had entered into administrative settlements, as well as those who had entered into judicially approved settlements.[91] In some respects, the

87. For a discussion of the court's role in reviewing settlements that the proposed consent decree sets forth, see *infra* notes 113-242 and accompanying text.

88. *See* H.R. REP. No. 99-253, pt. 3, at 32-33.

89. H.R. REP. No. 99-962, at 38 (1986).

90. For the text of the analogous provision in House Bill 2817, see *supra* note 74 and accompanying text. A minor change was that House Bill 3852 extended contribution protection to any "person," not, as House Bill 2817 provided, to "any party." H.R. REP. No. 99-962, at 38. Congress presumably substituted "person" for "party" because H.R. 3852 extended contribution protection to those who had entered into administrative settlements, as well as judicially approved settlements. *See* H.R. REP. No. 99-962, at 222.

91. *See* H.R. REP. No. 99-962, at 38.

reference to administrative settlements in section 113(f)(2) created a redundancy because sections 122(g)(5) and 122(h)(5) of House Bill 3852 extended contribution protection to those who had entered into administrative de minimis settlements and administrative cost recovery settlements.[92] Thus, section 113(f)(2), on the one hand, and sections 122(g)(5) and 122(h)(5), on the other, were duplicative in providing contribution protection for those who had entered into de minimis or cost recovery administrative settlements.

But, in two respects, the contribution protection afforded by section 113(f)(2) was broader than that afforded by sections 122(g)(5) and 122(h)(5). Section 113(f)(2) extended contribution protection to a person who had resolved its liability to the United States in *any type of administrative settlement* — not just a de minimis or cost recovery settlement.[93] In addition, section 113(f)(2) extended contribution protection to any person who had resolved its liability *to a State* in an administrative or judicially approved settlement.[94] Section 113(f)(2) of House Bill 3852 also differed from House Bill 2817 in a second respect — House Bill 3852 added a sentence that denied contribution protection to settlements that involved fraud, misrepresentation, misconduct or mutual mistake.[95] As we have seen, the House Judiciary Committee added this sentence to the "de minimis" and cost recovery administrative settlement provisions of House Bill 2817.[96]

3. The Conference Committee

By the time of the House passage, the Senate had already passed its own bill, Senate Bill 51 (S. 51), which incorporated the provisions of an earlier version of House Bill 2005.[97] Congress appointed a conference committee to reconcile the difference between the House and Senate bills.[98]

92. *See* H.R. REP. No. 99-962, at 78-79.

93. *See* H.R. REP. No. 99-962, at 38.

94. *See* H.R. REP. No. 99-962, at 38.

95. *See* H.R. REP. No. 99-962, at 38.

96. See H.R. REP. No. 99-962, at 77-78. Sections 122(g) and (h) of House Bill 3852 contained administrative *de minimis* and cost recovery settlement provisions, respectively. *See* H.R. REP. No. 99-962, at 78-79. Sections 122(g)(5) and (h)(4) provided contribution protection for those who have entered into such settlements. *See* H.R. REP. No. 99-962, at 78-79. Each provision contained the third sentence, "withholding contribution protection where the settlements involved fraud, misrepresentation, misconduct, or mutual mistake." H.R. REP. No. 99-962, at 38.

97. *See* S. 51, 99th Cong. (1985). *See also* S. REP. No. 99-11 (1985); S. REP. No. 99-73 (1985)(both accompanying Senate Bill 51).

98. *See* H. R. REP. No. 99-962, at 1 (1986).

The Conference Committee added a new section, section 122(m), and deleted the last sentences from sections 113(f)(2), 122(g)(5) and 122(h)(5) of the House version of House Bill 2005. Section 122(m), captioned "Applicability of General Principles of Law," stated:

> In the case of consent decrees and other settlements under this section (including covenants not to sue), no provision of this Act shall be construed to preclude or otherwise affect the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements.[99]

The Committee's rationale for the changes to section 113(f)(2), as the conference report noted, was that the new section 112(m) addressed the various contexts in which settlements could be set aside and that a similar provision was therefore unnecessary in section 113(f)(2).[100] The report set forth a similar rationale for the deletion of the last sentence of sections 122(g)(5) and 122(h)(4), explaining that the conferees added section 122(m) to resolve inconsistencies regarding the different contexts in which settlements could be set aside.[101] This single provision reflected "the Conferees' understanding that the general principles of law regarding the setting aside or modification of consent decrees or other settlements will be applicable to all agreements and covenants not to sue under the Act."[102] These conference substitutes were passed by both the House and the Senate and became law.[103]

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99. H.R. REP. NO. 99-962, at 80. *See also* SARA Legislative History, *supra* note 68, at 4897.

100. *See* H.R. REP. NO. 99-962, at 222. *See also* SARA Legislative History, *supra* note 68, at 5038.

101. *See* H.R. REP. NO. 99-962, at 255. The House Report states:

> Section 122(m) is added to the conference substitute because there are inconsistent provisions in the House and Senate versions regarding the circumstances under which settlement agreements, including covenants not to sue, could be set aside for reasons such as fraud, misrepresentation, and mutual mistake of fact. All of these provisions are combined in a single provision to avoid confusion arising from the use of inconsistent language . . . .

H.R. REP. NO. 99-962, at 255. In the conference version of the cost recovery settlement provision, the contribution protection provision has been renumbered from section 122(h)(5) to section 122(h)(4). *See* H.R. REP. NO. 99-962, at 79.

102. H.R. REP. NO. 99-962, at 255. *See also* SARA Legislative History, *supra* note 68, at 5071.

103. *See generally* Denise J. DeHaan, Note, *New Perspectives on a Familiar Problem: The Defense Reform Act of 1997 Addresses Environmental Hazards at Federal Facilities*, 23

The changes made by the Conference Committee were significant. Under the last sentences of sections 113(f)(2), 122(g)(5) and 122(h)(5) of House Bill 2005, as passed by the House, it was clear that a court was not to grant contribution protection under a settlement shown to be tainted by fraud, misrepresentation, misconduct or mutual mistake of fact.[104] Had this last sentence remained in the contribution protection provisions, it is clear that it would have complicated a court's task when, in a contribution action by a non-settling PRP, a defendant PRP asserted that it had entered into a settlement and thus was immune from liability under one of the contribution protection provisions. The plaintiff could seek to avoid the contribution protection defense by demonstrating that the settlement was achieved through fraud, misrepresentation, misconduct or mutual mistake of fact. With the deletion of the last sentence — and the substitution of section 122(m) — it appeared that a PRP asserting a contribution claim against a settling PRP could avoid a contribution protection defense only if, under "general principles of law," the settlement might be set aside or modified.[105]

4. *Congressional Reports and the Determination of "Matters Addressed" in a Settlement*

There is nothing in the congressional reports relating to the SARA amendments of 1986 that speaks directly to the meaning of the phrase "matters addressed" in the contribution protection provisions. There are, however, numerous statements that support the

SETON HALL LEGIS. J. 179 (describing process through which proposed legislation became law).

104. *See* H.R. REP. NO. 99-962, at 222, 255.

105. *See* H.R. REP. NO. 99-962, at 80. Section 122(m) does not specify what the procedure for setting aside or modifying the settlement would be. *See* H.R. REP. NO. 99-962, at 80, 225. If the settlement involved is a judicially approved settlement, the proceeding would presumably be a motion, under Federal Rule of Civil Procedure 60(b), to set aside or modify the consent decree. *See* FED. R. CIV. P. 60(b)(5)(6). *See also* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (discussing general applicability of Federal Rule of Civil Procedure 60(b) to issue of setting aside or modifying settlement). "General principles of law" regarding the setting aside or modification of settlements would govern the motion. H.R. REP. NO. 99-962, at 80, 255.

If, however, the settlement involved is an administrative settlement, a party might petition the agency (EPA) to set aside or modify the settlement. But it is unclear what "general principles of law" would apply to such a petition to set aside an *administrative* settlement. Moreover, if EPA were to deny such a petition, it is less than clear that such denial would be subject to judicial review. For a discussion of whether EPA's action in approving administrative settlements under sections 122(g) and 122(h) is subject to judicial review, see *supra* note 54 and accompanying text.

conclusion that the contribution protection provisions were intended to provide an inducement to settle. For example, a House Report contains the following statement regarding the effect of judicially approved settlements:

> If a party has resolved its liability to the U.S. or a state in a judicially approved, good faith settlement, the party would not be liable for claims for contribution or indemnity on matters addressed in the settlement. These provisions should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups.[106]

Similar statements exist with respect to the two types of administrative settlements — de minimis[107] and "costs incurred."[108]

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106. H.R. REP. No. 99-253, at 59 (1985). *See also* SARA Legislative History, *supra* note 68, at 636.

The Senate Report similarly states:

> In addition to encouraging settlement, the amendment [providing for contribution protection] will help bring an increased measure of finality to settlements. Responsible parties who have entered into a judicially approved good faith settlement under the Act will be protected from paying any additional response costs to other responsible parties in a contribution action.

S. REP. No. 99-11, at 44. In identifying "good faith" settlements, these statements are referring to a limitation that was subsequently deleted. For a discussion of good faith settlements, see *supra* notes 74-77 and accompanying text.

107. *See* H.R. REP. No. 99-253, pt. 3, at 31 (1985). For example, Senator Bentsen made the following statement:

> Another amendment provides small contributors with the opportunity to settle their portion of a site separately. While such settlements are at the discretion of the President, minimal contributors can make good faith offers that would allow them to pay their appropriate share of the remedy and then they would be removed from the litigation. Removing these small contributors allows them to pay a fair share, but it reduces the ability of other — major — responsible parties from dragging these small contributors into the process and through the length litigation in which, in many cases, the lawyers' fees could exceed the amount of the responsibility.

SARA Legislative History, *supra* note 68, at 1242. The House Judiciary Committee's recommendations for amendments to House Bill 2817 similarly state:

> Both types of *de minimis* settlements are intended to relieve the covered parties from prolonged and costly litigation . . . . These settlements will protect the party against the claims of other persons who are liable under the Act, unless a person seeking contribution can show that the settlement was achieved through fraud, misrepresentation, other misconduct or a mutual mistake of fact.

H.R. REP. No. 99-253, pt. 3, at 31. *See also* SARA Legislative History, *supra* note 68, at 4063. The reference to a showing of "fraud, misrepresentation, other misconduct, or a mutual mistake of fact" is a reference to a provision that was later deleted. For the text of this provision, see the text accompanying *supra* note 89.

108. H.R. REP. No. 99-253, pt. 3, at 33. The House Judiciary Committee's recommendations for amendments to House Bill 2817 states, "[n]ew subsection

Most statements in the committee reports and in the floor debates seem to assume that the contribution protection provisions shield a settlor from *all* claims for contribution by PRPs who are not parties to the settlement. The statements fail to note that contribution protection under all three provisions is limited to contribution claims regarding the "matters addressed in the settlement."[109]

5. Congressional Debate on the Contribution Protection Provisions

The congressional debate regarding the scope of the contribution protection provisions contains little that speaks to how a court is to determine the "matters addressed" in a settlement. There appears to be only one statement that recognizes the possibility of a "partial settlement." Senator Stafford, Chairman of the Senate Environment and Public Works Committee, made the following statement regarding the contribution protection provision in Senate Bill 51:

> In terms of encouraging prompt and effective action, an important provision of [Senate Bill 51] is the proposal to add a new paragraph . . . to provide contribution protection to parties who settle with the United States or a State in good faith. The proposed new paragraph provides that, where a party has entered into a judicially approved good faith settlement with the United States or a State, no other responsible or potentially responsible party may seek contribution from the settling party. This protection attaches only to matters that the settling party has resolved with the United States or a State.
>
> Thus, in cases of partial settlements where, for example, a party has settled with the United States or a State for a surface cleanup, the settling party shall not be subject to any contribution claim for the surface cleanup by any party. The settlor may, however, remain liable in such instances for other cleanup action or costs not addressed by

122(h)(5) provides that parties who settle with the EPA for past response costs are protected from the contribution claims of non-settling parties, whether or not the administrative settlement is entered as a judicially approved consent decree." *Id.* *See also* SARA Legislative History, *supra* note 68, at 4063.

109. *See* H.R. REP. NO. 99-962, at 38, 78-79. For a discussion of the contribution protections of sections 113(f)(2) and 122(g)(5) and 122(h)(4), see *supra* notes 73-103 and accompanying text.

the settlement such as, in this example, a subsurface cleanup.[110]

6. Summary of the Legislative History

Although there is little in the legislative history that speaks directly to the determination of "matters addressed" in a settlement — only Senator Stafford's comments —, the legislative history is helpful in suggesting the role of a court when it is faced with a defense by a settlor-PRP that a claim for contribution is barred under the terms of a contribution protection provision.

First, when the House Judiciary Committee deleted the requirement that, in order to afford contribution protection, a judicially approved settlement must be in "good faith," the Committee was clear in stating that it believed that such a determination was unnecessary because it would duplicate the task that had been performed by the district court that had approved the settlement.[111] The deletion of the "good faith" limitation suggests that, insofar as judicially-approved settlements are concerned, Congress intended that the task of determining the "good faith" of any settlement was a task to be performed by the court that reviewed the settlement; that task was not to be duplicated by another court that, in a claim for contribution against a settling PRP, was faced with the task of determining the scope of contribution protection enjoyed by the settlor.

Second, it is significant that Congress first proposed, and then deleted, a sentence in the contribution protection provisions that would have allowed a PRP asserting a claim for contribution against a settlor PRP to avoid a contribution protection defense by showing that the settlement that was the basis for the defense "was achieved through fraud, misrepresentation, other misconduct by one of the parties to the settlement, or mutual mistake of fact." In deleting these provisions, the Conference Committee made it clear that "all

110. SARA Legislative History, *supra* note 72, at 1153-54. The provision Senator Stafford's comments referred to stated, in pertinent part, "[w]hen a person has resolved its liability to the United States or a State in a judicially approved good faith settlement, such person shall not be liable for contribution . . . regarding matters addressed in the settlement." *Id.* at 920-21. For a discussion of the later-deleted "good faith" limitation, see *supra* notes 74-77 and accompanying text. Senate Bill 51 limited contribution protection to those who had entered into judicially approved settlements. *See* 131 CONG. REC. S14895 (Conference Report Oct. 3, 1986) (statement of Sen Stafford). For a discussion of Senator Stafford's opposition to administrative settlements, see *infra* note 314 and accompanying text.

111. For a discussion of the House Judiciary Committee's actions, see *supra* notes 76-88 and accompanying text.

of these provisions are combined in a single provision" — section 122(m) — that states that nothing in CERCLA precludes or otherwise affects "the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements."[112] The creation of section 122(m), together with the explanation offered by the Conference Committee, suggest that Congress intended that, if a non-settlor believes that a settlement is the product of fraud, misrepresentation, misconduct or mutual mistake, the non-settlor was to make such contentions by seeking to set aside or modify the settlement. Such contentions were *not* to be considered by a court that, in a claim for contribution against a settling PRP, was faced with the task of determining the scope of contribution protection enjoyed by the settlor.

In sum, though the legislative history does not directly address how a court faced with a claim for contribution is to determine the scope of contribution protection — in particular, the "matters addressed" in a settlement —, the legislative history is helpful in describing what a court should *not* do. If the contribution protection defense is grounded upon a judicially approved settlement, the court is not to duplicate the task that was performed by the court that approved the settlement. And, whether the contribution protection defense is grounded upon a judicially approved or administrative settlement, the court is not to entertain contentions that the settlement was the product of fraud, misrepresentation, misconduct or mutual mistake; rather, a non-settlor seeking to make such contentions must assert them by seeking, under "general principles of law," to set aside or modify the settlement.

Against the backdrop of the preceding legislative history, this Article now turns to an examination of the major decisions in which courts have discussed the scope of contribution protection for CERCLA settlements. These decisions make no reference to, much less discuss, the legislative history of the contribution protection provisions.

C. *Akzo Coatings, Inc. v. Aigner Corp.*: Interpreting the Scope of Contribution Protection in Accordance with the Equitable Apportionment Objectives of Section 113(f)(1) of CERCLA

The most thorough discussion of how a court is to determine the scope of contribution protection enjoyed by those who have en-

112. H.R. REP. NO. 99-962, at 80 (1986).

tered into judicially approved settlements enjoy is contained in *Akzo Coatings, Inc. v. Aigner Corp.*[113] *Akzo* involved a claim by PRPs who had performed "emergency removal activities" on a portion of a contaminated site.[114] These PRPs (Akzo) sought to recover the costs they incurred in implementing the order against other PRPs who had entered into a settlement (the settlors).[115] This settlement was embodied in an approved consent decree, under which the settlors agreed to perform remedial action on the remainder of the contaminated site.[116] The settlors moved to dismiss Akzo's claim on the ground that the action was "a claim for contribution regarding matters addressed" in the remedial action consent decree and thus was barred by operation of section 113(f)(2) of CERCLA.[117] The district court granted the settlors' motion to dismiss and Akzo appealed.[118]

Judge Rovner, writing for the majority,[119] concluded that Akzo's claim was a claim for contribution regarding a matter that

113. 30 F.3d 761 (7th Cir. 1994). *Akzo* clearly troubled the Seventh Circuit panel. The panel took over a year, after argument, to render its decision. After the panel's decision, there was an unsuccessful petition for rehearing *en banc*. *See id.* at 761.

114. *See id.* at 762. The entire contaminated site existed within an industrial park in Kingsbury, Indiana and was known as the "Fisher-Calo" site. *See id.* This site included a variety of facilities that received hazardous wastes from more than 200 companies between 1972 and 1985. *See id.* One facility, the "Two-Line Road" facility, was used to recycle solvents during a portion of this period. *See id.* The plaintiffs, Akzo and others, had cleaned up the Two-Line Road facility pursuant to an administrative order issued under section 106(a) of CERCLA and, in so doing, had incurred costs in excess of $1.2 million. *See id.* at 762-63. The order required the plaintiffs' "(1) fencing off and otherwise securing the facility; (2) securing and removing all drums, tanks, and other containers of hazardous waste from the premises, including buried containers; and (3) determining the extent to which the soil was contaminated and removing any soil that was visibly polluted." *Id.* at 762.

115. *See id.* at 763. The cleanup the consent decree required was based on EPA's Record of Decision. *See id.* In forming the agreement, over 200 PRPs negotiated with EPA regarding their role in implementing or paying for the cleanup. *See id.* EPA brought suit against these PRPs in 1991 and asked the district court to approve the proposed consent decree. *See id.* The district court approved the consent decree in *United States v. Partitions Corp.*, Civ. No. S91-00646 M (N.D. Ind. 1991). *See id.*

116. *See id.* The remedial actions the consent decree required the settlors to perform included the settlors' removal of contaminated soils and buried tanks located at the north end of the Two-Line Road facility. *See id.*

117. *See id.* For the text of section 113(f)(2) of CERCLA, see *supra* note 23.

118. *See Akzo*, 30 F.3d at 763. Pursuant to Federal Rule of Civil Procedure 12(b), the district court considered the defendants' motion as one for summary judgement and ruled in the defendants' favor. *See id.*

119. *See id.* at 762. Judge Rovner's majority opinion was joined by Judge Spencer Williams of the Northern District of California, sitting by designation. *See id.* at 762 n.**.

had *not* been addressed in the consent decree signed by the settlors.[120] Judge Easterbrook dissented.[121] The analytical approaches in the two opinions differed greatly.[122]

1. Judge Rovner's Majority Opinion

In *Akzo*, the court addressed whether Akzo's contribution claim was for a "matter addressed" by the cleanup settlement signed by the settlors.[123] In beginning her analysis, Judge Rovner explained that although CERCLA provides no direct guidance for determining "matters addressed," section 113(f)(1) explicitly states that the court should use appropriate equitable factors in resolving a contribution claim.[124] She then asserted that "rather than adopting any bright lines, Congress clearly envisioned a flexible approach to contribution issues."[125]

Against this backdrop, Judge Rovner stated that "[o]ur starting point, naturally, is the consent decree itself."[126] She noted that the decree addressed the contaminated site "as a whole" and that it incorporated EPA's "far-ranging remedial plan," which had an anticipated cost of more than $30 million.[127] Finally, Judge Rovner stated that the decree contained a "covenant not to sue" provision under which the United States and Indiana agreed not to sue the settlors for "covered matters" which included "any and all claims available to the United States under Sections 106 and 107 of CERCLA . . . relating to the Facility available to the State under [various provisions of Indiana law]."[128]

120. *See id.* at 770. As previously described, the plaintiffs had sought to avoid the settlors' contribution protection defense by contending that their claim was not a "claim for contribution," but rather a private cost recovery claim under section 107(a) of CERCLA. *See id.* at 763. The *Akzo* court rejected this unanimously.

121. *See id.* at 771-74. Judge Easterbrook dissented in part and concurred in part. *See id.* at 771. Judge Easterbrook concurred with the majority's conclusion that *Akzo's* suit was one for contribution, but dissented from the majority's reasoning that the claim for contribution did not concern a "matter addressed" by the settlement. *See id.* at 771-74. For a discussion of Judge Easterbrook's dissent, see *infra* notes 140-50 and accompanying text.

122. The description of the two opinions in *Akzo* this Article sets forth is limited to a discussion of the opinions' basic analytical structures. The author does not intend the descriptions to be exhaustive.

123. *See Akzo*, 30 F.3d at 764.

124. *See id.* at 765.

125. *Id.* at 765 (citations omitted).

126. *Id.*

127. *Id.* Judge Rovner noted that the decree also required the settlors to pay EPA and the State of Indiana nearly $3.1 million for costs already incurred. *See id.* For a summary of the plan EPA set forth in its 1990 Record of Decision, see *id.* at 763.

128. *Akzo*, 30 F.3d at 765.

The settlors had relied upon the broad language of this covenant not to sue to support their contention that the "matters addressed" in the settlement (embodied in the consent decree) included the entire contaminated site (the Facility).[129] This broad language was the basis for the settlors' argument that judicial approval of the settlement therefore precluded (pursuant to section 113(f)(2)) all claims for contribution relating to the cleanup of any part of the Facility.[130] Judge Rovner, however, said that the such reliance upon the covenant not to sue provision was misplaced:

> [T]he fact that the decree bestows comprehensive immunity from claims by the state and federal governments does not necessarily mean that Aigner [the collective name for the settling parties] enjoys the same immunity from claims brought by a party in Akzo's position. Whatever light the government's covenant not to sue may shed on the intended scope of the decree, it should not be treated as dispositive of the contribution protection the settling PRPs are afforded under Section 113(f)(2). The government's agreement to seek nothing more from the parties to the decree does not signal an intent to preclude non-settling parties from seeking contribution.[131]

Judge Rovner then quoted from the amicus brief of the United States, which asserted that "[i]f the covenant not to sue alone were held to be determinative of the scope of contribution protection, the United States would not be free to release settling parties from further litigation with the United States, without unavoidably cutting off all private party claims for response costs."[132] Judge Rovner's response was dismissive: "Surely this is not what Congress intended."[133] Rather, the task of the court was not to give "undue weight to a provision of the decree having nothing to do with the claims of the non-settling parties" — i.e., the covenant not to sue, but instead to "look to the decree as a whole to decide whether its provisions encompass the type of activity for which Akzo seeks con-

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129. *See id.* at 765-66.

130. *See id.* at 765. *See also* CERCLA § 123(f)(2), 42 U.S.C. § 9613(f)(2)(1994)(stating settlors "shall not be liable for claims for contribution regarding matters addressed in the settlement").

131. *See Akzo*, 30 F.3d at 766.

132. *Id.* at 766. The United States was not a party in *Akzo* because the action was based on a claim for contribution one PRP asserted against another PRP.

133. *See id.*

tribution."[134] However, Judge Rovner made it clear that the provisions of a consent decree are not dispositive in determining the "matters addressed" by the decree: "Ultimately, the 'matters addressed ' by a consent decree must be assessed in a manner consistent with both the reasonable expectations of the signatories and the equitable apportionment of costs that Congress has envisioned."[135]

In summary, Judge Rovner stated that the relevant statutory language in section 113(f)(2) — "matters addressed" — provided no guidance in determining the scope of contribution protection afforded to a settlor.[136] Therefore, Judge Rovner looked to both section 113(f)(1) and the language of the consent decree as determinative of the "matters addressed."[137] She concluded that the covenant not to sue defined the extent to which the settlors were afforded protection from further claims *by the government* — but that this provision was not determinative of the scope of protection against contribution claims by third parties.[138] Rather, in determining the "matters addressed" by a settlement — and thus the scope of contribution protection —, Judge Rovner concluded that a court must examine "the decree as a whole" and assess its provisions in a manner "consistent with both the reasonable expectations of the signatories and the equitable apportionment of costs that Congress has envisioned."[139]

2. *Judge Easterbrook's Dissent*

In determining the "matters addressed" by the consent decree, Judge Easterbrook began by noting, "my colleagues concede that the consent decree covers the whole site — including Two-Line Road," the part of the site for which the non-settling plaintiffs incurred response costs and sought contribution.[140] To Judge Easterbrook, the broad language of the covenant not to sue — covering

134. *Id.* at 766. *See id.* at n.7 (noting consent decree supplies no definition of "matters addressed").

135. *See id.* at 766. For a critical analysis of the *Akzo* majority's use of the parties' reasonable expectations in determining the scope of the settlement, see *infra* notes 151-96 and accompanying text.

136. *See Akzo*, 30 F. 3d at 765.

137. *See id.*

138. *See id.*

139. *See id.* at 766. Judge Rovner highlighted that the work plaintiffs performed at the Two-Line Road facility "[s]tands apart in kind, context, and time from the work envisioned by the consent decree." *Id.* at 767. Therefore, Judge Rovner concluded, plaintiffs' work "is not a 'matter addressed by the decree.'" *Id.*

140. *See id.* at 762-63. For a description of the site at issue in *Akzo*, see *supra* note 114.

the entire site — "[made] this [i.e., that the consent decree covered the whole site] doubly clear."[141]

Thus, to Judge Easterbrook, the task of determining the "matters addressed" in the consent decree was simple. The court need simply look to whether the consent decree covered that part of the entire site for which the plaintiffs sought contribution.[142] He found that it did, relying in particular upon the "covenant not to sue" provisions of the consent decree.[143]

The remainder of Judge Easterbrook's opinion is a critique of the analysis in the majority opinion. First, Judge Easterbrook criticized the majority for "pluck[ing] some language from Section 113(f)(1) and us[ing] this language to disregard the scope of the settlement."[144] To Judge Easterbrook, section 113(f)(1) describes the task that a court is to undertake when it must resolve a claim for contribution.[145] But, "this task is unrelated to the scope of protection offered by the next sub-section [i.e., section 113(f)(2)]."[146]

Second, Judge Easterbrook rejected the majority's statement that the "consent decree and the covenant not to sue regulate only the settling parties' liability to the United States and to Indiana" and thus cannot be relied upon as "regulating" — by defining the "matters addressed" — the viability of contribution claims by non-settlors.[147] To Judge Easterbrook, language in a settlement that is limited to claims by the United States and Indiana [i.e., the language of the covenant not to sue] *can* "extinguish claims by strangers . . . because the language of section 113(f)(2) says so."[148] In other words, although the settlement itself resolved only the *governments'* claims (a point emphasized by Judge Rovner), the settlement

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141. *Akzo*, 30 F.3d at 771. Judge Easterbrook described the "covenant not to sue" by stating:

> The United States and Indiana pledge not to sue the settling defendants for "covered matters," which include "any and all claims available to the United States under Sections 106 and 107 of CERCLA . . . relating to the [Fisher-Calo] Facility, and any and all claims relating to the Facility available to the State [under provisions of the Indiana Code]."

Id.

142. *See id.*

143. *See id.* For the text of the covenant not to sue, see *supra* note 141.

144. *Id.*

145. *Id.* Judge Easterbrook expressed concern regarding the use of section 113(f)(1) equitable factors in determining the scope of contribution protection because of the "[r]isk that in the name of 'equity' a court will disregard the actual language of the parties' bargain . . . lead[ing] potentially responsible parties to fight harder to avoid liability . . . undermining the function of § 113(f)(2)." *Id.*

146. *Akzo*, 30 F.3d at 771.

147. *Id.*

148. *See id.*

— by operation of section 113(f)(2) — protected the settlors against *private* contribution claims regarding matters addressed in the settlement.[149] The consent decree described the "matters addressed" by the settling parties, and section 113(f)(2) extended the effect of the settlement to private claims by non-settlors that relate to these "matters addressed."[150]

3. Critique of the Akzo *Majority Opinion*

Judge Rovner's majority opinion in *Akzo* sets forth two factors for a court to consider when, in response to a contribution protection defense a settling PRP asserts, it must determine the "matters addressed" in a settlement.[151] As her opinion states, "the 'matters addressed' by a consent decree must be assessed in a manner consistent with *both* the reasonable expectations of the signatories *and* the equitable apportionment of costs that Congress has envisioned."[152]

Both components of this approach are questionable. First, it is not clear why, in determining the effect of a settlement *upon non-settling parties*, a court is to consider the "reasonable expectations of the signatories" — in particular, the reasonable expectations of the signatories regarding the effect of the settlement upon non-settlors.[153] The "reasonable expectations of the parties" may be significant, even dispositive, in determining how the settlement affects the signatories themselves. Insofar as the signatories are concerned, the consent decree is basically a contract, approved by a court.[154] The rights and obligations of the *signatories* under the ju-

149. *See id.*

150. *See id.* Judge Easterbrook argued that if EPA does not wish to provide such expansive contribution protection, it has the ability to limit the protection when negotiating the settlement. *See id.* at 774. Specifically, Judge Easterbrook stated, "[EPA] may adopt a policy of defining 'matters addressed in the settlement' narrowly. Each settlement specifies the 'matters addressed.' It would have been simple to say in this settlement, for example, that work done at Two-Line Road under the 1988 order is *not* 'addressed' by the 1992 settlement." *Id.*

For a discussion of the memorandum EPA recently issued discussing "matters addressed" in CERCLA settlements, see *infra* notes 310-52 and accompanying text.

151. *See Akzo*, 30 F.3d at 761. For a description of Judge Rovner's opinion, see *supra* notes 133-51 and accompanying text.

152. *Id.* (emphasis added) (citing Accord Transtech Indus., Inc. v. A&Z Septic Clean, 798 F. Supp. 1079, 1088 (D.N.J. 1992)).

153. *Id.*

154. *See* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 324-25 (1998) (describing consent decrees as containing elements of contract and judgment).

dicially approved contract are quite properly evaluated under contract concepts, including reasonable expectations of the parties.[155]

But, the impact of a settlement upon non-signatories is not governed by contract law. Judge Easterbrook is persuasive when he says that the effect of a settlement upon contribution claims by non-settlors is determined by section 113(f)(2) — not by the expectations of the settling parties. If Congress intended that a settlement would extinguish the contribution rights of non-settlors, such would be the effect of a settlement even if the "reasonable expectations" of the party-settlors were that the settlement would not extinguish such contribution rights. Conversely, if Congress intended that a settlement would not extinguish the contribution rights of non-settlors, such would be the effect of a settlement even if the "reasonable expectations" of the party-settlors were that the settlement would extinguish such contribution rights. The party settlors cannot, by private agreement, terminate the rights of non-settlors. Such an effect can be achieved only by legislative declaration.

Thus, when a court is faced with a contribution protection defense, the issue before the court is what Congress intended the effect to be upon the contribution rights of non-settlors. In determining the "matters addressed" in a settlement, a court may look to the "reasonable expectations" of the settlors only if this was Congress's intention.[156] Judge Rovner's opinion makes no effort to demonstrate that Congress intended that a court, in determining the "matters addressed" by a settlement, was to look to the "reasonable expectations" of the settlors.[157] There is nothing in the legislative history of the contribution protection provisions that would support such an interpretation of congressional intent.[158]

Second, Judge Rovner is not persuasive when she states that "the 'matters addressed' by a consent decree must be assessed in a manner consistent with . . . the equitable apportionment of costs that Congress has envisioned."[159] As Judge Easterbrook states, the task performed by section 113(f)(1) — the "equitable apportion-

155. *See id.* at 324-31.

156. For a detailed discussion of congressional intent as evidenced through CERCLA's legislative history, see *supra* notes 68-112 and accompanying text.

157. *See Akzo*, 30 F.3d at 765. Judge Rovner simply stated that "[t]he statute itself does not specify how we are to determine what particular 'matters' a consent decree addresses." *Id.* After making this observation, Judge Rovner declined to examine any of the legislative history of section 113(f)(2) to aid in interpretation of the statute. *See id.*

158. For a critique of Judge Rovner's opinion in connection with CERCLA's legislative history, see *infra* notes 161-96 and accompanying text.

159. *Akzo*, 30 F.3d at 766.

ment" of cleanup costs — is "unrelated to the scope of protection offered by the next subsection [section 113(f)(2)]."[160] Section 113(f)(1) creates a right of contribution and sets forth the standard by which courts are to resolve contribution claims.[161] The purpose of section 113(f)(1) is to provide relief to PRPs who are jointly and severally liable and who have incurred costs that are disproportionate to their fair (or equitable) share of the total cleanup costs.[162]

Section 113(f)(2), on the other hand, was intended to induce settlements by extinguishing a non-settlor's right to obtain contribution against a settlor and leaving a non-settlor subject to the risk of disproportionate liability.[163] The purpose of section 113(f)(2) is furthered if a PRP knows that, in entering into a settlement, the PRP "buys peace" against contribution claims by non-settling PRPs. The peace desired by the settlor is not merely protection against further liability to the government (or governments) with whom settlement is reached;[164] the settlor wants peace that includes protection against the substantial cost of litigating contribution claims under the wide-ranging and costly inquiry the "equitable factors" standard section 113(f)(1) contemplates.

Under the *Akzo* majority's approach, settlement purchases little, if any, peace for the settlor. If, after settlement, a settlor asserts a contribution protection defense in response to a contribution claim by a non-settlor, the court, in assessing the "matters addressed" in the settlement, must — under the approach Judge Rovner's majority opinion adopted — conduct such assessment "in a manner consistent with the equitable apportionment that Congress has envisioned [in section 113(f)(1)]."[165] And this equitable apportionment may be required even if the settlement contains an express contribution protection provision.[166]

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160. *Id.* at 771.

161. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1)(1994). In resolving contribution claims, a court is to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.*

162. *See Akzo*, 30 F.3d at 771.

163. *See id.* For the text of section 113(f)(2), see *supra* note 23.

164. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1). The settlor obtains this "peace" through a "covenant not to sue," for which section 122(f) of CERCLA provides. *See id.* § 122(f), 42 U.S.C. § 9622(f). For the text of CERCLA's covenant not to sue provisions, see *supra* note 9.

165. *Akzo*, 30 F.3d at 766.

166. Judge Rovner's opinion is unclear regarding the manner in which, for the purpose of assessing the "matters addressed" in a settlement, a court is to weigh "the reasonable expectations of the parties," on the one hand, and "the equitable apportionment contemplated by section 113(f)(1)," on the other. What if, for example, it appeared that the "reasonable expectations of the parties" were

In requiring that the assessment of "matters addressed" be conducted in a manner consistent with the equitable apportionment criteria of section 113(f)(1), Judge Rovner seems to believe that Congress could not have intended that section 113(f)(2) would be used to grant contribution protection to settlors where the underlying settlement is unfair — in the sense that the settlement imposes upon a settlor an obligation that is less than the settlor's equitable share under section 113(f)(1). This belief is inappropriate for several reasons. First, Congress intended to induce settlements by subjecting non-settlors to the risk of disproportionate liability. This intent is apparent in the second sentence of section 113(f)(2), which states that a settlement "does not discharge any of the other potentially liable persons unless its terms so provide, but it *reduces the potential liability of the others by the amount of the settlement.*"[167] Here Congress has made it clear that a non-settling PRP, jointly and severally liable with settling PRPs, runs the risk that EPA will enter into an agreement that rewards settlors with a settlement that amounts to less than their proportionate share of liability and that punishes non-settlors with the risk of bearing more than their equitable share of liability.[168] In short, Congress, in the second sentence of

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to protect the settlors against contribution claims to an extent that was inconsistent with the "equitable apportionment contemplated by section 113(f)(1)?" Might the court, in determining the "matters addressed" by the settlement, reject an interpretation of the settlement that is consistent with the "reasonable expectations of the parties" because the settlement, as so interpreted, would result in an inequitable apportionment of responsibility for the costs up cleaning up the site?

In an ambiguous footnote, Judge Rovner highlights a means through which the settling parties might include an express contribution protection clause in the settlement.

> The parties might . . . include [in the settlement] a provision protecting the settling PRPs from contribution for work that is otherwise beyond the scope of the decree. But such terms do not foreclose the kind of fact-specific evaluation of the "matters addressed" we have employed here; they are simply among the circumstances that the court ought to consider. Thus if the parties have included terms explicitly describing the "matters addressed" by their settlement, then those terms will be *highly relevant to, and perhaps even dispositive of, the scope of contribution protection.*

Id. at n.8. (emphasis added)(citations omitted).

167. CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) (emphasis added). For the full text of section 113(f)(2), see *supra* note 26.

168. *See generally* United States v. Cannons Eng'g Corp., 899 F.2d 79 (1st Cir. 1990) (rejecting non-settlor's argument that lower court should not have approved settlement because it would subject non-settlors to risk of "disproportionate liability," i.e. liability that exceeds the equitable allocation section 113(f)(1) contemplates). The First Circuit stated: In the SARA Amendments, Congress explicitly created a statutory framework that left nonsettlors at risk of bearing a disproportionate amount of liability. The statute immunizes settling parties from liability for contribution and provides that only the amount of the settlement — not the pro rata share attributable to the settling party — shall be subtracted from the liability

section 113(f)(2) made it clear that it intended that settlements could leave non-settlors subject to liability to an extent that would be inconsistent with the "equitable apportionment" contemplated by section 113(f)(1).[169]

It is inappropriate, therefore, for a court, in assessing "matters addressed" in a settlement pursuant to section 113(f)(2), to assess the settlement in a manner that is consistent with "the equitable apportionment of costs that Congress has envisioned [in section 113(f)(1)]."[170] The two provisions of section 113(f) send distinct messages: (1) if there is no settlement, the costs of cleaning up a site are to be allocated among the various PRPs in accordance with "equitable factors" — the message of section 113(f)(1); (2) if there is a settlement, non-settlors may be left subject to liability in an amount that may be more than that which would be allocated under an "equitable factors" analysis — the message of section 113(f)(2). In short, where there is a settlement, section 113(f)(2) overrides the equitable allocation contemplated by section 113(f)(1).[171]

There is a second reason, based on the overall structure of CERCLA, that it is inappropriate for a court, in resolving a contri-

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of the nonsettlors. [Here the court, by way of footnote, quotes section 113(f)(2).] This can prove to be a substantial benefit to settling PRPs — and a corresponding detriment to their more recalcitrant counterparts.

> Although such immunity creates a palpable risk of disproportionate liability, that is not to say that the device is forbidden. To the exact contrary, Congress has made its will explicit and the courts must defer. . . . Disproportionate liability, a technique which promotes early settlements and deters litigation for litigation's sake, is an integral part of the statutory plan.

Id. at 91-92 (citations omitted).

169. *See id.* For an explanation of most courts' interpretation of section 113(f)(2) as adopting UCATA approach for determining effect of settlement on liability of non-settling joint tortfeasors, see *supra* note 25. Although there exists academic commentary to the contrary, the reasoning underlying this commentary has not won judicial approval. *See generally* Pesnell, *supra* note 26 (explaining current jurisprudence regarding contribution claims and liability under CERCLA).

170. *Akzo*, 30 F.3d at 766.

171. The discussion the text presents is limited to the extent to which a *judicially* approved settlement may, by virtue of section 113(f)(2), override the equitable allocation section 113(f)(1) contemplates. The analysis would also support, however, the conclusion that an *administrative* settlement, either a *de minimis* settlement under section 122(g) or a costs incurred settlement under section 122(h), may override the equitable allocation section 113(f)(1) contemplates. Both sections 122(g)(5) and 122(h)(4) state that a settlement "reduces the potential liability of the others [i.e., non-settling PRPs] by the amount of the settlement." *See* CERCLA §§ 122(g)(5), 122(h)(4), 42 U.S.C. §§ 9622(g)(5), 9622(h)(4). This statement, like the second sentence of section 113(f)(2), indicates congressional intent to expose non-settlors to the risk of liability for response costs in an amount that exceeds the non-settlors' equitable share under section 113(f)(1).

bution protection defense, to assess the "matters addressed" in a settlement in a "manner consistent with the equitable apportionment that Congress has envisioned [in section 113(f)(1)]." A court faced with a contribution protection defense should recognize that the substantive fairness of the underlying settlement has *already been evaluated.* If the underlying settlement is an administrative settlement, an administrative agency (usually EPA) has evaluated the extent to which the settlement is substantively fair to non-settlors.[172] If the underlying settlement is embodied in a consent decree, the court approving the consent decree has evaluated the extent to which the settlement is substantively fair to non-settlors.[173]

The settlement in *Akzo* had been judicially approved.[174] In accordance with section 122(d)(2)(B), the non-settling PRPs had had an opportunity to submit comments regarding the proposed consent decree.[175] The non-settlors had had the opportunity to contend that the court should not approve the proposed settlement because it was substantively unfair to the non-settlors in that, if approved, the non-settlors would be subject — under the second sentence of section 113(f)(2) — to the risk of liability in excess of their equitable share.[176] In reviewing the proposed settlement, the district court had to "satisfy itself that the settlement [was] reasonable, fair, and consistent with the purposes that CERCLA is intended to serve."[177] In approving the settlement in *Akzo,* the district court

172. Whether the settlement at issue is *de minimis* settlement under section 122(g) or a cost recovery settlement under section 122(h), EPA is not to approve the settlement if comments "disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate." *Id.* § 122(i)(3), 42 U.S.C. § 9622(i)(3). For a description of the administrative settlement procedures, see *supra* notes 31-39 and accompanying text.

173. For a discussion of the role of a court that a party has asked to approve a settlement in the form of a proposed consent decree, see *supra* note 41 and accompanying text.

174. *See Akzo,* 30 F.3d at 763. Judge Rovner's majority opinion in *Akzo* acknowledged a district court judge had approved the settlement the settlor-defendants relied upon, stating:The EPA filed suit against these PRPs [the settlors] in late December 1991 and asked the court to approve the proposed consent decree it filed contemporaneously with its complaint. Pursuant to the decree, the settling PRPs agreed to undertake the actions specified by the 1990 ROD and to compensate the EPA for some of the costs it had incurred to date. In late February 1992, following the requisite notice period, the district court approved the consent decree.

Id. (emphasis added)(citations omitted).

175. *See id.* at 763-74.

176. *See id.* at 765, 767-68.

177. *See id.* "SARA's legislative history makes pellucid that when such consent decrees are forged, the trial court's review function is only to 'satisfy itself that the legislation is reasonable, fair, and consistent with the purposes that CERCLA is

had necessarily determined that these requirements had been satisfied.

The *Akzo* majority's approach to determining "matters addressed" in effect permits a collateral attack upon the determination (by the district court that approved the settlement) that the settlement was substantively fair to the non-settlors — or at least as fair as CERCLA requires.[178] If a non-settlor is unhappy with the approval of a settlement — because it believes that the district court erred in concluding that the criterion of substantive fairness was satisfied —, it has the opportunity to appeal the district court's action in approving the settlement.[179] Under the *Akzo* majority's analysis, the non-settlor has an alternative forum for judicial assessment of the fairness of a settlement — when a court, in determining the "matters addressed" by the settlement, assesses the settlement in accordance with the equitable apportionment contemplated by section 113(f)(1).[180]

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intended to serve.'" United States v. Cannons Eng'g Corp., 899 F.2d 79, 85 (1st Cir. 1990)(quoting H.R. REP. No. 253, pt. 3, at 19 (1985)).

178. For a discussion of the role the judiciary plays in determining the scope of contribution protection CERCLA provides, see *supra* notes 41-51 and accompanying text. Although a court reviewing a proposed consent decree is to evaluate the substantive fairness of the settlement the decree embodies, the court may not disapprove the proposed decree simply because the approval would effectively leave non-settlors exposed to the risk of liability that exceeds their equitable share. The court explained in *United States v. Cannons Engineering Corp.* that "Congress explicitly created a statutory framework that left nonsettlors at risk of bearing a disproportionate amount of liability." 899 F.2d 79, 91 (1st Cir. 1990). This framework, expressed in section 113(f)(2), reduces the liability of non-settlors by the amount of any settlement. *See* CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2). Thus, although the role of a court reviewing a proposed consent decree is to evaluate the substantive fairness of the decree, in undertaking this evaluation, the court is not to demand that the decree allocates liability in accordance with the strictly equitable apportionment section 113(f)(1) contemplates. Rather, the reviewing court, in evaluating the substantive fairness of a proposed consent decree, is to determine whether the settlement terms are "based upon, and roughly correlated with, some acceptable measure of comparative fault." *Cannons Eng'g*, 899 F.2d at 87.

179. *See generally* United States v. Montrose Chem. Corp., 50 .3d 741 (9th Cir. 1995) (discussing case in which appellate court vacated district court's approval due to concerns regarding reasonableness and fairness). Of course, those who were not parties to a judicially approved consent decree may not appeal, unless they were parties to the action in which the consent decree was approved.

Section 113(i) has been interpreted as providing non-settlors with a right to intervene in actions in which other PRPs (and the United States or a State) seek judicial approval of a settlement. *See generally* United States v. Union Elec. Co., 64 F.3d 1152 (8th Cir. 1995). Of course, it is possible that the non-settlor plaintiffs in *Akzo* did not intervene (and were not named as parties) in the action seeking judicial approval of the defendants' cleanup settlement. But, even if this were so, it would not justify transforming the non-settlors' contribution action into the functional equivalent of an appeal from the district court approval of the consent decree.

180. *See Akzo*, 30 F.3d at 764-71.

There is no support for the proposition that Congress intended that there would be *two* opportunities for a non-settlor to obtain judicial evaluation of the substantive fairness of a settlement. Congress intended that a court would evaluate the substantive fairness of a settlement when the parties to a proposed settlement submitted it to the court for approval. At such a time, all of the interested parties — the government, the settling PRPs and the non-settling PRPs — have an opportunity to be heard regarding the fairness of the proposed settlement.[181]

Ironically, Judge Rovner recognized that, if courts broadly interpreted the "matters addressed" in a settlement — and thus granted broad contribution protection to settlors —, the effect would be that non-settlors would raise their fairness concerns before the court that is reviewing a proposed settlement.[182]

> [W]e suspect that is we were to bar Akzo from pursuing contribution, parties who found themselves in a similar position in the future would simply exercise the intervention right granted them by Section 113(i) and oppose the approval of any consent decree that might be construed to foreclose their right to contribution. Thus, we might accomplish no more than to shift the battle to a different venue.[183]

But that different venue would be the *right venue.* It would be the venue intended by Congress.

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181. *See* CERCLA § 122(d)(2)(B), 42 U.S.C. § 9622(d)(2)(B). At the least, non-settlors have an opportunity to submit comments regarding the proposed settlement. *See id.* They also have the right to intervene. *See id.* § 113(i), 42 U.S.C. § 9613(i). For a discussion of issues related to notice and comment period, see *supra* notes 34-36 and accompanying text.

It is possible that, between the time of judicial approval of a settlement and the assertion of a contribution protection defense, the circumstances regarding the substantive fairness of the settlement might have changed. For example, there may exist more complete information regarding the amount and nature of hazardous substances each PRP contributed to the contaminated site. Such changed circumstances might justify a motion by non-settlors to set aside or modify the consent decree. Section 122(m) contemplates such a possibility, stating that nothing in CERCLA "preclude[s] or otherwise affect[s] the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements." *Id.* § 122(m), 42 U.S.C. § 9622(m).

182. *See Akzo,* 30 F.3d at 770.

183. *Id.* at 770 (citations omitted). It should be noted that, in this statement, Judge Rovner *assumes* that non-settlors have a right, under section 113(i), to intervene in actions in which other PRPs seek judicial approval of a proposed settlement. For a discussion of the case law regarding such a right to intervene, see *supra* note 48.

The approach taken by the *Akzo* majority is also inconsistent with congressional intent as manifested in the legislative history of SARA. As we have seen, Congress considered, and ultimately rejected, two provisions that would have limited contribution protection. Congress first deleted a provision that would have limited contribution protection to "good faith" judicially approved settlements.[184] In rejecting this limitation, the House Judiciary Committee stated that "judicial examination and approval of the settlement itself is adequate to protect against improper or 'bad faith' settlements."[185] Congress also deleted provisions that denied contribution protection to "a settlement that was achieved through fraud, misrepresentation, or other misconduct by one of the parties to the settlement, or mutual mistake of fact."[186] In deleting these provisions, the Conference Committee made it clear that section 122(m) covered the concerns underlying these provisions.[187]

The message of this legislative history is clear: (1) Congress intended that, with respect to judicially approved settlements, any fairness inquiry would take place upon judicial review of the proposed settlement — not when a court is considering the extent of contribution protection enjoyed by settlors; and (2) Congress intended that with respect to all settlements (judicially approved and administrative), concerns about fraud, misconduct and mistakes were to be considered in a petition to set aside or modify the settlement — not when a court is considering the extent of contribution protection enjoyed by settlors.

If the *Akzo* majority's approach to determining the "matters addressed" in a settlement is inappropriate, how then should a court go about determining the scope of contribution protection afforded by a settlement? Judge Easterbrook is persuasive in arguing that, since Congress enacted section 113(f)(2) in order to induce settlements, settlements should be presumed to confer broad protection upon settlors against contribution claims by non-settlors.

184. *See* H.R. REP. NO. 99-253, at 19 (1985). For discussion of the legislative history of the contribution protection provisions, see *supra* notes 68-112 and accompanying text.

185. H.R. REP. NO. 99-253, at 19 (1985). *See also* SARA Legislative History, *supra* note 72, at 2231. For further discussion of the House Judiciary Committee's rejection of the good faith limitation, see *supra* notes 73-103 and accompanying text.

186. For a discussion of the history of these provisions, see *supra* note 64 and accompanying text.

187. *See generally* H.R. REP. NO. 99-962 (1986). *See also* SARA Legislative History, *supra* note 68, at 5038, 5071 (discussing development of CERCLA provisions). For further discussion of these provisions, see *supra* notes 68-112 and accompanying text.

And, though section 113(f)(2) reveals a congressional intent that settlors should, as a general matter, enjoy broad protection against contribution claims by non-settlors, this intention would not preclude the settling parties from including in the settlement a provision that expressly limited the scope of contribution protection.

Such an approach would look to the settlement-inducement intention underlying section 113(f)(2) as the basis for a "canon of construction" that courts should apply in determining the "matters addressed" by a settlement. Specifically, in light of Congress's intent to induce settlements, all settlement should be presumed to afford to the settlors protection against claims for contribution regarding an entire site, unless there is an explicit provision to the contrary. In a decision subsequent to *Akzo*, the Seventh Circuit explained that *Akzo* should be viewed as adopting a contrary canon of construction.[188]

In that decision, the Seventh Circuit explained that a court starts with the language of consent decrees in making its assessment of "matters addressed" in the settlement.[189] Although the court considers equitable factors in this process, the Seventh Circuit noted that "[t]his does not mean that the language of the decree is subject to an ill-defined equitable trump card; the congressional intent was viewed instead as *something like a canon of construction for the language of the decree.*"[190] The Seventh Circuit continued by emphasizing the *Akzo* majority's concern regarding third-party rights and its emphasis on the fact that the statute directly speaks to this issue by limiting the bar to only administratively and judicially approved settlements.[191] In conclusion, the Seventh Circuit stated that "*Akzo* held that terms in a decree that are especially likely to affect third-party rights *must be more explicit.*"[192] The court explained that the majority in *Akzo* looked to section 113(f)(1) to support a canon of construction — that, in light of Congress's intent to have cleanup liability resolved by means of an equitable apportionment, all settlements should be construed to accord to the settlors limited protection against claims for contribution, unless there is an explicit provision to the contrary.[193]

188. *See* Rumpke of Ind., Inc. v. Cummins Engine Co., Inc., 107 F.3d 1235, 1240-43 (7th Cir. 1997).

189. *Id.* at 1242.

190. *Id.* (emphasis added).

191. *See id.*

192. *Id.* (emphasis added)(citations omitted).

193. *See Rumpke*, 107 F.3d at 1242. The quoted statement from *Rumpke* also seeks to clear up the ambiguity in *Akzo* regarding the relationship between the two

The two opinions in *Akzo* illustrate that the basic task assigned to the courts by section 113(f)(2) — that of determining "the matters addressed in a settlement" — is one in which the outcome turns upon what one is looking for. Is the court to look for a provision that deals expressly with the scope of contribution protection enjoyed by settlors (the view of the majority)? Or is the court to look more generally at the nature of the matters covered by the settlement (the view of the dissent)? What a court looks for should depend on congressional intent. The majority found that intent in the congressional desire for "equitable apportionment" under section 113(f)(1).[194] The dissent found that intent in the settlement-inducing threat of disproportionate liability in section 113(f)(2).[195] In this Section, I have sought to demonstrate that the second approach to interpreting "the matters addressed in a settlement" is more consistent with the language of section 113(f)(2), the overall structure of CERCLA (in particular the provisions for judicial and administrative approval of settlements), and the legislative history of SARA.

D. *Waste Management v. City of York*: The Scope of Contribution Protection Administrative Settlements Afford

Akzo deals specifically with the scope of contribution protection to be accorded to those who have entered into judicially approved settlements.[196] This Article now turns to an examination of

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factors that, according to the *Akzo* majority, a court must consider in assessing the "matters addressed in a settlement" — the "reasonable expectations of the parties" and "the equitable apportionment of costs that Congress has envisioned." *Id.* As the *Rumpke* court explained, "equitable apportionment" is not an "ill-defined equitable trump card" that can override the "reasonable expectations of the parties" as expressed in an explicit contribution protection provision in a settlement. *Id.* Rather, the congressional desire for equitable apportionment, as section 113(f)(1) expresses, affects the manner in which a court determines "matters addressed" when the settlement does not contain such an explicit contribution provision. *See id. Akzo*, as the *Rumpke* court explained, requires that, in such circumstances, a court should strictly construe the scope of the "matters addressed" to satisfy the congressional desire for equitable apportionment. *See id.* Such an approach will minimize the instances in which a settlement extinguishes the contribution rights of nonsettlors. *See id.*

Rumpke makes the holding of *Akzo* more intelligible. Nevertheless, for the reasons discussed in this text, the "canon of construction" set forth in the *Akzo* majority opinion, is inappropriate in its reliance upon section 113(f)(1). Congressional intent regarding the scope of contribution protection exists in section 113(f)(2), not section 113(f)(1).

194. *See Akzo*, 30 F.3d at 769.

195. *See id.* at 772-73.

196. *See generally* Akzo Coatings, Inc. v. Aigner Corp, 30 F.3d 761 (7th Cir. 1994). For a discussion of *Akzo*, see *supra* notes 123-211 and accompanying text.

the scope of contribution protection to be accorded those who have entered into administrative settlements.[197] In undertaking this analysis, this section of the Article first focuses upon a district court opinion that contributed to EPA's decision to modify its position regarding the inclusion of an express contribution protection provision in CERCLA settlements.

1. The Waste Management *Decision*

In *Waste Management of Pennsylvania v. City of York*,[198] Waste Management of Pennsylvania (WMPA) filed a claim for contribution against the City of York, Pennsylvania (the City).[199] WMPA sought contribution for costs that it had incurred (and would incur) in cleaning up a contaminated site.[200] WMPA undertook the cleanup under the terms of a cleanup order issued by EPA under section 106(a) of CERCLA.[201] After the suit had been commenced, the City entered into an administrative settlement (referred to in the opinion as an administrative order by consent (AOC)) under which the City was obligated to make a series of payments to EPA

197. Although the precise issue in *Akzo* was the scope of contribution protection to be accorded to those who had entered into a judicially approved settlement, the court's underlying reasoning would also apply in a case involving the scope of contribution protection to be accorded to those who had entered into an administrative settlement under either section 122(g) or section 122(h). *See id.* at 770-71. Whether a settlor is claiming contribution protection under section 113(f)(2) (relating to judicially approved settlements) or either section 122(g)(5) or section 122(h)(4) (relating to administrative settlements), the question before a court is the same: whether the non-settlor's contribution claim relates to "matters addressed" in the settlement. If the assessment of "matters addressed" under section 113(f)(2) must be consistent with the "equitable apportionment" section 113(f)(1) contemplates, as the *Akzo* majority held, there is no apparent reason why the assessment of "matters addressed" under section 122(g)(5) or section (h)(4) should be any different. If so, a PRP contemplating an administrative settlement under section 122(g) or section 122(h) must realize that, if it asserts a contribution protection defense in response to a non-settlor's subsequent claim for contribution, the court's resolution of this defense will turn upon a assessment of "matters addressed" that considers the "equitable apportionment" section 113(f)(1) contemplates. Thus, the decision in *Akzo* creates uncertainty regarding the scope of contribution protection for both administrative as well as judicially-approved settlements. *See id.*

198. 910 F. Supp. 1035 (M.D. Pa. 1995).

199. *See id.* at 1036.

200. *See id.* at 1036-37. WMPA asserted contribution claims under CERCLA, state statutory law and common law. *See id.* The contribution protection provisions of CERCLA extinguish both federal and state contribution claims that relate to "matters addressed" in a settlement. *See* Pesnell, *supra* note 28, at 170. The extinguishment of state contribution claims is a product of the preemptive effect of CERCLA's contribution protection provisions. *See* Karla A. Raettig, *When Plain Language May Not Be Plain: Whether CERCLA's Preclusion of Pre-Enforcement Judicial Review is Limited to Actions Under CERCLA*, 26 ENVTL. L. 1049, 1063 (1996).

201. *See Waste Mgmt.*, 910 F. Supp. at 1038.

for past and future response costs at the site.[202] The City, by way of affirmative defense, asserted that, under section 113(f)(2) and section 122(h)(4), the AOC barred WMPA's contribution claim.[203] In response to this defense, WMPA contended that EPA's authority to settle under section 122(h)(1) was limited to "costs incurred" — which, according to WMPA, meant costs that EPA had paid as of the time of the settlement.[204] WMPA also argued that the costs for

202. *See id.* at 1038. The City of York, Pennsylvania (the City) owned the site and operated it as a municipal waste landfill from 1961 to 1975. *See id.* at 1037. The City sold the site in 1978 to the site's current owner. *See id.* From 1961 until 1968, the City was the sole operator of the site. *See id.* In 1968, however, the City contracted with various private companies to operate the site. *See id.* Waste Management of Pennsylvania (WMPA) acquired one of these companies through a merger. *See id.* Thus, WMPA's liability as a successor (through merger) to an entity that had operated the site at the time of disposal was derivative liability under section 107(a).

The site was placed on the National Priorities List in 1982. *See id.* at 1038. Thereafter, EPA notified the City and others that EPA considered them to be PRPs. *See id.* EPA did not notify WMPA at this time because EPA was apparently unaware of WMPA's potential liability. In October 1987, the notified PRPs (including the City) entered into an administrative order by consent (AOC), under which they agreed to perform a Remedial Investigation and Feasibility Study (RI/FS) for the site. *See id.*

After completion of the RI/FS, EPA issued a Record of Decision (ROD) in which it selected remedial action with an estimated cost of $8 million. *See id.* In June of 1992, EPA issued a Unilateral Administrative Order that required five PRPs — including WMPA, but not including the City — to perform the remedial action the ROD set forth. *See id.* Four of the PRPs, including WMPA, incurred costs in complying with the order. *See id.* In its contribution action, WMPA sought to recover some of those costs from the City. *See id.* at 1037-38.

203. *See id.* at 1038. Under the terms of the AOC, the City agreed to pay EPA $615,000, which was approximately 7% of the estimated $8 million total cleanup cost. *See id.* at 1038. In the AOC, EPA released the City from any further liability regarding the site; that is, EPA granted the City a full covenant not to sue regarding the site. *See id.* The court set forth what it understood to be EPA's rationale for the AOC with the City by stating:

> EPA and the City claim that the agreement is predicated on the City's limited financial resources. The City in fact contends that it cannot pay more than it has agreed to pay and infers [sic] that to require it to pay more would cause it to be unable to provide essential services, such as police and fire protection.

Id. The court also highlighted, however, other costs the City "allegedly" incurred, commenting, "[t]he City has allegedly already incurred more than $1 million in response costs. The City reportedly paid $1.138 million toward the RI/FS, an additional $586,000 for remediation, which included installing a public water line, and $127,000 in oversight costs and disputed invoices paid to the RI/FS contractor." *Id.* at 1038 n.6.

204. *See id.* at 1037. As previously described, there is a degree of overlap and redundancy between the general contribution protection clause in section 113(f)(2) and the more limited contribution protection clauses in sections 122(g)(5) and (h)(4). For a discussion of this, see *supra* notes 73-113 and accompnaying text. Section 113(f)(2) provides contribution protection for those who have entered into judicially-approved and administrative settlements. *See* CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2). For a discussion of section

which it sought contribution were not "matters specifically addressed" in the AOC.[205]

The *Waste Management* court granted WMPA's motion for a ruling that the AOC did not bar WMPA's claims.[206] The court's ruling

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113(f)(2), see *supra* note 140. Sections 122(g)(5) and (h)(4) provide contribution protection for those who have entered into *particular types of administrative settlements* — de minimis settlements under section 122(g)(5) or cost recovery settlements under section 122(h)(4). *See id.* §§ 122(g)(5), 122(h)(4), 42 U.S.C. §§ 9622(g)(5), 9622(h)(4). For a discussion of sections 122(g)(5) and 122(h)(4), see *supra* notes 73-113 and accompanying text. Thus, the City could quite understandably contend that, as a party to the AOC, it enjoyed contribution protection under both section 113(f)(2) and section 122(h)(4). *See Waste Mgmt.* 910 F. Supp. at 1036-38. There was no contention that the City enjoyed contribution protection under section 122(g)(5). *See id.*

205. *See Waste Mgmt.*, 910 F. Supp. at 1037. The *Waste Management* court was not consistent in describing WMPA's contentions. At the beginning of its opinion, the court characterized WMPA's argument by stating:

> WMPA argues that Section 122(h), the statutory authority for the EPA settlement with the City, only authorizes administrative agency resolution of claims "for *costs incurred by the United States Government*. . . ." Because WMPA is not seeking contribution for its potential liability to the United States for costs the Government may have incurred, but is instead pursuing claims for costs which WMPA itself has incurred, WMPA contends that the settlement with EPA does not immunize the City from liability.

Id. at 1036 (quoting CERCLA § 122(h)(1), 42 U.S.C. § 9622 (h)(1) (emphasis added). At a later point, however, the Court characterized WMPA's argument somewhat differently, stating:

> WMPA argues that section 122(h) only allows the City to settle liability for costs already incurred by EPA, not claims for costs incurred or to be incurred by a party other that (*sic*) the United States Government. Furthermore, WMPA argues that EPA's authority to grant contribution protection to settling parties extends only to those claims which are "matters addressed in the settlement." Because WMPA's claims are not matters specifically addressed in the settlement, WMPA argues that the City is not shielded from WMPA's claims.

Id. at 1037 (quoting CERCLA §§ 122(h)(4), 12(f)(2), 42 U.S.C. §§ 9622 (h)(4), 9613(f)(2).

The first statement of WMPA's argument is straightforward. The argument is that EPA *lacks the authority*, in a section 122(h) settlement, to settle (resolve) anything other than its own claims for costs that it has incurred. *See id.* EPA does not have the authority to settle claims for costs that others have incurred. *See id.* This argument, an "authority" argument, is restated at the beginning of the court's second statement of what "WMPA argues." *See id.*

The "furthermore" argument the second statement sets forth is quite different. This argument is more like the argument presented in *Akzo* and asserts that WMPA's claims are not barred because such claims were not "specifically addressed" in the settlement. Regarding this argument, it is important to note that the AOC settlement did not contain an explicit contribution protection provision defining the matters addressed by the settlement. *See id.* According to the *Waste Management* court, the AOC settlement simply "grants the City full contribution protection pursuant to 42 U.S.C. §§9613(c)(2) (*sic*) and 9622(h)(4)." *Id.* at 1038.

The *Waste Management* court grounded its decision on the first (authority) argument and did not address the second (matters addressed) argument. *See id.* at 1039-44.

206. *See id.* at 1036.

was grounded upon "[t]he text of Section 122(h), the context of this legislative authorization of administrative settlement of response costs, and the policies underlying CERCLA."[207] According to the court, section 122(h)(1) limits EPA's settlement authority to "costs incurred by the United States Government"; this limitation upon EPA's settlement authority has the effect of limiting the matters that may be addressed in a section 122(h) settlement and therefore has the effect of limiting the scope of contribution protection under section 122(h)(4).[208] According to the court, "because subsection (h) authorizes only settlements for 'costs incurred by the United States Government,' it follows that contribution protection under that subsection is limited to claims by a party which contends to have borne [sic] a disproportionate share of the liability for such costs."[209] Since WMPA's claim for contribution did not relate to costs borne by the Government — but rather to costs borne by WMPA itself — its claim was not barred by section 122(h)(4).[210] This is the "text" ground for the court's ruling.

In interpreting the scope of contribution protection under section 122(h)(4), the *Waste Management* court also looked to the "context" of the section 122(h) settlement provision. The court contrasted EPA's settlement authority under section 122(h)(1) with EPA's "de minimis" settlement authority under section 122(g)(1):

> Section 122(g)(5) affords contribution protection "regarding matters addressed in the settlement." Since Section 122(g)(1) authorizes "*final* settlements," it necessarily follows that contribution protection under Section 122(g)(5) is greater than that authorized under Section 122(h). That is, because the matter addressed under a Section 122(g) agreement is a *final* settlement, contribution protection is necessarily complete. By way of contrast, the matter addressed under a Section 122(h) settlement is the cost incurred by the United States, which cannot encompass privately-incurred costs.[211]

Further, in its "context" analysis, the court thought it significant that CERCLA contains three distinct settlement provisions and three contribution protection provisions, asserting that if contribu-

207. *Id.* This Article will hereinafter refer to these three grounds for the *Waste Management* court's decision as the "text," "context," and "policy" grounds.

208. *Id.* at 1040.

209. *Id.*

210. *See Waste Mgmt.*, 910 F. Supp. at 1040.

211. *Id.* at 1041 (emphasis in original).

tion protection was as expansive as the City and EPA contended, it would be unnecessary to have a detailed framework for each type of settlement.[212] Likewise, the court noted that the separate contribution protection provisions sections 122(g) and 122(h) contain would also be unnecessary.[213] The court emphasized that "[t]he inclusion of a contribution protection in each subsection suggests that contribution protection was intended to be limited to that which Congress authorized to be included in the settlement agreement."[214] And, as the court had previously stated, Congress authorized only costs incurred by the United States to be included in a section 122(h) settlement.[215]

2. *Analysis of the* Waste Management *Court's Reasoning*[216]

Central to the "text" reasoning in *Waste Management* is the court's assertion that the scope of contribution protection resulting from an administrative settlement — a question governed by section 122(h)(4) — is necessarily limited by the scope of the administrative agency's settlement authority — a question governed by section 122(h)(1). To put it another way, the court in *Waste Management* court believed that, in determining the "matters addressed"

212. *See id.*

213. *See id.*

214. *Id.*

215. *See Waste Mgmt.*, 910 F. Supp. at 1040. The *Waste Management* court expressly declined to ground its opinion upon an argument that WMPA had advanced. *See id.* at 1039-43. WMPA had argued that EPA's settlement authority under section 122(h)(1) was limited to the resolution of claims for costs that had already been incurred as of the time of settlement. *See id.* at 1037. WMPA grounded this argument entirely upon Congress's use of the term "incurred" in section 122(h)(1) and the assertion that this term necessarily referred only to "past costs." *See id.* at 1041. The City and EPA, conversely, argued that the term "incurred" was "time neutral." *See id.* Regarding this argument, the Waste Management court commented:

> The parties address at great length the question of whether the phrase "costs incurred" signifies an intent to limit authority to settle claims for *past* costs or is time neutral. While that issue may be important in another context, the crucial issue here is the significance of the fact that authority is limited to settling claims for costs incurred *by the United States Government.*

Id. at 1041 n.8.

216. The preceding description of the *Waste Management* court's reasoning is limited to the court's "text" and "context" grounds for its ruling. The court also set forth a "policy" ground for its decision, and, within its policy discussion, raised questions regarding the constitutionality of CERCLA's administrative settlement provisions. *See id.* at 1042-43. The court's "policy" analysis is not set forth as part of the reasoning underlying the court's decision because it is axiomatic that a court may not ground its decision upon its perception of what constitutes good policy. For a discussion of the court's constitutional concerns, see *infra* notes 265-325 and accompanying text.

in an administrative settlement (the contribution protection issue), a court must look to the administrative agency's settlement authority because the "matters addressed" in a settlement may never go beyond the limits of the agency's settlement authority.[217]

This reasoning is not compelling. Admittedly, as the *Waste Management* court stated, section 122(h)(1) — captioned "Authority to settle" — authorizes "the head of a department with response authority" to "settle a claim under Section 9607 of this title for *costs incurred by the United States Government.*"[218] But section 122(h)(1), on its face, simply limits the agency's *authority to settle,* administratively, a claim by the United States under section 107.[219] It is not clear why the section 122(h)(1) limitation upon *settlement authority* serves as a limitation upon the scope of *contribution protection* enjoyed by a party under section 122(h)(4).[220] The two provisions perform different functions.

The limitation upon settlement authority in section 122(h)(1) reflects congressional concern about an agency entering into a settlement that would extinguish any future liability of the settlor *to the United States.*[221] On its face, the first sentence of section 122(h)(1) authorizes a federal agency to settle a claim for costs the United States incurs only "if the claim has not been referred to the Department of Justice for further action."[222] This limited grant of agency settlement authority is further limited by the second sentence of section 122(h)(1): if the total response costs exceed $500,000, an agency may not settle a claim without obtaining the approval of the

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217. *See id.* at 1040. The *Waste Management* court found that "because subsection (h) authorizes only settlements for 'costs incurred by the United States Government,' it follows that contribution protection under that subsection is limited to claims by a party which contends to have borne [sic] a disproportionate share of the liability for such costs." *Id.* (quoting CERCLA § 122(h), 42 U.S.C. § 9622(h)).

218. *Id.* (quoting CERCLA § 122(h)(1), 42 U.S.C. § 9622(h)(1)(emphasis added). Section 122(h)(1) states:

> The head of any department or agency with authority to undertake a response action under this chapter pursuant to the national contingency plan may consider, compromise, and settle a claim under section 9607 of this title for costs incurred by the United States Government if the claim has not been referred to the department of justice for further action. In the case of any facility where the total response costs exceed $500,00 (excluding interest), any claim referred to in the preceding sentence may be compromised and settled only with the prior written approval of the Attorney General.

CERCLA § 122(h)(1), 42 U.S.C. § 9622(h)(1).

219. *See* CERCLA § 122(h)(1), 42 U.S.C. § 9622(h)(1).

220. *See id.* §§ 122(h)(1), 122(h)(4), 42 U.S.C. § 9622(h)(1), 9622(h)(4).

221. *See id.* § 122(h)(1), 42 U.S.C. § 9622(h)(1)(emphasis added).

222. *See id.*

Attorney General.[223] Together these provisions suggest that Congress was concerned about agencies entering into settlements that would relieve the settling PRP from any further liability to the United States. Congress did not want agencies to have such authority where (1) the claim had been referred to the Department of Justice, or (2) even if the claim had not been referred to the Department of Justice, the total response costs were fairly high — i.e., in excess of $500,000.[224] In either of these situations, Congress wanted settlement authority to be vested in the Attorney General.[225]

Though Congress intended in section 122(h)(1) to limit an agency's authority to settle any future liability to the United States, it does *not* follow that the scope of contribution protection under section 122(h)(4) is limited to those matters that the agency has the authority to settle. The scope of contribution protection for section 122(h) settlements is governed by section 122(h)(4) — not section 122(h)(1) — and requires a determination of the "matters addressed" in a settlement. The court in *Waste Management* asserts that the "matters addressed" in a section 122(h) settlement — the issue in determining the scope of contribution protection under section 122(h)(4) — must necessarily be limited to what an agency is authorized to settle under section 122(h)(1).[226] But the basis for such an assertion is less than clear. Since the main purpose of contribution protection provisions is to induce settlements, it is at least arguable that, in order to induce PRPs to enter into administrative settlements under section 122(h), Congress intended to grant broad contribution protection to settlors under section 122(h)(4).[227]

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223. *See id.*

224. *See* CERCLA § 122(h)(1), 42 U.S.C. § 9622(h)(1).

225. *See id.*

226. *See* Waste Mgmt. of Pa., Inc. v. City of York, 910 F. Supp. 1035, 1040 (M.D. Pa. 1995) (finding that terms section 122(h) contains preclude agency from settling).

227. *See* CERCLA § 122(h)(4), 42 U.S.C. § 9622(h)(4). The analysis the text accompanying this note sets forth addresses WMPA's argument, and the *Waste Management* court's conclusion, that the scope of contribution protection section 122(h)(4) provides is necessarily limited by the scope of the settlement authority set forth in section 122(h)(1). *See Waste Mgmt.*, 910 F. Supp. at 1040. If, however, one accepts the argument in the text — that the two provisions perform distinct functions so that the scope of settlement authority under section 122(h)(1) does not limit the scope of contribution protection under section 122(h)(4) —, it would then be necessary, where a party to a section 122(h) settlement asserts contribution protection, to determine whether a particular contribution claim relates to "matters addressed" in the settlement. If the settlement resolves only a claim for costs incurred by the United States — the limit of the agency's settlement author-

The *Waste Management* court's "context" analysis is also not compelling. In comparing administrative settlements under section 122(h) with administrative settlements under section 122(g), the court incorrectly asserts that, since section 122(g)(1) confers expansive and final settlement authority, the scope of contribution protection section 122(g)(5) grants is correspondingly broad and comprehensive.[228] Section 122(g)(1) authorizes an administrative "final settlement" with a potentially responsible party under certain specified circumstances.[229] The *Waste Management* court concludes that "because the matter addressed under a Section 122(g) agreement is a *final* settlement, contribution protection is necessarily complete."[230]

Once again, the court has asserted that the scope of contribution protection is governed by the scope of settlement authority.[231] But simply because section 122(g)(1) authorizes a "final settlement," it does not follow that contribution protection under sec-

ity under section 122(h)(1) — then one might argue that such a claim is the only "matter addressed" in the settlement and that the settlement therefore does not protect the settling party against claims for costs incurred by another PRP. Such an approach, however, makes no sense because every settlement a government and settling PRPs enter into will resolve only claims the government asserts. It is the contribution protection provisions — sections 113(f)(2), 122(h)(4) and 122(g)(5) — that cause a settlement to have an impact upon non-settlors. Because Congress intended that these contribution protection provisions serve to induce settlements, there should exist a presumption of broad contribution protection. For further discussion of this, see *supra* notes 24-29 and accompanying text.

228. *See id.* at 1041.

229. *See* CERCLA § 122(g)(1), 42 U.S.C. § 9622(g)(1). Section 122(g)(1) states:

> Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion if the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:
> (A) Both of the following are minimal in comparison to other hazardous substances at the facility:
> (i) The amount of the hazardous substances contributed by that party to the facility.
> (ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.
> (B) The potentially responsible party–
> (i) is the owner if the real property on or in which the facility is located;
> (ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and
> (iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission. . . .

Id.

230. *Waste Mgmt.*, 910 F. Supp. at 1041.

231. *See id.*

tion 122(g)(5) is "necessarily complete." The "final settlement" section 122(g)(1) authorizes is a final settlement regarding claims *by the United States.* The extent to which such settlement protects settlors against contribution claims by non-settlors is governed by section 122(g)(5) which, like sections 113(f)(2) and 122(h)(4), protects a settlor against contribution claims "regarding matters addressed in the settlement."[232] It is that language — not the language of section 122(g)(1) — that determines the extent to which a settlor enjoys contribution protection.[233]

Finally, in its "context" analysis, the *Waste Management* court attempts to tie the scope of contribution protection to the scope of settlement authority when it notes that section 122(g) and section 122(h) each has its own contribution protection provision.[234] The court reasons "that the inclusion of a contribution protection provision in each sub[s]ection suggests that contribution protection was intended to be limited to that which Congress authorized to be included in the settlement agreement."[235]

But there is no support for this "suggestion" in the legislative history of the contribution protections provisions.[236] As we have seen, the early versions of section 113(f)(2) extended contribution protection only to those who had entered into judicially approved settlements.[237] Later, the House Judiciary Committee added administrative settlement sections which included their own contribu-

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232. CERCLA § 122(g)(5), 42 U.S.C. 9622(g)(5).

233. *See id.* The argument the text accompanying this note sets forth is that the scope of contribution protection under section 122(g)(5) is not governed by the scope of settlement authority under section 122(g)(1). In other words, though it is clear that section 122(g)(1) authorizes "final" settlements under certain circumstances, the use of the term "final" refers to any future liability of the settling party to the United States. The term "final" does *not* describe the effect of the settlement upon contribution claims by non-settling parties. Section 122(g)(5), which confers contribution protection regarding "matters addressed in the settlement," governs the effect of the settlement upon such claims. As previously stated, courts should interpret this language broadly in the interest of achieving Congress's goal of inducing settlements. But it is this language, interpreted in accordance with congressional intent — not the language of section 122(g)(1) — that provides contribution protection to those who have entered into section 122(g) settlements.

234. *See Waste Mgmt.*, 910 F. Supp at 1041.

235. *Id.* For further discussion of the *Waste Management* court's reasoning, see *supra* notes 214-32 and accompanying text.

236. For a discussion of the legislative history of the contribution protection provisions, see *supra* notes 72-122 and accompanying text.

237. For a discussion of the early versions of section 113(f)(2), see *supra* notes 72-113 and accompanying text.

tion protection provisions.[238] It is hard to understand how the fact that each administrative settlement provision has its own contribution protection clause provides support for the court's conclusion that Congress intended that the scope of contribution protection was to be limited by the scope of the administrative settlement authority. If the two administrative settlement provisions had had a single, common contribution protection provision, it could still be argued (incorrectly) that Congress intended to limit the scope of contribution protection enjoyed by a settlor by the scope of the relevant settlement authority.[239]

There is nothing in the legislative history of SARA that explains why sections 122(g) and 122(h) each have a contribution protection provision. But there is also no explanation for the overlap and redundancy as between these two provisions, on the one hand, and the provision for contribution protection for administrative settlements in section 113(f)(2), on the other. The drafting history of these provisions suggests that the existence of these three almost-identical provisions is nothing more than an unintended redundancy.[240]

E. Constitutional Questions Regarding the Scope of CERCLA's Contribution Protection Provisions

The preceding discussion of the decisions in *Akzo* and *Waste Management* has focused upon the courts' statutory analyses in determining whether a contribution claim is barred by one of CERCLA's contribution protection provisions.[241] Some courts and commentators have suggested that the extinguishment of a nonsettlor's contribution rights through an administrative or judicially approved settlement raises constitutional concerns and, therefore, justifies a narrow interpretation of the scope of contribution protection afforded by settlements.[242] But, as this Article will now demon-

238. For a discussion of the House Judiciary Committee's addition of administrative settlement sections, see *supra* notes 72-103 and accompanying text.

239. For a discussion of the differences between the scope of settlement authority and the scope of contribution protection, see *supra* notes 163-210 and accompanying text.

240. For a discussion of the legislative history of these contribution provisions, see *supra* notes 72-103 and accompanying text.

241. For a discussion of *Akzo*, see *supra* notes 123-62 and accmpanying text. For a discussion of *Waste Management*, see *supra* notes 214-60 and accompanying text.

242. *See generally, e.g., Akzo*, 30 F. Supp. at 762-71; *Waste Mgmt.*, 910 F. Supp. at 1036-44; Christopher D. Man, *The Constitutional Rights of Nonsettling Potentially Responsible Parties in the Allocation of CERCLA Liability*, 27 ENVTL. L. 375 (1997);

strate, the suggested constitutional concerns are dubious, at best, and thus do not justify a narrow interpretation of the scope of contribution protection afforded by administrative settlements.[243]

1. Extinguishment of Contribution Claims as "Takings"

In *Waste Management,* the court stated that to hold that an administrative "costs incurred" settlement extinguished all contribution claims third parties raised "would implicate Fifth Amendment issues."[244] Further, "[i]n the case at bar the City and EPA are essentially contending that the Act extinguishes rights not only under CERCLA but also under state and statutory common law. The right to sue a party for contribution or to recover costs incurred may be viewed as a property right."[245] According to the court, deprivation of a property right raises the potential issue of a taking without just compensation.[246]

The *Waste Management* court's statement is tentative on its face and is unsupported by any authority or analysis. There is *no* support for the general proposition that "the right to sue a party for contribution or to recover costs incurred may be viewed as a property right" that may not be extinguished without just compensation.[247] There is nothing in the extensive and sophisticated "takings" decisions of the Supreme Court (decisions that are not mentioned, much less examined, by the court in *Waste Management*) that supports the general proposition that a right to sue for contribution or for costs incurred, whether based upon federal or state law,[248] is *per se* a right of "property" that is subject to substantive

Neuman, *supra* note 28; Pesnell, *supra* note 28; Timothy K. Webster, *Protecting Environmental Consent Decrees from Third Party Challenges,* 10 VA. ENVTL. L.J. 137 (1990).

It appears that there exists only one judicial decision in which a court declined to sustain a contribution protection defense expressly upon constitutional grounds. *See generally* General Time Corp. v. Bulk Materials, Inc., 826 F. Supp. 471 (M.D. Ga. 1993). For a discussion of the *General Time* decision, see *infra* note 300.

243. This Article does not attempt to undertake an exhaustive analysis of all the constitutional concerns that courts and commentators have expressed. Rather, this Article simply seeks to demonstrate that the constitutional concerns are dubious, at best, and thus do not justify a restrictive interpretation of the "matters addressed" by a settlement.

244. Waste Mgmt. of Pa. v. City of York, 910 F. Supp. 1035, 1043 (M.D. Pa. 1995).

245. *See id.*

246. *See id.*

247. *Id.*

248. The *Waste Management* court apparently distinguished a claim for contribution under section 113(f)(1) from a private cost recovery action under section 107(a)(4)(B). For a discussion of the relationship between these two types of action, see *supra* notes 59-66, 72-113 and accompanying text.

protection under the Fifth Amendment.[249] Furthermore, such a *per se* rule is inconsistent with congressional understanding as expressed in section 308 of CERCLA:

> If an administrative settlement under Section 9622 of this title has the effect of limiting any person's right to obtain contribution from any party to such settlement *and* if the effect of such limitation would constitute a taking without just compensation in violation of the Fifth Amendment of the Constitution of the United States, such person shall not be entitled, under other laws of the United States, to recover compensation from the United States for such taking, but in any such case, such limitation on the right to obtain contribution shall be treated as having no force and effect.[250]

The conjunctive "and" makes it clear that Congress did not believe that the termination of contribution rights would, *per se*, constitute a taking. In order for an administrative settlement to be treated as "having no force and effect," it must terminate a person's "right to contribution" *and* have the effect of a "taking."[251]

Furthermore, the court in *Waste Management* completely misunderstood the purpose of section 308. The court pointed to section 308 as reflecting "congressional concern" regarding the potential for a settlement to effect a "taking."[252] But then the court improperly used this concern as a justification for narrowly interpreting the scope of "matters addressed" in a settlement, thereby obviating the need to address any "taking" concern.[253]

The purpose of section 308 is clearly not to create an independent substantive limit on the scope of contribution protection afforded by administrative settlements. The Fifth Amendment itself prohibits administrative settlements that have the effect of a "taking."[254] Rather, the purpose of section 308 is to declare that any such administrative settlements have no "force and effect" —

249. *See generally, e.g.*, Phillips v. Washington Legal Found., 524 U.S. 156 (1998); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (all discussing takings issues).

250. CERCLA § 308, 42 U.S.C. § 9657 (emphasis added).

251. *Id.*

252. *See Waste Mgmt.*, 910 F. Supp. at 1043.

253. *See id.*

254. *See* U.S. CONST. amend. V. The Fifth Amendment states, in pertinent part, "[n]o person shall . . . . be deprived of life, liberty, or property, without due

specifically, they do not have the effect of extinguishing contribution rights — and *therefore do not entitle the non-settlor to recover compensation "under other laws of the United States."*[255] The purpose, in other words, is to eliminate a possible financial disincentive to administrative settlements that extinguish contribution claims by providing that such settlements do not, in any circumstances, give rise to a claim for financial relief against the United States.[256] Section 308 thus facilitates settlements and the conferring of broad contribution protection upon settling parties.

Furthermore, to use "taking" concerns as a basis for narrowly interpreting the "matters addressed" in a settlement is to deny effect to section 308 in most situations. If settlements are narrowly construed whenever a non-settlor raises a "taking" concern, a settlement will rarely be determined to extinguish the contribution rights of a non-settlor and thereby effect a taking. And such narrow construction is inconsistent with the purpose of section 308: to facilitate broad protection against contribution claims by providing that the extinguishment of such claims does not give rise to a claim for financial compensation, except when it is *determined* that the extinguishment of a contribution claim effects a taking.[257]

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process of law; nor shall private property be taken for public use, without just compensation." *Id.*

255. CERCLA § 308, 42 U.S.C. § 9657. *See also,* Tucker Act, 28 U.S.C. § 1491 (granting United States Court of Federal Claims jurisdiction to render judgment upon "any claim against the United States founded . . . upon the Constitution."). Section 308 effectively denies to a non-settlor the right to seek compensation against the United States under the Tucker Act on the ground that the extinguishment of the non-settlor's contribution claim, under one of the contribution protection clauses, amounts to an unconstitutional taking of property without just compensation. Section 308 makes it clear that, even if the non-settlor can establish that the extinguishment of its contribution claims amounts to a taking, the settlement upon which the extinguishment of the non-settlor's contribution claim is based has no force and effect. *See* CERCLA § 308, 42 U.S.C. § 9657.

256. For a discussion of the incentive effect of contribution protection, see *supra* notes 24-29 and accompanying text.

257. *See* CERCLA § 308, 42 U.S.C. § 9657. Section 308 applies to the situation in which *administrative* settlements extinguish contribution claims and have the effect of a taking, but is inapplicable to *judicially approved* settlements that, through section 113(f)(2), extinguish contribution claims. What, then, if a non-settlor believed that a proposed settlement (embodied in a proposed consent decree) would extinguish the non-settlor's contribution claim and have the effect of a taking (assuming that the extinguishment of a non-settlor's contribution claims could ever effect a taking)? If the non-settlor were to make such an assertion, by way of comments submitted pursuant to section 122(d)(2)(B), the court would consider the comments and, if it believed that the assertion had merit, decline to approve the proposed settlement. In other words, section 308, in denying effect to settlements that effectively constitute a taking, does not apply to judicially approved settlements because a court would not approve a settlement that had such an effect.

2. *Extinguishment of Contribution Claims and the Requirements of Procedural Due Process*

Some courts and commentators have suggested that the extinguishment of a non-settlor's contribution claim as the result of an administrative or judicially approved settlement may violate the non-settlor's right to procedural due process.[258] More specifically, it has been argued that a non-settling PRP's statutory right to contribution is a property interest and that the extinguishment of this right through a judicially approved or administrative settlement may, at least in some circumstances, violate the non-settlor's due process rights to notice, a fair hearing and a fair tribunal.

The due process concerns of commentators are grounded primarily upon the Supreme Court's decision in *Martin v. Wilks*.[259] In *Martin*, the Court reaffirmed that "'[i]t is a principle of general jurisprudence in anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'"[260] Applying that principle, the Court held that a group of white firefighters was not bound by consent decrees that had been entered in a case in which they were not parties.[261]

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258. Since the extinguishment of a non-settlor's contribution claim — the action giving rise to the procedural due process contention — is a consequence of federal law, the due process contention would be grounded upon the Due Process Clause of the Fifth Amendment.

259. 490 U.S. 755 (1989).

260. *Id.* at 761 (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)). The Supreme Court in *Martin* also stated that this principle was part of a "'deep rooted historic tradition that everyone should have his own day in court.'" *Id.* at 762 (citation omitted). Even though such a judgment or decree among those who are parties to a lawsuit resolves the issues among those parties, this same judgment "does not conclude the rights of strangers to those proceedings." *Id.*

261. *See id.* at 755. The consent decrees had been entered in a class action that the National Association for the Advancement of colored People and seven black individuals had brought against the city of Birmingham, Alabama (the City of Birmingham), and the Jefferson County Personnel Board (the Board). *See id.* at 759. The plaintiffs alleged that the City of Birmingham and the Board had engaged in racially discriminatory hiring and promotional practices in violation of federal law. *See id.* After partial trial, but before judgment, the parties had entered into consent decrees under which the defendants agreed to a remedial scheme that included goals for the hiring and promotion of blacks within the City of Birmingham's Fire Department. *See id.* Before final approval of the decrees, the court directed publication of a notice that there would be a "fairness hearing" on the proposed decrees. *See id.* The plaintiffs in *Martin* were not parties to this action and did not participate in the fairness hearings. *See id.* at 759-60. After the final approval of the consent decrees, the plaintiffs filed the *Martin* action in which they sought an injunction against the enforcement of the consent decrees on the ground that the decrees would illegally discriminate against them. *See id.*

The Court's decision in *Martin* does not support the proposition that CERCLA's contribution protection provisions are unconstitutional insofar as they provide that a settlement can have the effect of extinguishing the contribution rights of those who are not parties to the settlement. Indeed, the Court in *Martin* expressly noted that "the general rule" — that a non-party is not bound by a judgment in a litigation to which he has not been made a party by service of process[262] — is subject to the following exception: "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with due process."[263]

This exception applies to the extinguishment of non-settlors' contribution claims under the contribution protection provisions of CERCLA. In these provisions, Congress has established a "remedial scheme" that seeks to induce settlements by "foreclosing successive litigation by nonlitigants" — that is, by foreclosing non-settlors from litigating against settlors claims for contribution regarding matters addressed in the settlement. The termination of these "pre-existing [contribution] rights" of non-settlors is valid so long as CERCLA's remedial scheme "is consistent with due process." This Article thus turns to the question of whether the extinguishment of non-settlors' contribution claims under CERCLA's contribution protection provisions is consistent with due process.

a. Statutory Right to Contribution as "Property"

The first inquiry in procedural due process analysis is whether the challenged government action has the effect of depriving the challenger of an interest protected by the Due Process Clause — that is, an interest in "life, liberty, or property."[264] Since it is hard to see how a right to seek contribution could be viewed as a "life" or "liberty" interest, the question is whether such right is a property interest.

At least one court has concluded that a non-settlor's right to seek contribution is *not* a property interest that is protected by the

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The defendants in *Martin* contended that the "collateral attack doctrine" precluded the plaintiffs' action. *See id.* at 762. For a discussion of the "collateral attack docrine," see generally Kramer, *supra* note 166.

262. *See Martin*, 490 U.S. at 762.

263. *Id.* at 762 n.2 (citations omitted). The note recognizes a second exception to the general rule that is inapplicable to CERCLA settlements.

264. *See generally, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972) (explaining interests Due Process Clause protects).

Due Process Clause. In *United States v. Cannons Engineering*,[265] the court pointed out that "a right of contribution from a joint tortfeasor does not exist as a matter of federal common law."[266] Rather, section 113(f)(1) "both established and defined, rather than removed, the right of a joint tortfeasor to contribution in CERCLA cases."[267] In other words, a PRP's right to seek contribution is defined and limited by all the provisions of CERCLA, including the various contribution protection provisions.

But whether a non-settlor's right to seek contribution is a "property" right that triggers the procedural protections of the Due Process Clause is of no analytical relevance because, as we have seen, CERCLA contains provisions that require notice and an opportunity for comments before a settlement (judicial or administrative) may be entered. These notice and comment provisions recognize that the contribution rights of non-settlors are interests that merit some procedural protections before they may be extinguished by a settlement.[268] Since CERCLA imposes certain procedural requirements that must be followed before a non-settlor's contribution rights may be extinguished, the constitutional issue is whether these statutory procedures satisfy the requirements of due process.

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265. 720 F. Supp. 1027 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990).

266. *Id.* at 1050. In *Cannons Engineering*, the United States District Court for the District of Massachusetts relied on two Supreme Court cases in rendering its decision. *Id.* at 1050. First, the court relied on *Texas Industries, Inc. v. Radcliff Materials, Inc.*, in which the Supreme Court held that neither the Sherman nor Clayton Acts provided a basis for a tortfeasor to seek contribution from a joint tortfeasor. *See id.* (citing 451 U.S. 630, 638 (1981)). Second, the court employed the Supreme Court's rationale in *Northwest Airlines, Inc. v. Transport Workers Union, AFL-CIO*, in which the Court found it inappropriate for the courts to fashion a right of contribution as a matter if federal common law in applying the Equal Pay Act and Title VII of the Civil Rights Act. *See id.* (citing 451 U.S. 77, 90 (1981)). *See also* United States v. Serafini, 781 F. Supp. 336, 339 (M.D. Pa. 1992) (finding that "the government may, if it chooses, deny parties any opportunity to settle their liability. Without question, if identified parties do not have the right to participate in settlement, unidentified parties do not retain such a right").

267. *See id.* The *Cannons Engineering* court further stated that "even if the non-settling defendants would have otherwise had a pre-existing right to contribution, enactment of [section 113(f)(1)] . . . was not an unconstitutional taking or a violation to due process because Congress has the power to create new rights or limit existing ones if, as here, it has a valid legislative purpose." *Id. See also* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n.32 (1978); Hammond v. United States, 786 F.2d 8, 12 (1st Cir. 1986) (both explaining that Congress can alter current rights as long as valid legislative purpose is present).

268. For a discussion of the notice and comment provisions, see *supra* notes 36-42 and accompanying text.

b. Notice

Section 122(i) requires notice of a proposed administrative settlement.[269] Section 122(d)(2)(B) requires that the Attorney General provide non-parties to a proposed consent decree with an opportunity to submit written comments, but does not expressly provide for notice.[270]

Several courts have rejected the contention that, before a non-settlor's right to contribution may be extinguished by a settlement, a non-settlor must receive actual notice of the proposed settlement.[271] However, at least one court, has questioned whether constructive notice, by publication in the *Federal Register*, satisfies due process.[272] Under established principles, the answer to this inquiry depends upon the particular facts.

In *Mullane v. Central Hanover Bank & Trust Co.*,[273] the Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."[274] The Court went on the explain:

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269. *See* CERCLA § 122(i), 42 U.S.C. § 9622. Section 122(i)(1) states:
> At least 30 days before any settlement (including any settlement arrived at through arbitration) may become final under subsection (h) of this section, or under subsection (g) of this section in the case of a settlement embodied in an administrative order, the head of the department or agency which has jurisdiction over the proposed settlement shall publish in the Federal Register notice of the proposed settlement. The notice shall identify the facility concerned and the parties to the proposed settlement.

Id.

270. *See id.* § 122(d)(2)(B), 42 U.S.C. § 9622(d)(2)(B). For the text of section 122(d)(2)(B), see *supra* note 37.

271. *See generally, e.g.*, United States v. Serafini, 781 F. Supp. 336, 339 (M.D. Pa. 1992). In *Serafini*, the district court held that, while the cross-claim plaintiffs did not receive *actual* notice, they did receive constructive notice. *See id.* Section 122(i) of CERCLA requires that prior to the entry into any settlement, notice of the proposed settlement must be published in the Federal Register. *See* CERCLA § 122(i), 42 U.S.C. § 9622(i). The settlement requested in *Serafini* appeared in the Federal Register at least five times. *See Serafini*, 781 F. Supp. at 339. Thus, the court held that the cross-claim plaintiffs received constructive notice of the litigation because of its appearance in the Federal Register. *See id.*

272. *See* General Time Corp. v. Bulk Materials, Inc., 826 F. Supp. 471, 477 n.12 (M.D. Ga. 1993).

273. 339 U.S. 306 (1950). At issue in *Mullane* was the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law. *See id.* at 307. The only notice the beneficiaries received was through publication in a local newspaper in compliance with one of the New York statutory requirements. *See id.* at 306.

274. *Id.* at 314.

> The means [of notice] employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.[275]

In short, actual notice is constitutionally required except "where conditions do not reasonably permit such notice."[276]

At a Superfund site, the number of PRPs may be substantial — in the hundreds. At the time of a proposed settlement, however, EPA may not have identified all of the PRPs; EPA may be uncertain whether some entities are liable; as to others, it may be relatively certain of their liability, but unable to locate them. As to those nonsettling PRPs whose liability is clear and address is known, due process would seem to require actual notice; in other words, the notice required by section 122(i)(1) — publication in the *Federal Register* — would be constitutionally deficient. But as to those PRPs whose liability is uncertain, or whose location is unknown, constructive notice by publication would satisfy due process.[277]

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275. *See id.* at 315.

276. *Id.* For a thorough analysis of the extent to which due process requires actual notice, see generally *Chemetron Corporation v. Jones*, 72 F.3d 341 (3rd Cir. 1995). The court in *Chemetron* found publication in national newspapers to be sufficient to provide notice to unknown creditors, especially notice in papers of general circulation in locations where the unknown creditors were conducting business supplemented such publication. *See id.* at 348.

277. There appears to be only one decision in which a court has declined to give effect to an administrative settlement because of its belief that to do so would violate due process. In *General Time Corporation v. Bulk Materials, Inc.*, General Time, the owner of a contaminated site, sought to recover cleanup costs against Fleet Transport, who had spilled hazardous substances at the site. *See* 826 F. Supp. 471, 473-74 (M.D. Ga. 1993). Fleet had "consented to an order by the Georgia Department of Natural Resources . . . to engage in a clean-up effort at the site, and to pay a fine for the spill." *Id.* at 474. In response to General Time's claims for cleanup costs, Fleet moved for summary judgment on the ground that section 113(f)(2) did not bar General Time's claims. *See id.* In response to this motion, General Time argued that the consent order between the state agency and Fleet "[was] not an 'administrative or judicially approved settlement' under section 113(f)(2) because . . . no notice of or opportunity to be heard on the settlement was provided in violation of General Time's procedural due process rights." *Id.* at 475.

The *General Time* court began its analysis by stating that section 113(f)(2) affords contribution protection "to PRPs who settle with a State or the federal government." *Id.* The court agreed, however, with General Time that "barring Plaintiff's contribution claim would violate due process." *Id.* at 476. Further, the

Due process dictates not only the means of notice, but also its timing and content. As the Supreme Court stated in *Mullane*, "[t]he notice [required by due process] must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance."[278] Thus, in order to satisfy due process, the notice of a proposed settlement must inform nonsettling PRPs of the "required information" — at the least, the location of the contaminated site and a location where the proposed settlement may be examined. Also, nonsettling PRPs must have a reasonable time after receipt of notice to "make their appearance" — that is, to submit their comments regarding the proposed settlement.

Because the due process requirements regarding the method and content of notice turn upon the specific facts, a generalized concern about the constitutionality of notice cannot justify a *general* rule of narrow construction of the matters addressed in a CERCLA settlement. If a court concludes that a contribution claim relates to a matter addressed in a settlement — and thus is barred by one of CERCLA's contribution protection provisions —, the court may then consider whether the extinguishment of the contribution claims would violate due process because the non-settlor did not receive the kind of notice that was reasonable under the particular facts.

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court stated that "[d]ue process requires an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting Matthews v. Eldridge, 424 U.S. 319, 333 (1976). The court then concluded that General Time had not received the constitutionally-required opportunity to be heard and that the administrative settlement did not bar its contribution claims against Fleet. *See id.*

The decision in *General Time* does not support a general proposition that administrative settlements violate the procedural due process rights of non-settlors and thus cannot constitutionally bar contribution claims non-settlors assert. *See id.* Indeed, the court in *General Time* went to great lengths to contrast the situation before it, which involved a state administrative settlement, with a federal administrative settlement in accordance with the procedural requirements of CERCLA. *See id.* at 476-77. The court pointed out that, under section 122(i), "the head of the department or agency, which has jurisdiction over the proposed settlement, is required to publish notice of both de minimis and cost recovery settlements in the Federal Register with a 30 day public comment period to follow before the settlement may become final." *Id.* at 476. Further, the court stated that these notice provisions "demonstrate that Congress recognized the danger in permitting an administrative settlement to extinguish claims for contribution and sought to ensure that an administrative settlement comply with procedural due process requirements before it could bar claims for contribution." *Id.* at 477. The court, highlighted, however, that the notice requirements of CERCLA were inapplicable to the situation before it, in which there had been a *state* administrative settlement, and that the nonsettlor-plaintiff in the case before it had not received the notice due process requires. *See id.*

278. *Mullane*, 339 U.S. at 314.

c. Fair Hearing

Even if a non-settling PRP has received constitutionally adequate notice, due process also requires that the non-settling PRP be given an opportunity for a fair hearing before its contribution rights may be extinguished.[279] If a proposed settlement is to be submitted for judicial or administrative approval, non-settlors have (at the least) an opportunity to submit comments on the proposed settlement.[280]

Some commentators suggest that due process requires that non-settlors be granted a trial-type evidentiary hearing before their contribution rights may be extinguished.[281] However, the courts have been unanimous in concluding that such evidentiary hearings are not required except in unusual circumstances.[282] Similarly, in

279. *General Time*, 826 F. Supp. at 477. This conclusion assumes that the non-settlor's statutory right to seek contribution constitutes a "property" right under the Due Process Clause. *See id.* For further support of this view, see generally Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); United States v. Cannons Eng'g Corp., 899 F.2d 79 (1st Cir. 1990); United States v. Serafini, 781 F. Supp. 336 (M.D. Pa. 1992); C.P.C. Int'l, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269 (W.D. Mich. 1991).

280. *See* CERCLA § 122(d)(2)(B), 42 U.S.C. §122(d)(2)(B). For a description of CERCLA's notice and comment provisions, see *supra* notes 36-42, 292-301. It is possible that the non-settlors will be parties to a judicial proceeding in which a proposed consent decree has been entered, either because the non-settlors were originally named as parties or because they have intervened in the action under section 113(i). For a discussion of judicial decisions regarding a non-settlor's right to intervene, see *supra* note 48. If the non-settlors are parties to a judicial proceeding in which the proposed consent decree has been entered, they will, as parties, have the right to comment upon the proposed consent decree.

281. *See* Man, supra note 264, at 398-99 (noting that requests for evidentiary hearings are usually denied); Neuman, *supra* note 28, at 10300 (stating that "[some] Superfund cases . . . are noteworthy because they not only deprive nonsettlors of a 'fairness' evidentiary hearing prior to judicial approval of the settlement, but would also hold nonsettlors fully liable to the government for the balance of cleanup costs even if the settlors paid less than their fair share"; Pesnell, *supra* note 28, 239-44 (stating, "[t]he courts have consistently recognized in other contexts that evidentiary hearings are necessary where questions of collusion or bad faith are involved").

282. *See generally Cannons Eng'g*, 899 F.2d 79 (1st Cir. 1990) (serving as leading case in this area). In *Cannons Engineering*, the court rejected the non-settlors' argument that the district court, in approving a proposed consent decree, erred in failing to hold an evidentiary hearing regarding the suitability of the proposed decree. *See id.* The court stated:

> We review a district court's declination to convene an evidentiary hearing on a confirmation motion only for abuse of discretion. We start with the proposition that "motions do not usually culminate in evidentiary hearings." That being so, it rests with the proponent of an evidentiary hearing to persuade the court that one is desirable and to offer reasons warranting it.
>
> In general, we believe that evidentiary hearings are not required under CERCLA when a court is merely deciding whether monetary settle-

the case of proposed settlements that are considered for administrative approval, there is no obligation for the approving agency to provide an evidentiary hearing to non-settlors who oppose the proposed settlement.[283]

As the Court has made abundantly clear, due process does not necessarily require a trial-type evidentiary hearing before a person may be deprived of property. In *Matthews v. Eldridge*,[284] the Court stated that due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[285] The Court

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ments comprise fair and reasonable vehicles for disposition of superfund claims. As in other cases, the test for granting a hearing "should be substantive: given the nature and circumstances of the case, did the parties have a fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions?" In this case, that inquiry must be answered in the affirmative. There was no showing of any substantial need for an evidentiary hearing. The issues were fully argued and compendiously briefed. We have been advised of no particular matter which, fairly viewed, necessitated live testimony. The district court's determination that no evidentiary hearing was required fell well within the realm of the court's discretion.

Id. at 93-94 (citations omitted). *See also* United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1086 (1st Cir. 1994) ("[E]ven without an evidentiary hearing, the parties had 'a fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions'")(citations omitted); United States v. Bliss, 133 F.R.D. 559, 568-69 (E.D. Mo. 1990) ("A hearing should be held only where it is necessary in the circumstances for the parties' fair opportunity to present facts and arguments and to counter opposition to the decrees")(citation omitted); United States v. Rohm & Haas, 721 F. Supp. 666, 686 (D.N.J. 1989) ("Courts have consistently held that lengthy evidentiary hearings are not required under CERCLA when a court is merely deciding whether a non-*de minimis* monetary settlement is fair, adequate and reasonable")(citation omitted); Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 519 (W.D. Mich. 1989) ("I see no reason to subvert the very purpose of this settlement agreement, which is to avoid the costs of extended litigation, by ordering a hearing"); In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1031 n.21 (D. Mass. 1989) ("[T]o grant inevitably lengthy hearings in [CERCLA cases] would either frustrate the express intent of Congress to encourage settlement or negate the benefits of any settlement that resulted.").

283. *See generally* CERCLA § 122, 42 U.S.C. § 122.

284. 424 U.S. 319 (1975).

285. *Id.* at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). The plaintiff in *Matthews* had completed a questionnaire the state agency monitoring his condition sent him, noting that his condition had not improved and listing the doctors who had recently treated him. *See id.* at 323-24. In turn, the state agency compiled medical reports from his doctor and a psychiatric consultant. *See id.* at 324. After reviewing these reports and other information the plaintiff's file contained, the state agency informed him that it had tentatively determined that his disability had ceased. *See id.* In holding that no evidentiary hearing was required prior to termination of disability benefits, the Court stated, "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." *Id.* at 349 (citations omitted). The Court thus held that disability benefits could be terminated without a

then set forth the now familiar framework for determining whether a particular type of hearing is "meaningful" and thus satisfies due process.

> "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." . . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government[']s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[286]

There might be specific circumstances in which a non-settlor could make a persuasive argument that, applying the three-factor *Matthews* analysis, due process requires a trial-type evidentiary hearing before the court may approve a proposed consent decree.[287] But *Matthews* makes it clear that due process does not, as a general matter, require such a hearing. And, whatever the specific circumstances, a court undertaking the three-factor analysis of *Matthews* must recognize that providing a full evidentiary hearing will undercut the congressional desire to encourage settlements by affording settlors protection against the burden of litigating contribution claims by other PRPs. Any evidentiary hearing would presumably include a determination of whether the proposed settlement is substantively fair to the non-settlors. Such a hearing would be all but identical to an equitable apportionment determination in a

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prior evidentiary hearing and that the administrative procedures the state agency used met with the requirements of due process. *See id.* For a discussion of the factors to be weighed in making such a determination, see *infra* notes 311-12 and accompanying text.

286. *Id.* at 334-35 (citations omitted).

287. *See* United States v. Cannons Eng'g Corp., 899 F.2d 79, 94 (1st Cir. 1990) (stating that determination of whether such specific circumstances exist is "substantive"). The *Cannons Engineering* court described the relevant inquiry as whether "given the nature and circumstances of the case, did the parties have a fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions?" *Id.* (quoting Aoude v. Mobil Oil Corp., 862 F.2d 890, 894 (1st Cir. 1988). In *Aoude* the First Circuit explained that "[i]f the question is close and time permits, then doubts should be resolved in favor of taking evidence." *Aoude*, 862 F.2d at 894.

contribution action. In short, if the settlors (the court or administrative agency) must undergo an evidentiary hearing prior to approval of a settlement, the burden of such a hearing upon both the settlors and the court or administrative agency will all but eliminate the intended benefits of a settlement.[288]

d. Fair Tribunal

During the course of Senate debate on the Conference Committee bill that became the SARA amendments of 1986, Senator Stafford expressed strong policy objections to the granting of contribution protection to those who had entered into administrative settlements.[289] He also then raised a distinct procedural due pro-

288. *See generally In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019 (D. Mass. 1989). The *Acushnet* court stated that "to grant inevitably lengthy hearings in [CERCLA cases] would either frustrate the express intent of Congress to encourage settlement or negate the benefits of any settlement that resulted." *See id.* at 1031 n.21. In making this statement, the court did not consider whether due process requires an evidentiary hearing prior to approval of a proposed consent decree. The *Acushnet* court's comment is relevant to the third factor (the government interest factor) of the *Matthews* three-factor due process analysis. *See* Matthews v. Eldridge, 424 U.S. 319, 334-35 (providing three factor analysis).

289. *See* S. 51, 99th Cong. (1985). Senator Stafford made his comments in opposition to the Conference Committee's extension of contribution protection to those who had entered into administrative settlements. *See generally* 131 CONG. REC. S11830-03 (daily ed., Sept. 20, 1985). The bill the Senate passed (a version of House Bill 2005) afforded contribution protection to those who had entered into judicially approved settlements. *See id.* The House bill, however, provided for administrative settlements and extended contribution protection to those who had entered into such settlements. For a discussion of the House bill, see *supra* notes 94-103 and accompanying text. For a discussion of the legislative history of the contribution protection provisions, see *supra* notes 72-122.

In Senator Stafford's view, the Conference Committee's adoption of the House bill was "bad policy and very likely unconstitutional." S. 51, 99th Cong. (1985). Senator Stafford described his policy argument by stating:

> It [i.e., the affording of contribution protection to those who enter into administrative settlements] is bad policy because it gives bureaucrats, often under pressure to produce settlements, the power to determine when legitimate claims on (*sic*) shall be cut off. I do not for a moment question either the motives or energy of executive branch employees. I simply point out that both the Congress and EPA management have sought to crank up the Government's enforcement machine, and that those in the Government responsible for negotiating settlements are understandably eager to conclude such agreements. Hence, it seems unwise to allow administrative settlements, negotiated in private and not subject to judicial scrutiny, to peremptorily extinguish any valid claims that might be made in later contribution suits. Persons seeking fair reimbursement after paying an excessive damage award are at least entitled to have their rights determined impartially. This is fundamental in our society, and in my view is realized only when a judge, not an administrative agency, has the final say on the terms of a settlement.

132 CONG. REC. S14904-05 (daily ed., Oct. 3, 1986) (statement of Sen. Stafford). Immediately following this statement, Sentaor Stafford expressed his constitutional

cess argument regarding contribution protection and administrative settlements:

> The extension of contribution protection to administrative settlements is . . . flawed on constitutional grounds. It is a truism that the due process requirement of a fair tribunal applies to administrative agencies as well as to courts. *Withrow v. Larkin*, 421 U.S. 35 (1975). I am troubled . . . by the ability of the executive branch settlement negotiating team to meet this unyielding constitutional standard.[290]

No court has addressed the Constitutional concern Senator Stafford expressed, perhaps because there is, as a general matter, no basis for such concern.

The Supreme Court's decision in *Withrow v. Larkin* states the general proposition that "a 'fair trial *in a fair tribunal* is a basic requirement of due process'"[291] and that this requirement "applies to administrative agencies which adjudicate as well as to courts."[292] As the Court in *Withrow* explained, "[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'"[293] Further,

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concern, grounded upon *Withrow v. Larkin*. *See id.* For a discussion of *Withrow*, see *infra* notes 315-25 and accompanying text.

It is important to note that, in speaking against the extension of contribution protection to administrative settlements, Senator Stafford assumes that such settlements are not subject to judicial review. For a discussion of the reviewability of administrative settlements, see *supra* notes 43-55 and accompanying text.

290. *See* 131 CONG. REC. S14895 (debate, Oct. 3, 1986) (statement of Sen. Stafford) (citation omitted).

291. *Withrow*, 421 U.S. at 46 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (emphasis added).

292. *Id.* (citing Gibson v. Berryhill, 411 U.S. 564, 579 (1973)). The *Withrow* Court held that the combination of the medical examining board's investigative and adjudicative functions did not, without more, constitute a due process violation by creating an unconstitutional risk of bias. *See id.* at 47-52. The court then stated that both federal and state case law generally reject the proposition that combining investigative and adjudicative functions denies due process. *See id.* at 52. Further, plaintiff could not establish a basis for the Court's conclusion that the board had been prejudiced in its investigation. *See id.* at 55. The Court stated:

> The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing. Without a showing to the contrary, state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."

Id. at 55 (quoting United States v. Morgan, 313 U.S. 409, 421 (1941)).

293. *Id.*

> [i]n pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these are cases in which the adjudicator has a pecuniary interest in the outcome. . . .[294]

The Court goes on to reject "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication."[295]

The principles set forth in *Withrow* might very well support the setting aside of a CERCLA administrative settlement when the federal government, as a PRP, enters into an administrative settlement with EPA. In such a situation, a court might believe that reliance upon the settlement to bar contribution claims by other PRPs would violate the *Withrow* requirement of a "fair tribunal." The court might conclude that, in such a situation, the "probability of actual bias" is "too high to be constitutionally tolerable" because "the adjudicator [i.e., the federal government] has a pecuniary interest in the outcome."[296] More directly, such a situation presents the risk of a "sweetheart" settlement in which the federal government settles out at a low figure and thereby insulates itself, through the contribution protection provisions, against claims by other PRPs.[297]

But aside from this limited situation, the *Withrow* principles do not call into question the constitutionality of providing contribution protection to those who have entered into administrative settlements. To be sure, EPA may enter into administrative settlements that, *by design*, seek to reward settlors and threaten non-settlors with disproportionate liability.[298] In doing so, EPA might be said to be violating the *process* requirement of a "fair tribunal" to the extent

294. *Id.* at 47 (quoting *In re Murchison*, 349 U.S. at 136).

295. *Id.*

296. *Id.*

297. *See* United States v. Pesses, No. Civ.A.90-654, 1994 WL 741277 (W.D. Pa. Nov. 7, 1994) (providing example of this type of "sweetheart" settlement). The *Pesses* court did not hold a trial-type hearing. *See id.* at *1-*2. In declining to approve a proposed settlement under which federal agencies would be released from any further liability for cleanup costs, the court expressed its belief that the settlement was substantively unfair in that the federal agency PRPs had received preferential treatment. *See id.* at *18.

298. *See id.* at *5 (citing United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1436 (6th Cir. 1991)). The *Pesses* court stated that "[t]he court's function in determining whether a particular decree passes muster is not to determine the best possible settlement that could have been reached has been, but is limited to determining whether the agreement is fair, reasonable and consistent with the

that EPA, as the decisionmaker, exhibits a "bias" in favor of settlors and against non-settlors.[299] But such a "bias" is not the type of bias that comes within the principles of *Withrow*; it is not a bias, or preference, that is illegitimate. Rather, in favoring settlors over non-settlors, EPA is merely furthering a bias, or preference, that Congress intended.[300]

F. Judicial Concern About the Fairness of CERCLA's Contribution Protection Provisions

As this Article has sought to demonstrate, the legal bases for the majority opinion in *Akzo* and the decision in *Waste Management* are questionable, at best. In interpreting the scope of CERCLA's contribution protection provisions, both the *Akzo* and *Waste Management* courts ignored the legislative histories of these provisions and disregarded the clear legislative intent to induce settlements by exposing non-settlors to the risk of disproportionate liability. And the constitutional concerns raised by courts and commentators in opposition to the extinguishment of non-settlors' contribution claims simply do not stand up to even the most cursory analysis.

There are strong suggestions in both the *Akzo* and *Waste Management* decisions that the courts' legal conclusions were influenced by concerns about the fairness of CERCLA's contribution protection provisions — in particular, the fairness of interpreting the provisions in such a way as to extinguish rights of contribution when the result would be to impose disproportionate (and, in the courts' view, unfair) liability upon the non-settlors who were asserting contribution claims. In *Akzo*, the majority addressed, and rejected, Judge Easterbrook's interpretation of section 113(f)(2), highlighting the dissent's analysis "that because it lies within the EPA's power to draft the release language more narrowly, we should simply take the language in this settlement on its face and construe it broadly to include the clean-up work for which Akzo seeks contribution."[301] The *Akzo* court continued by emphasizing that Akzo ultimately had no control over the language the settlement contained and that the parties to the settlement had no incentive to consider Akzo's contribution rights.[302] In conclusion, the court stated:

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goals of CERCLA." *See also generally*, H.R. REP. No. 99-962, 99th Cong. (1st Sess.); SARA Legislative History, *supra* note 68, at 4897-5181.

299. *See Withrow*, 421 U.S. at 46-47.

300. *See generally* H.R. REP. No. 99-962 (1986).

301. Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 768 (7th Cir. 1994).

302. *See id.*

> Given the sweeping power Congress has given the EPA to extinguish the contribution rights parties would otherwise enjoy under [s]ection 113(f)(2) [*sic*, presumably, intended reference is to section 113(f)(1)], we believe it prudent to require the settling parties to be more explicit when they intend to bar contribution for work such as Akzo's which, factually speaking, is not clearly a 'matter addressed' by the agreement.[303]

This is not legal analysis. It is a declaration and imposition of what, according to the court, seems fair. It is not fair, says the court, to broadly construe the "matters addressed" in a settlement — and thereby extinguish a non-settlor's claim for contribution — when the non-settlor had no control over the language of the settlement. It is not fair because the settling parties (EPA and Aigner) have no incentive to protect the contribution rights of non-settlors. It is therefore "prudent" to require settling parties to be explicit if they wish to extinguish the contribution rights of non-settlors. Thus, in interpreting the scope of contribution protection afforded by section 113(f)(2), the court is guided by its conception of what is "prudent," not by congressional intent.[304]

Similarly, in *Waste Management*, the court relied upon fairness considerations to support its narrow interpretation of the scope of contribution protection afforded by section 122(h)(4). Indeed, the last part of the court's opinion is captioned "Policy Reasons Which Explain Why Section 122(h) Affords Only Limited Contribution Protection."[305] In that part of the opinion, the court stated:

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303. *See id.*

304. *See, e.g., id.* at 765-70. The *Akzo* court found in section 113(f)(1) an expression of congressional intent that cleanup costs were to be apportioned equitably. *See id.* at 766. As previously discussed, section 113(f)(1) is inconsistent with the congressional intent underlying section 113(f)(2) to induce settlements by exposing non-settlors to the risk of disproportionate liability. For further discussion of this, see *supra* notes 162-213 and accompanying text.

A further indication of the policy basis for the majority opinion in *Akzo* is the acknowledgment of "policy considerations of the kind discussed in *McDermott* [that,] to some extent [,] have informed our decision on how broadly to construe the 'matters addressed' by the consent decree." *Id.* at 769 (citing McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994)). In *McDermott*, the Court was called upon to develop judge-made law regarding the effect of settlements upon contribution claims by non-settling parties in admiralty actions. *See McDermott*, 511 U.S. at 202-11. In *Akzo*, however, the court was not fashioning judge-made law; it was interpreting the intent of Congress as set forth in section 113(f)(2). Thus, it was inappropriate for the majority, in interpreting section 113(f)(2), to be "informed" by "policy considerations of the kind discussed in *McDermott*."

305. 910 F. Supp. 1035, 1042 (M.D. Pa. 1995).

> Clearly, Congress did not intend agreements between the Government and private parties to foreclose all other private party claims against the settling party. Such a result would be fundamentally unfair to non-settling parties and would discourage such parties to engage in clean-up operations, contrary to one of CERCLA's primary goals.[306]

Again, as in the majority opinion in *Akzo*, judicial concerns about fairness, rather than congressional intent, drive the court's interpretation. With no examination of the relevant legislative history, the court stated that "clearly" Congress did not intent that settlement agreements would foreclose private party claims against a settling party. But, as we have seen, there is much in the legislative history of SARA — and in the plain language of the contribution protection provisions — that indicates that this is precisely what Congress intended.[307]

Courts may not, of course, substitute their notions of fairness for policy determinations made by legislatures. Congress is free to impose liability that seems unfair so long as the burden of liability,

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306. *Id.* at 1042-43. After making this statement, the *Waste Management* court discussed its concern that a broad interpretation of contribution protection provision in section 122(f)(4) "would implicate Fifth Amendment issues." *Id.* For a discussion of these concerns, see *supra* notes 263-325 and accompanying text.

307. For discussion of the legislative history of SARA, see *supra* notes 72-122 and accompanying text. In *Waste Management*, the court stated that a broad interpretation of the contribution protection section 122(h)(4) affords would not only be "fundamentally unfair to non-settling parties," but would also "discourage such parties to engage in clean-up operations, contrary to one of CERCLA's primary goals." *Waste Mgmt.*, 910 F. Supp. at 1042-43. Regarding the second point, the court was apparently referring to a situation such as the one before it, where the non-settling party (WMPA) had performed a cleanup pursuant to a unilateral adminstrative order under section 106(a). The court's point seems to be that a recipient of a section 106(a) order would be "discouraged" from complying with the order if it believed that other PRPs could enter into settlements that would afford them protection against contribution claims the non-settling recipient of the section 106(a) order might assert.

There are at least two responses to the court's concern regarding discouraging non-settling parties from engaging in cleanup operations. First, a non-settling party who has performed cleanup operations either voluntarily or pursuant to a section 106(a) order has the right to comment upon a proposed settlement by another PRP. If the non-settling PRP believes that the proposed settlement would be unfair in imposing disproportionate liability upon it, it can submit comments reflecting its concern to such effect to the court (if the proposed settlement is submitted for judicial approval) or to EPA (if the proposed settlement is subject to administrative approval). Second, the recipient of a seciton 106(a) order has little choice but to comply with the order since noncompliance with such an order, without "sufficient cause," subjects the recipient to the risk of fines (under section 106(b)(1)) and punitive damages (under section 107(c)(3)). For a decision upholding the constitutionality of these fine and punitive damage provisions, see generally *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383 (8th Cir. 1987).

and the procedures for imposing liability, do not violate the Constitution. The liability scheme of CERCLA — and, in particular, the extinguishment of contribution claims by judicially or administratively approved settlements — may be viewed as unfair to non-settling PRPs. But, if so, the legislative history of the contribution protection provisions indicates clearly that this was intended by Congress to serve as an inducement to settlements.

VI. EPA Memorandum on Defining "Matters Addressed" in CERCLA Settlements

In March of 1997, in the face of the uncertainty created by the *Akzo* and *Waste Management* decisions, EPA issued a memorandum revising the agency policy regarding the content of contribution protection clauses in judicial and administrative settlements under CERCLA.[308] A "background" statement in the memorandum states that "[i]n the past, CERCLA settlements have generally not included a definition of 'matters addressed,' but instead have at most contained a statement that the 'Settling Defendants are entitled to such protection from contribution actions or claims as is provided in [either] CERCLA Section 113(f)(2)'" or one of the other contribution protection provisions.[309] The memorandum then describes the problems caused by this approach: "This approach has sometimes caused uncertainty regarding the effect of the settlement on the contribution rights of persons not party to the settlement, resulting in delays in the entry of decrees and the entanglement of the United States in subsequent litigation regarding the scope of contribution protection."[310] The memorandum concludes that these problems can be alleviated by defining "matters addressed" in every settlement:

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308. *See generally* "Matters Addressed" Memorandum, supra note 8.

309. *Id.* at 1-2.

310. *Id.* at 2 (footnote omitted). Among the cases cited as examples of such "entanglement" are *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994) and *Waste Management of Pennsylvania v City of York*, 910 F. Supp. 1035 (M.D. Pa. 1995). *See id.* at 8, n.1. The "Matters Addressed" Memorandum also notes that "[s]everal courts have indicated that the United States can reduce this uncertainty [i.e. the uncertainty regarding the effect of settlements on contribution rights] by defining 'matters addressed' explicitly in its CERCLA consent decrees." *Id.* at 2. Among the courts listed is the Seventh Circuit, which, in *Akzo* stated that "if the parties have included terms explicitly describing the 'matters addressed' by their settlement, then those terms will be highly relevant to, and perhaps even dispositive of, the scope of contribution protection . . . ." *Id.* at 8, n.2 (quoting *Akzo*, 30 F.3d at 766, n.8).

> Defining "matters addressed" in CERCLA settlements will serve the public interest by reducing uncertainty and litigation regarding the scope of contribution protection associated with such settlements, and will enable the United States to maximize the value of its CERCLA recoveries by affording greater certainty and finality to settling parties . . . . Therefore, a definition of "matters addressed" should typically be included in the contribution protection Section of future CERCLA settlements.[311]

The remainder of the memorandum sets forth "general principles" that are to be followed by EPA attorneys in drafting "matters addressed" sections[312] and applies these principles to different types of settlements.

In its memorandum, EPA abandoned the position that it advocated unsuccessfully in *Waste Management* — that CERCLA's contribution protection provisions in and of themselves should be interpreted to afford broad contribution protection to settling PRPs.[313] Rather, EPA accedes to the view, set forth in the majority opinion in *Akzo*: that the scope of contribution protection afforded by the statutory provision is dependent in large measure on the expectation of the parties to the settlement, and that these expectations are most clearly expressed in a separate and explicit "matters addressed" section.[314]

In the remainder of this Part, this Article will consider the likely effect of the implementation of the policy set forth in EPA's "Matters Addressed" Memorandum, and the extent to which the objectives of the memorandum may be frustrated by existing deci-

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311. *Id.* at 2 (footnote omitted).

312. *Id.* at 2. The Memorandum sets forth the following "general principle:"

> The term "matters addressed" should be drafted on a site-specific basis to correspond to the facts of the case and the intent of the parties. Generally, the term "matters addressed" should identify those response actions and costs for which the parties intend contribution protection to be provided. At a minimum, these will be the response actions or costs the settling parties agree to perform or pay; however, "matters addressed" can be broader if the settlement is intended to resolve a wider range of response actions or costs, regardless of who undertakes the work or incurs those costs.

Id. Further, the memorandum states that "broader contribution protection is typical in most *de minimis* and ability to pay settlements, as well as in certain RD/RA and cash-out settlements." *Id.*

313. *See generally* "Matters Addressed" Memorandum, *supra* note 11. *See also generally Akzo*, 30 F.3d 761; *Waste Mgmt.*, 910 F. Supp. 1035.

314. *See generally* "Matters Addressed" Memorandum, *supra* note 11, at 1-3. *See also Akzo*, 30 F.3d at 767.

sions that discuss the effect of CERCLA's contribution protection provisions.

A. Reduction of Uncertainty Regarding the Scope of Contribution Protection

The "Matters Addressed" Memorandum states that an explicit "matters addressed" section in a settlement will reduce uncertainty — and thereby reduce litigation — regarding the extent to which the settling parties enjoy protection against non-settling PRPs' contribution claims.[315] The extent to which explicit "matters addressed" provisions in settlements reduce uncertainty and litigation regarding the scope of contribution protection will depend upon the extent to which courts disregard the suggestion in the *Akzo* majority that, in determining the matters addressed by a settlement, a court is to consider "*both* the reasonable expectations of the signatories *and* the equitable apportionment of costs that Congress has envisioned [as section 113(f)(1) states]."[316] An explicit "matters addressed" section might be viewed as *conclusive* in defining "the reasonable expectations of the parties," but it would have no relevance in defining the equitable apportionment of costs that Congress has envisioned" in section 113(f)(1).[317]

As previously discussed, in its subsequent opinion in *Rumpke of Indiana, Inc. v. Cummins Engine Co.*,[318] the Seventh Circuit sought to limit the "equitable apportionment" prong of its *Akzo* majority's test for determining the "matters addressed" by a settlement.[319] The *Rumpke* court stated that the seemingly two-pronged test for determining "matters addressed" (set forth in the *Akzo* majority opinion) "does not mean that the language of the decree is subject to an ill-defined equitable trump card."[320] Rather, the *Rumpke* court stated that the congressional desire for equitable apportionment(as expressed in section 113(f)(1)) should be viewed as a kind of "canon of construction" that reflected congressional concern about the impact of settlements on "third-party" (i.e., non-settlor) rights.[321] In accordance with this canon of construction, "the terms in a decree

315. *See* "Matters Addressed" Memorandum, *supra* note 11, at 2.

316. *Akzo*, 30 F.3d at 766 (citation omitted)(emphasis added).

317. *See id.* at 766 & n.8.

318. 107 F.3d 1235 (7th Cir. 1997).

319. *See id.* at 1242-43. For a discussion of *Rumpke*, see *supra* notes 203-10 and accompanying text.

320. *Id.* at 1242.

321. *Id.* For the *Rumpke* court's explanation of the *Akzo* test for determining "matters addressed," see *supra* note 209 and accompanying text.

that are especially likely to affect third-party rights *must be more explicit.*"[322]

The test case for determining whether there exists a distinct "equitable apportionment" prong that a court must apply in determining the "matters addressed" by a settlement will be a case in which the court is faced with a contribution protection defense that is grounded upon a settlement that contains an explicit "matters addressed" section that, if it controls in determining the scope of contribution protection, would produce a clearly inequitable apportionment of cleanup costs. In such a situation, the court will have to determine whether the explicit language of the decree is "subject to an ill-defined equitable trump card."[323] Since, as this Article has previously argued, the equitable apportionment prescribed by section 113(f)(1) should be viewed as irrelevant in determining the scope of contribution protection afforded by section 113(f)(2) and other provisions,[324] courts should defer to the language of an explicit "matters addressed" section in the settlement.[325]

Though the incorporation of explicit "matters addressed" sections in settlements should reduce litigation regarding the scope of contribution protection, a likely consequence of the inclusion of explicit broad contribution protection provisions is that non-settlors, when faced with a contribution protection defense grounded upon such a provision, will be more inclined to assert constitutional

322. *Id.* (citation omitted)(emphasis added).

323. *Rumpke*, 107 F.3d at 1242.

324. As stated previously, section 113(f)(1) and the contribution protection provisions perform quite different functions. Section 113(f)(1) clearly states the intent of Congress to allocate cleanup costs equitably among the various PRPs. Section 113(f)(2), however, which expresses congressional intent to induce settlements by exposing non-settlors to the risk of a disproportionate (i.e., inequitable) share of the total cleanup costs, limits this intent. For a more complete statement of this argument, see *supra* notes 94-113 and accompanying text.

325. In the situation hypothesized, where the explicit "matters addressed" section would produce an inequitable apportionment of costs, courts could defer only when the language of the section is so explicit that it is not subject to an interpretation that would produce an equitable apportionment of costs. Courts might, in other words, follow the suggestion in *Rumpke*, and view the congressional desire for equitable apportionment, as section 113(f)(1) expresses, as the basis for a "canon of construction" that requires that "matters addressed" sections in a settlement be construed, if possible, in such a way as to produce an equitable apportionment of costs. *See Rumpke*, 107 F.3d at 1242.

As previously argued, even such a limited use of section 113(f)(1) in determining the scope of contribution protection is not justified. Congress intended section 113(f)(2)to induce settlements by exposing non-settling PRPs to the risk of disproportionate liability. The use of section 113(f)(1) as a "canon of construction" that would limit the impact of exlicit "matters addressed" sections in settlements would be inconsistent with the intent underlying section 113(f)(2).

reasons for denying effect to the provision. For example, a non-settlor seeking contribution from a settlor might contend that the effect of a broad contribution protection provision would constitute a "taking" of the non-settlor's property or that the procedure used in approving the settlement was not consistent with due process.[326] As we have seen, non-settlors have raised such constitutional concerns and courts have occasionally used them to justify a restrictive interpretation of the scope of contribution protection enjoyed by settlors.[327] If such a restrictive interpretation is precluded by an express broad contribution protection provision, courts will not be able to avoid the merits of any constitutional contentions made by non-settlors. Although such constitutional contentions might rarely have merit, the raising of such contentions would, at the least, complicate contribution litigation where a contribution protection defense is asserted.[328]

B. The Inclusion of Broad Express Contribution Protection Provisions in Administrative Settlements

EPA's "Matters Addressed" Memorandum sets forth "principles" to guide EPA regional attorneys with respect to when it is appropriate for a settlement to include a provision that expressly provides broad contribution protection to the settlors.[329] The principles are applied to various types of judicially approved and administrative settlements.[330] One part of the memorandum deals with "Cash-Out Settlements." With respect to such settlements, the memorandum recognizes, by way of footnote, the impact of *Waste Management*:

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326. For a discussion of potential takings contentions, see *supra* notes 263-79 and accompanying text. For a discussion of potential due process arguments, see *supra* notes 280-325 and accompanying text. *See also* Pesnell, *supra* note 28, at 237-48 (analyzing manner in which courts have addressed due process concerns in such settlements).

327. For a discussion of cases in which courts restricted the scope of contribution protection because of constitutional concerns, see *supra* notes 123-260, 264 and accompanying text.

328. Presumably, when such constitutional contentions are raised, EPA will often wish to appear as an *amicus* in the litigation. If so, one of the objectives of the "Matters Addressed" Memorandum, eliminating "the entanglement of the United States in subsequent [i.e. post-settlement] litigation regarding the scope of contribution protection," will not be realized. *See* "Matters Addressed" Memorandum, *supra* note 11, at 2 (footnote omitted).

329. *See* "Matters Addressed" Memorandum, *supra* note 11, at 2-3.

330. *See id.* at 3-6 (listing "typical settlements" as de minimis settlements, final RD/RA consent decrees, partial (operable unit) consent decrees, past cost-only settlements, cash-out settlements and ability to pay settlements).

> Note that one court has held that, because Section 122(h) of CERCLA allows EPA to settle claims only for costs incurred by the government, administrative cash-out settlements under Section 122(h) cannot extinguish contribution claims of private parties with respect to the cleanup costs they incur. In light of this decision, it may be prudent in the case of cash-out settlements in which the government intends to afford protection from contribution actions for private party response costs . . . to utilize a settlement vehicle other than an administrative settlement based solely on Section 122(h) of CERCLA, such as an administrative settlement based on the Attorney General's inherent authority to settle or a judicially approved consent decree.[331]

This note recognizes that an express broad contribution protection clause in a "past costs" settlement might be ineffective because, according to the reasoning of the court in *Waste Management*, the scope of contribution protection afforded by section 122(h)(4) is limited by the scope of settlement authority set forth in section 122(h)(1).[332] According to the *Waste Management* decision, EPA lacks the authority to include in a settlement under section 122(h) a provision that protects settlors against claims by non-settlors regarding costs incurred by the non-settlors.[333]

The memorandum suggests two methods for getting around the holding in *Waste Management* when EPA wishes to settle a claim for past costs and, at the same time, grant the settlor express broad contribution protection against non-settlors.[334] The first, "an administrative settlement based on the Attorney General's inherent authority to settle,"[335] is apparently premised upon the belief that such a settlement would be an "administrative settlement" that

331. *See id.* at 9-10, n.9 (citing Waste Mgmt. of Pennsylvania, Inc. v. City of York, 910 F. Supp. 1035 (M.D. Pa. 1995)).

332. *See Waste Mgmt.*, 910 F. Supp. at 1042-43 (adding that scope of settlement authority section 122(h)(1) sets forth is limited to settlement for past costs government incurred). For a discussion of *Waste Management*, see *supra* notes 211-60 and accompanying text. *See also* "Matters Addressed" Memorandum, *supra* note 11, at 9-10, n.9.

333. *See Waste Mgmt.*, 910 F. Supp. at 1042-43.

334. *See* "Matters Addressed" Memorandum, *supra* note 11, at 10, n.9 (stating, "[i]n light of [*Waste Management*], it may be prudent . . . to utilize a settlement vehicle other than an administrative settlement based solely on Section 122(h) of CERCLA, such as an administrative settlement based on the Attorney General's inherent authority to settle or a judicially approved consent decree").

335. *See id.*

would afford settlors contribution protection under section 113(f)(2), not section 122(h)(4).[336] This approach is legally defensible and, if ultimately successful, would be a triumph of form over substance that would, as a practical matter, nullify the holding in *Waste Management.*

The second method for getting around the holding in *Waste Management* is a "judicially approved consent decree."[337] That is, if EPA wishes to settle a claim for past costs and, at the same time, grant the settlor express broad contribution protection against non-settlors, EPA can submit such a settlement for judicial approval.[338] This approach avoids the holding in *Waste Management* because that holding limits *administrative* settlement authority under section 122(h); it has no effect upon the government's authority to afford broad contribution protection in judicially approved settlements. One problem with this second method, however, is that, in using this method, EPA loses the ultimate approval authority that it has when it proceeds by way of administrative settlement. To put it simply, a settlement that is submitted for judicial approval might mot be approved.

C. Impact of "Matters Addressed" Memorandum Upon the Settlement Process

In its "Matters Addressed" Memorandum, EPA abandons its past practice under which CERCLA settlements did not have an explicit "matters addressed" section but simply contained a statement that the "Settling Defendants are entitled to such protection from contribution actions or claims as is provided in [either] CERCLA Section 113(f)(2)" or one of the other contribution protection provisions.[339] Before decisions such as *Akzo* and *Waste Management,*

336. If the Attorney General seeks and obtains judicial approval of a proposed settlement, the settlement is not an administrative settlement.

Section 113(f)(2) provides contribution protection for those who have entered into administrative settlements. Thus there is a degree of redundancy between section 113(f)(2) and the two provisions, sections 113(g)(5) and 122(h)(4), that provide contribution protection for administrative settlements. *See* CERCLA sections 113(f)(3), 122(g), 122(h)(4); 42 U.S.C. §§ 9613(f)(3), 9622(g), 9622(h)(4)(1994). If the Attorney General enters into an "inherent authority" administrative settlement, such a settlement would not be pursuant to the settlement authority conferred by section 122(h)(1). Thus the effect of the settlement upon non-settlors' contribution claims would not be subject to the *Waste Management* court's restrictive interpretation of the scope of contribution protection under section 122(h)(4).

337. *See* "Matters Addressed" Memorandum, *supra* note 11, at 10 n.9.

338. *See id.*

339. *See id.* at 1-2.

prospective settlors might have reasonably believed that such a statement afforded them protection against all possible contribution claims by non-settlors.

But *Akzo* and *Waste Management* (and similar decisions) together with the "Matters Addressed" Memorandum, have changed all that.[340] Well-advised prospective settlors will now routinely demand that the "matters addressed" section of the settlement contain a broad statement of contribution protection. What is not clear is whether such demands will slow down the settlement process or, more significantly, reduce the number of settlements.

If EPA denies a prospective settlor's demand for an express statement of broad contribution protection, this may be a "deal-breaker" and the prospective settlor will decline to settle.[341] The prospective settlor will know that, in exchange for his commitment to undertake some cleanup activity (or pay toward the cost of cleanup), he will not buy peace against future contribution claims by non-settlors. In the past, a prospective settlor might have been willing to enter into a settlement that merely stated (in accordance with past policy) that the settling party was entitled to such contribution protection as was provided by one of the contribution protection provisions. But now that EPA, in its "Matters Addressed" Memorandum, has taken the position that the provisions themselves do not afford settlors broad contribution protection, courts are unlikely to decide otherwise. Thus, as a result of the revised policy in the "Matters Addressed" Memorandum, it seems certain that there will be some situations in which, if EPA denies a prospective settlor's demand for an express broad contribution protection provision, there will not be a settlement.

But what if EPA accedes to the well-advised prospective settlor's demand for an explicit broad contribution protection section? The settlor will, of course, be more inclined to settle — and EPA may be able to reach settlements that it could not have reached under the old policy where the scope of contribution protection was uncertain. But the inclusion of an express broad contribution protection provision in a proposed settlement is likely to affect the settlement approval process.

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340. *See generally* Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 762 (7th Cir. 1994); Waste Mgmt. Of Pennsylvania v. City of York, 910 F. Supp. 1035 (M.D. Pa. 1995); "Matters Addressed" Memorandum, *supra* note 11.

341. EPA might deny such a demand because of EPA's belief that the proposed settlement does not represent an appropriate share of the settlors' liability for the total cleanup costs at a contaminated site.

Due process requires that EPA provide non-settlors with adequate notice of a proposed settlement.[342] Any notice that does not mention that a proposed settlement contains an express broad contribution protection provision will most likely be inadequate since it fails to inform non-settlors of that aspect of the settlement that most directly affects them.[343] On the other hand, a notice to non-settlors stating that a proposed settlement contains a broad express contribution protection provision will serve as a "red flag" that is likely to produce numerous and heated objections to the proposed settlement.

If notices of settlements with express broad contribution protection provisions stimulate numerous objections by non-settlors, the effect may be to slow up the settlement approval process. With respect to a proposed administrative settlement, the time devoted to responding to non-settlors' comments is within EPA's control; this is not so with proposed judicial settlements.[344] With respect to proposed administrative settlements, EPA can always reject the objections that are contained in non-settlors' comments and approve the settlement — including an express broad contribution protection provision. If, however, EPA is cavalier in dealing with non-settlors' objections to proposed settlements, it may induce non-settlors to file actions seeking judicial review of the settlement.[345] Though, as we have seen, there is support for the position that administrative settlements are not subject to judicial review, the case law is less than conclusive.[346]

Insofar as settlements submitted for judicial approval are concerned, non-settlors' comments objecting to such settlements must ultimately be considered by the reviewing court.[347] If a proposed settlement contains an express broad contribution protection provi-

342. For a discussion of the due process notice requirement, see *supra* notes 269-77 and accompanying text.

343. For a discussion of the elements necessary to fulfill the due process notice requirement, see *supra* notes 271-77 and accompanying text.

344. *See generally* Pesnell, *supra* note 28, at 239-40 (discussing importance of affording non-settlors evidentiary hearings before contribution protection provisions are enforced against them).

345. *See, e.g., Waste Mgmt.*, 110 F. Supp. at 1037 (filing separate action seeking judicial review of settlement).

346. Notably, the non-settlor in *Waste Management* filed a separate action seeking judicial review of the settlement in that case. *See id.* at 1037. Because the *Waste Mgmt.* court held that the administrative settlement did not bar the non-settlor's contribution claim, there was no need for the court to consider the non-settlor's separate action for judicial review of the settlement.

347. *See id.* at 1040 (noting, "[j]udicial review of a 'cleanup settlement' thus affords a PRP the opportunity to adjudicate the fairness of contribution protection . . .").

sion, the comments of the non-settlors will undoubtedly argue the substantive unfairness of the proposed settlement.[348] An express broad contribution protection provision will reduce uncertainty regarding the scope of contribution protection that the settlors will enjoy (if the proposed settlement is approved) and thus will highlight the extent to which the proposed settlement may impose disproportionate liability upon the objecting non-settlors.[349] Under these circumstances, it is possible that courts, faced with numerous comments emphasizing the substantive unfairness of the proposed settlement, will (at the least) delay in approving the settlements. It is even possible that a court, faced with a situation in which a broad express contribution protection provision will result in the imposition of disproportionate liability on objecting non-settlors, will be more inclined to conclude that a proposed settlement is so substantively unfair that it should not be approved.

VII. CONCLUSION

The practical consequences of CERCLA's liability scheme are nowhere more apparent than when a court is faced with a contribution protection defense. The PRP seeking contribution may have incurred cleanup costs that seem to exceed (perhaps to a significant extent) the PRP's equitable share of the total cleanup costs for a contaminated site. The defendant PRP asserting a contribution protection defense may be relying upon a settlement that, to the court, seems to have been far too kind to the settlors. If the court accepts the contribution protection defense, its decision will be the final step in imposing disproportionate liability upon non-settling PRPs. Given the apparent unfairness of such a decision, it is not surprising that some courts have sought a rationale that will support the rejection of a contribution protection defense.[350]

In this Article, I have sought to demonstrate that, in two influential contribution protection decisions — *Akzo* and *Waste Management* —, the courts have improperly relied upon their notions of fairness to support the rejection of a contribution protection de-

348. *See* United States v. Cannon Eng'g, 899 F.2d 79, 85-92 (1st Cir. 1990); United States v. Rohm & Haas, 721 F. Supp. 666, 681-97 (D.N.J. 1989); In re Acushnet River,, 712 F. Supp. 994, 1027-38 (D. Ma. 1989) (standing for proposition that courts must decide whether settlements are "fair, reasonable, and consistent with goals of CERCLA").

349. *See* "Matters Addressed" Memorandum, *supra* note 11, at 2.

350. For a discussion of cases in which courts have rejected the contribution protection defense, see *supra* notes 196-240 and accompanying text.

fense.[351] The courts have failed to give effect to Congress's intent to encourage settlements by offering settlors peace against contribution claims and by threatening non-settlors with the risk of disproportionate liability. Whatever one may think of the fairness of CERCLA's liability scheme — including the provision of contribution protection for settling PRPs —, Congress has the right to do what may seem to be unfair, so long as it is not unconstitutional. And, as I have sought to demonstrate, the constitutional questions that have been raised regarding the granting of contribution protection have little or no merit.[352]

Faced with the uncertainty produced by these decisions, EPA has given up its fight for an expansive interpretation of CERCLA's contribution protection provisions.[353] EPA's new policy, providing for the inclusion of express contribution protection provisions in settlements, may not produce the certainty and expedition that it seeks. Even more significant is the possibility that the new policy may, as I have suggested, produce fewer settlements.[354] If so, the main objective of CERCLA — the cleanup of contaminated sites — will be made more difficult.[355] And all of this will be the product of judicial decisions in which courts, relying upon their own sense of fairness, have second-guessed Congress's conclusion as to whether a particular device — contribution protection — is an appropriate method for encouraging settlements.

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351. *See* Akzo Coatings, Inc. v. Aigner Corp. 30 F.3d 761 (7th Cir. 1994); Waste Management of Pennsylvania v. City of York, 910 F. Supp. 1035 (M.D. Pa. 1995).

352. For a discussion and rejection of the constitutional arguments regarding the granting of contribution protection, see *supra* notes 241-300 and accompanying text.

353. *See generally* "Matters Addressed" Memorandum, *supra* note 11 (attempting to remedy uncertainty *Akzo* and *Waste Management* created and setting forth requirement that proposed settlements contain express contribution protection provisions).

354. For a discussion of the possibility that EPA's express contribution protection provision requirement may cause a decrease in the number of settlements reached, see *supra* notes 298-301 and accompanying text.

355. *See* Mark L. Frohman, *Rethinking the Partial Settlement Credit Rule in Private Party CERCLA Actions: An Argument in Support of the Pro Tanto Credit Rule*, 66 U. COLO. L. REV. 711, 712 (1995) (stating that CERCLA's primary goal is "the expedient cleanup of the severe environmental and public health damage caused by the historical disposal of hazardous substances throughout this country") (footnote omitted).