

1-1-1999

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Recommended Citation

Matthew J. Lawlor, *Super Settlements for a Superfund: A New Paradigm for Voluntary Settlement?*, 27 B.C. Env'tl. Aff. L. Rev. 123 (1999), <http://lawdigitalcommons.bc.edu/ealr/vol27/iss1/5>

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SUPER SETTLEMENTS FOR SUPERFUND: A NEW PARADIGM FOR VOLUNTARY SETTLEMENT?

MATTHEW J. LAWLOR*

Despite some recent improvements, cleanup of hazardous waste sites across the United States remains slow and very expensive, especially in terms of legal costs. In response to the continuing gridlock, those involved in settlement negotiations at various cleanup sites, including the Environmental Protection Agency, other federal and state government agencies, and private potentially responsible parties (PRPs), are exploring new arrangements of liability and cleanup responsibility under the existing legal and regulatory framework. One emerging response is the "Super Settlement" concept. Under a Super Settlement, a single entity agrees with all, or at least a sufficient preponderance, of the PRPs at a given cleanup site to assume all of their cleanup-related liability in exchange for a fixed and permanent cash-out amount. The Comment examines the Super Settlement concept in light of the current status of federal and state cleanup-related law. The Comment also identifies the trends that have made the concept possible and the issues that remain to be addressed. Finally, the Comment concludes by predicting that the Super Settlement concept will be put into widespread use across the United States as its advantages become better known.

INTRODUCTION

The second generation of litigation and cleanup under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund)¹ is drawing to a close. Despite some progress, the pace of actual Superfund site remediation remains

* Managing Editor, 1999-2000, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW. The author wishes to thank Robert Cleaves, Kenneth Gray, and Clayton Maybee for their assistance and willingness to discuss their experience with the Wells Super Settlement. The author also wishes to thank his wife, Ann-Marie, for her patience and support as this Comment was researched and written.

¹ 42 U.S.C. §§ 9601-9675 (1994 & Supp. II 1996).

painfully slow.² CERCLA has been widely criticized for many things, including (1) the high cost of cleanups under its control;³ (2) the continuance of an allegedly overly-Draconian, strict joint and several liability scheme, which some say actually contributes to foot-dragging by potentially responsible parties (PRPs);⁴ and (3) the continuing difficulty and inflated legal cost of managing multi-party negotiations to develop site specific remediation plans.⁵ Since the expiration of CERCLA's dedicated taxes at the close of 1994, those parties who are potentially responsible for cleanup under Superfund have focused substantial attention on the much anticipated, but long delayed, reauthorization of CERCLA to provide the needed impetus for real improvement at the federal level.⁶ Despite the widely-recognized drawbacks of CERCLA and the emphasis many participants have placed on the subject, the prospects for a productive reauthorization remain dim. Even without the extraordinary political distractions of recent months,⁷ there is little agreement between Congress and the

² See Steven A. Herman, *A Fundamentally Different Superfund Program*, 13 NAT. RESOURCES & ENV'T 196, 196 (1998), for a relatively upbeat report on the improvement in the administration of the current law by the Environmental Protection Agency (EPA) under the leadership of the Clinton Administration.

³ See PLATER, ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 852 (1998). Professor Plater noted that a 1994 Congressional Budget Office report pegged the average cleanup cost per site at between \$15.38 million and \$18.25 million in 1992 dollars. *See id.*

⁴ See JOHN A. HIRD, SUPERFUND: THE POLITICAL ECONOMY OF ENVIRONMENTAL RISK 28 (1994). Not surprisingly, this criticism has come primarily from the insurance industry. *See id.* But see Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 GEO. WASH. L. REV. 1043, 1044-45 (1994) (providing an academic's perspective on the settlement disincentives embedded in Superfund's liability scheme as implemented by EPA, the states, and the federal courts). *See id.* at 1067-69.

⁵ See Karen L. DeMeo, Note, *Is CERCLA Working? An Analysis of the Settlement and Contribution Provisions*, 68 ST. JOHN'S L. REV. 493, 497 (1994); John J. Fialka, *Maine Experiment May Point the Way to Ending Tangle of Litigation Around U.S. Superfund Law*, WALL STREET JOURNAL, Apr. 29, 1998, at A28; PLATER, *supra* note 3, at 855. Professor Plater cited a 1992 Rand Corporation study indicating that for the five-year period from 1984 to 1989, transaction costs (i.e., legal costs) represented twenty-one percent of the total private party expenditures related to Superfund. *See id.*

⁶ See Andrea Foster, *Legislative Squabbling Resumes*, CHEMICAL WK., Dec. 16, 1998, available in 1998 WL 17065141; *CMA Offers Bipartisan Commission To Resolve Superfund Deadlock*, CHEMICAL MKT. REP., Nov. 9, 1998, available in 1998 WL 10166586. Since 1994, Congress has consistently failed to provide for a comprehensive reauthorization package, including renewed taxes for the Superfund itself and reform of the more problematic liability provisions. *See id.* The one partial exception to the gridlock was the 1996 passage of the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act. *See* Pub. L. 104-208, 110 Stat. 3009-462 (codified primarily at 42 U.S.C. §§ 9601, 9607) (1996).

⁷ The initial impeachment-related maneuvering over the Monica Lewinsky scandal largely deadlocked Congress throughout the last five months of 1998, and the Senate im-

Clinton Administration regarding how and to what extent the law should be overhauled.⁸

In response to the continuing gridlock, those involved in Superfund settlement negotiations, including the United States Environmental Protection Agency (EPA), other federal and state government agencies, and private PRPs, are exploring new arrangements of liability and cleanup responsibility under the existing legal and regulatory framework.⁹ One response that has emerged in the last eighteen months is the "Global" or "Super" Settlement concept,¹⁰ which possesses significant potential for mitigating some of the more problematic aspects of CERCLA.¹¹ Under a Super Settlement, a single entity, presumably an environmental cleanup company (Superfund Entity), contracts with all, or at least a significant number, of the PRPs at a given Superfund site to assume all of their cleanup-related liability¹² in exchange for a fixed and permanent cash-out amount.¹³

peachment trial of President Clinton lasted from early January through mid-February of 1999. In short, Congress was almost completely preoccupied with the scandal for nearly six months, and the Administration was preoccupied with the matter for even longer. See, e.g., David M. Shribman, *The Year Washington Tried Our Patience*, BOSTON GLOBE, Dec. 30, 1998, at A1; Aaron Zitner, *Much of Corporate Agenda Dying in Congress*, BOSTON GLOBE, Oct. 10, 1998, at F1; Brian McGrory, *President's Effectiveness Questioned*, BOSTON GLOBE, Oct. 7, 1998, at A1.

⁸ See Ann R. Klee & Arnie Rosenberg, *The Moribund State of CERCLA Reauthorization*, 13 NAT. RESOURCES & ENV'T 451, 451 (1999) ("The fate of Superfund reform in the 105th Congress is a good case study on legislative impasse.").

⁹ See *500th Superfund Site Clean-up Completed*, HAZNEWS, Jan. 1, 1998, available in 1998 WL 9399186 (describing EPA's efforts to promote the use of innovative Prospective Purchaser Agreements at the Publicker Superfund site in Philadelphia); Kenneth F. Gray, "Super Settlements": *Early Release For All PRPS at Multiparty Superfund Sites?* 13 NAT. RESOURCES & ENV'T 298, 298 (1998) (one of the most frequently used settlement options has been the large-party/small-party cash-out, whereby the small, *de minimis* parties cash-out first, leaving the large parties to settle later and remain on the hook under CERCLA).

¹⁰ See Gray, *supra* note 9, at 298. Both terms—"Super" and "Global"—have been used interchangeably to describe the topic of this Comment, but "Global" can also be applied simply to multi-party settlements that resolve all, or nearly all, of the issues regarding cleanup of a particular Superfund site. This Comment will use "Super." See generally Joanne Wojcik, *Insurers Key to Novel Plan to Pay for Site Cleanup*, BUS. INS., May 25, 1998.

¹¹ As discussed immediately *infra* and in more depth at Section III(B), one of the chief benefits of the Super Settlement concept is that it directly addresses the extraordinarily long negotiation process that normally accompanies multi-party Superfund site cleanup by allowing all of the PRPs to be released from the process at the earliest possible moment, in exchange, of course, for some specified cash premium. See Gray, *supra* note 9, at 298.

¹² This includes liability for past and future response costs, as well as natural resources damages, and any health assessments performed at the site. See 42 U.S.C. § 9607(a) (1994 & Supp. II 1996).

¹³ See Gray, *supra* note 9, at 298; Wojcik, *supra* note 10.

As part of this process, the Superfund Entity enters into a contractual relationship with the relevant government agencies—state and/or federal (depending on the context)—and agrees, first, to be the solitary PRP, and, second, to pay any outstanding claims for response costs, carry out any remaining assessment activities, and construct and maintain/operate a stipulated cleanup at the site.¹⁴ The Superfund Entity must, by necessity, be backed by a major insurance company willing to provide it with an ironclad policy (preferably naming the former PRPs, and the appropriate state agency and/or EPA as co-insureds) guaranteeing that if cleanup costs exceed the initial estimate, the insurance company will make up the difference (usually within some capped coverage amount).¹⁵ One of the first attempts to craft a Super Settlement is currently approaching consummation between a major environmental cleanup company teamed with a multinational insurance provider, the PRP Site Steering Committee representing the named PRPs, and the Maine Department of Environmental Protection (Maine DEP), for a state-administered abandoned hazardous waste site in Wells, Maine.¹⁶

This Comment examines the Super Settlement concept in light of the current status of federal and state Superfund-related law. It also highlights the legal and non-legal trends and issues that have made it possible to use such a model in promoting faster, more efficient settlement of Superfund cases. Section I provides background on CERCLA, an illustrative state Superfund law—Maine's Uncontrolled Hazardous Substance Sites Law (Maine Superfund Law)¹⁷—and the concept of informal federalism under which CERCLA has generally been operated by EPA. Section II outlines and analyzes the primary technological trends and legal issues leading to the advent of Super Settlements. Section III lays out the key elements and major players in the nearly-concluded Super Settlement at the Wells, Maine state Superfund site, which is now bidding to become the first successful use of the Super Settlement concept, and provides an initial critique of the concept in action.

Section IV discusses four potentially critical legal issues surrounding Super Settlements. First, are regulatory agencies and the courts likely to approve of the Super Settlement concept, considering the clear for-profit motive of the concept, under the current legal frame-

¹⁴ See Gray, *supra* note 9, at 298; Wojcik, *supra* note 10.

¹⁵ See Gray, *supra* note 9, at 298; Wojcik, *supra* note 10.

¹⁶ See Gray, *supra* note 9, at 298.

¹⁷ ME. REV. STAT. ANN. tit. 38, §§ 1361–1371 (West 1998).

work for Superfund, at both the federal and state levels? Second, what happens if the cleanup estimate agreed to by the Superfund Entity is drastically low, leading it to run through the insurance coverage amount and then declare bankruptcy? Must the public then bear the cost of cleanup, or may the responsible government agencies turn to the original PRPs for redress? Third, considering the much larger universe of state-administered hazardous waste sites compared to EPA-administered sites, how should EPA be involved in Super Settlements at such state-administered sites? Fourth, and finally, are there other areas of environmental law in which the concept of for-profit liability assumption underlying Super Settlements can be applied?

The Comment concludes by predicting that the Super Settlement concept will be put into widespread use across the United States as its advantages become better known. Clearly, the Super Settlement concept is still in its infancy; it has some potential drawbacks, and some issues remain to be ironed out. Still, it seems likely that the concept's potential to dramatically reduce the long-term costs of the settlement process for all of the involved parties, including society at large, will make it a more powerful and successful tool in streamlining and facilitating the cleanup of more hazardous waste sites than other settlement methods.

I. FEDERAL AND STATE HAZARDOUS WASTE SITE LAW: AN EVOLVING PARTNERSHIP

This section begins with a description of the typical remediation process under CERCLA, with special emphasis on the central importance of negotiated settlements. It then outlines the prevailing informal federal-state relationship which exists under current hazardous waste site cleanup law, and highlights areas of similarity and difference between CERCLA and Maine's own hazardous waste site cleanup law.

A. *Federal Law: CERCLA*

The initial version of CERCLA was passed by a lame-duck Congress and signed into law by a lame-duck President in the waning days of 1980 as Ronald Reagan and the Republican Party stood poised to usher in a more conservative political era and a more industry-friendly EPA.¹⁸ In short, CERCLA was a somewhat rushed and ad hoc,

¹⁸ See HIRD, *supra* note 4, at 9-10.

but significant, response to public outcry over a series of highly publicized hazardous waste contamination incidents.¹⁹ Most of the essential elements of CERCLA were present in the first iteration of the law: identification of the “polluter-pays” principle as the first priority of the cleanup,²⁰ the imposition of liability on a wide range of identified contributors to abandoned hazardous waste sites,²¹ and the creation of a “Superfund” from taxes on the oil and chemical industries to provide for cleanup of sites where financially solvent and liable polluters could not be identified.²² Still, it took a second legislative initiative in 1986, the Superfund Amendments and Reauthorization Act (SARA),²³ to take the first legislative steps toward addressing the obstacles to achieving workable and truly defensible settlements between the federal government and PRPs.²⁴

As it is now codified, the primary provisions of CERCLA constitute a fairly straightforward investigation and remediation statute.²⁵ A broad range of hazardous materials is covered under CERCLA, although petroleum is specifically excluded.²⁶ EPA can be made aware of the release or threatened release of hazardous substances through a variety of mechanisms, including investigation by state and local officials or by EPA itself,²⁷ self-reporting by a responsible party,²⁸

¹⁹ See *id.* at 9. Among the best known of these was the 1978 Love Canal incident in which an entire residential neighborhood in upstate New York was abandoned due to high levels of toxic waste discovered in fill material beneath the homes. See *id.*; see also 42 U.S.C. § 9661 (1994 & Supp. II 1996) (special provision included in CERCLA relating to a publicly funded buy-out of the Love Canal Emergency Declaration Area).

²⁰ See HIRD, *supra* note 4, at 10.

²¹ See 42 U.S.C. § 9607(a). The federal courts further added a presumption of joint and several liability to the strict liability specifically mandated by CERCLA, although the presumption can be rebutted. See Organ, *supra* note 4, at 1049-50; see, e.g., *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992) (although CERCLA does not require joint and several liability, the logical conclusion to be drawn from its silence on the matter and the imposition of strict liability is that courts are free to impose whatever liability standard seems most appropriate in achieving CERCLA's overarching goal of expeditious cleanup by known polluters).

²² See 42 U.S.C. § 9611.

²³ Pub. L. No. 99-499, 100 Stat. 1678 (1999) (SARA). Among its many changes, SARA introduced an entirely new provision, section 122, codified at 42 U.S.C. § 9622, intended to act as a “significant inducement for parties to come forth, to settle, to avoid wasteful litigation, and thus to begin cleanup.” H.R. Rep. No. 99-253(I), at 59-60 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2840-41.

²⁴ See BRADFORD F. WHITMAN, *SUPERFUND LAW AND PRACTICE* 208 (1991).

²⁵ See Organ, *supra* note 4, at 1055.

²⁶ See 42 U.S.C. § 9601(14). EPA may make further additions to covered hazardous materials through the provisions of 42 U.S.C. § 9602.

²⁷ See 42 U.S.C. § 9604(e); 40 C.F.R. § 300.405(a)(3), (5) (1998).

²⁸ See 42 U.S.C. § 9603(a), (c); 40 C.F.R. § 300.405(a)(1)-(2), (4).

and/or private party/citizen petition to EPA to conduct an investigation.²⁹

Once such a site has been identified, EPA is initially responsible for conducting a preliminary site assessment and inspection to gauge the level and seriousness of contamination and the potential threat to human health and the natural environment through a variety of pathways (air, land, groundwater, etc.).³⁰ Depending on the seriousness and immediacy of the threat to the public and the environment, EPA may either choose to conduct a full removal evaluation³¹ if the threat is immediate, or a full remedial evaluation³² if the threat is anticipated to develop more slowly or a longer-term solution is required.³³ The latter cases, in which long-term, permanent site cleanup is undertaken, constitute the heart of the Superfund response regime.³⁴

If a remedial assessment is deemed appropriate, EPA will normally go through the formal steps required to assign the site a score in the Hazard Ranking System (HRS).³⁵ If EPA scores the risk from the site at a sufficiently high level on the HRS, the site is then proposed for listing on the National Priorities List (NPL).³⁶

From this point forward, the crucial consideration in any site remediation process is whether EPA will be forced to draw from the Superfund itself to finance the cleanup at the front end and pursue cost recovery from PRPs sometime later.³⁷ If PRPs can be identified through a variety of means,³⁸ and those PRPs possess the resources

²⁹ See 42 U.S.C. § 9605(d); 40 C.F.R. § 300.405(a)(6).

³⁰ See 42 U.S.C. § 9604(a)(1); VALERIE M. FOGLEMAN, HAZARDOUS WASTE CLEANUP, LIABILITY, AND LITIGATION: A COMPREHENSIVE GUIDE TO SUPERFUND LAW 32 (1992).

³¹ A full removal evaluation concentrates on the short-term, immediate response to the problem, including the rapid physical removal of contaminated soil and other matter from the site. See 42 U.S.C. § 9604(a). Removal actions themselves are limited to a total of two million dollars in cost and twelve months in duration. See *id.* § 9604(c)(1).

³² The typical full remedial evaluation is a more involved and drawn-out endeavor than a removal evaluation, including an examination by the Agency for Toxic Substance and Disease Registry (ATSDR) of the potential health effects of the site's contamination on the surrounding community and a first step toward developing the data required to perform a full, permanent site remediation project. See 42 U.S.C. § 9604(a)(1), (c), (i).

³³ See 42 U.S.C. § 9604(a)(1); 40 C.F.R. §§ 300.410 and 300.420.

³⁴ See 42 U.S.C. § 9604(c); 40 C.F.R. §§ 300.425-435; HIRD, *supra* note 4, at 16.

³⁵ See 40 C.F.R. § 300.425(d), and accompanying Appendix A.

³⁶ See *id.* § 300.425(d); HIRD, *supra* note 4, at 16. The NPL is the list of sites that are given the highest priority for EPA action and direct supervision of cleanup/remediation. See HIRD, *supra* note 4, at 16.

³⁷ See *id.* at 17.

³⁸ See Organ, *supra* note 4, at 1058.

needed to carry out the anticipated cleanup steps, EPA is instructed by CERCLA to force cleanup by those PRPs and thereby preserve the Superfund for truly orphaned sites.³⁹ PRPs are defined broadly under CERCLA as owners and operators of hazardous waste facilities (past and present, depending on the circumstances), those who arranged for disposal of hazardous substances at those facilities (generators), and other arrangers and transporters of hazardous substances to those facilities.⁴⁰ PRPs are made responsible not only for past and future response and remediation costs (i.e., the cost of assessing the site's risk to public health, selecting an alternative, and conducting and maintaining a cleanup),⁴¹ but also for damages to natural resources⁴² and for the costs of health assessments related to the site.⁴³

EPA has two options it can pursue to secure PRP funding and execution of cleanup.⁴⁴ On one hand, if the release presents a sufficiently imminent threat, EPA may use either the U.S. Attorney General and the federal courts or its own independent power to issue judicial or administrative orders to compel PRPs to perform site cleanup.⁴⁵ On the other hand, EPA may attempt to negotiate a settlement with the PRPs in which the PRPs agree to perform or fund all (or substantially all) remaining site cleanup activities in exchange for a release⁴⁶ from further liability to the federal government, and generally the applicable state, under CERCLA and state law, and protection from future contribution actions by other PRPs.⁴⁷

Once a site has been listed on the NPL, the remaining steps in the remediation process are fairly well established.⁴⁸ The lead agency, whether EPA or the appropriate state agency, or the PRPs themselves, will conduct the Remedial Investigation and Feasibility Study (RI/FS) to determine the precise extent of contamination, the nature of the hazardous wastes involved, the required level of cleanup, and the potential remedial actions that can be taken.⁴⁹ Next, EPA or the lead

³⁹ See 42 U.S.C. § 9622(a); DANIEL MAZMANIAN & DAVID MORELL, *BEYOND SUPERFUND: AMERICA'S TOXIC POLICY FOR THE 1990s*, at 33 (1992).

⁴⁰ See 42 U.S.C. § 9607(a)(1)-(4).

⁴¹ See *id.* § 9607(a)(4)(A), (B).

⁴² See *id.* § 9607(a)(4)(C).

⁴³ See *id.* § 9607(a)(4)(D).

⁴⁴ See Organ, *supra* note 4, at 1056-57.

⁴⁵ See 42 U.S.C. § 9606(a).

⁴⁶ Under 42 U.S.C. § 9622(f), this is known as a "covenant not to sue."

⁴⁷ See 42 U.S.C. § 9622(c), (f), (h)(4).

⁴⁸ See Organ, *supra* note 4, at 1055.

⁴⁹ See 40 C.F.R. § 300.430(a)-(e) (1998).

agency formally selects the final remedial alternative through a formal Record of Decision (ROD) after consulting with the appropriate federal and state agencies and the PRPs.⁵⁰ Once the ROD is finalized, these same parties then settle on a Remedial Design and a plan for carrying out that design, known as the Remedial Action (RA).⁵¹ EPA, the lead agency, or the PRPs then carry out or construct the planned RA.⁵² Finally, once the RA is completed, EPA usually moves to remove, or delist, the site from the NPL while still requiring proof of the continuing operation and maintenance of the RA.⁵³

Although issuing a judicial or administrative order requiring a strict set of cleanup actions from all of the identified PRPs at a given site may seem like a relatively simple, clear-cut way of approaching site cleanup, a voluntary settlement including a consent order⁵⁴ lodged with and reviewed by the appropriate federal district court has been viewed as the optimal method of operation since CERCLA's inception, an approach statutorily endorsed and reinforced by SARA in 1986.⁵⁵ As laid out at section 122, the primary purpose of encouraging settlements is to "expedite effective remedial actions and minimize litigation."⁵⁶ The key innovations provided in section 122 included: (1) expanded capacity for EPA and other lead agencies to mix funding between the Superfund and PRPs at individual sites;⁵⁷ (2) formalization of the already-existing consent decree process;⁵⁸ (3) encour-

⁵⁰ See *id.* § 300.430(f).

⁵¹ See *id.* § 300.435(a).

⁵² See *id.* § 300.435(a)-(c).

⁵³ See *id.* § 300.435(a)-(c), (f). The maintenance period for RAs is usually assumed to extend to thirty years. See FOGLEMAN, *supra* note 30, at 44.

⁵⁴ Early on, EPA acted without specific legislative authority when entering into voluntary agreements and lodging consent orders. See WHITMAN, *supra* note 24, at 208. After SARA and the adoption of 42 U.S.C. § 9622, which specifically authorized settlements and prescribed a process for their codification in consent decrees or administrative orders, EPA, in conjunction with the United States Department of Justice, was able to act more systematically, and has consistently revised and updated its series of model consent decrees, including, most significantly, its *Revised Model RD/RA Consent Decree* (July 1995), which provides the key negotiating basis for many voluntary settlements under CERCLA. See Organ, *supra* note 4, at 1057.

⁵⁵ See 42 U.S.C. § 9622 (1994 & Supp. II 1996). SARA, passed in 1986, represents the only complete reauthorization of Superfund since its initial passage in 1980. See HIRD, *supra* note 4, at 13-14. In addition to the codified settlement provisions of 42 U.S.C. § 9622, SARA also increased the amount available to the Superfund itself (from \$1.6 billion in the 1980 law, to \$8.5 billion), and attempted to set strict site assessment and cleanup goals for EPA. See *id.*

⁵⁶ 42 U.S.C. § 9622(a).

⁵⁷ See *id.* § 9622(b)(1).

⁵⁸ See *id.* § 9622(d)(1)(A)-(C).

agement for EPA and other lead agencies to notify PRPs promptly of their potential liability and the benefits of settlement, including a mandatory 120-day moratorium on further lead agency response actions after settlement negotiations are initiated;⁵⁹ (4) authorization for EPA to issue non-binding preliminary allocations of responsibility among PRPs;⁶⁰ (5) ability to provide settling PRPs with covenants not to sue;⁶¹ and (6) authorization to permanently settle all claims (including contribution claims from other PRPs) against any PRP, but especially against so-called "de minimis" PRPs.⁶² Although the improved and clarified settlement provisions of section 122 have been in place since 1986, the cleanup has continued to be slow and very costly, with some estimates putting the total time from site identification to de-listing at twelve years, and the average total cost per NPL site cleanup at nearly \$17 million.⁶³

Much has been written about the continuing impediments to voluntary settlements, especially under the federal Superfund law.⁶⁴ Many critics have pointed to the imposition of strict joint and several liability by CERCLA and the federal courts as a strong disincentive to settle despite the promise of contribution protection because doing so amounts to an almost perpetual acceptance of the inevitably high costs of that liability scheme.⁶⁵ Even when PRPs appear eager to settle, they may be deterred by the perceived unfairness of the distribution of the cleanup costs among the settling PRPs, and the existence of non-settling or recalcitrant PRPs whose shares must be funded by the settling PRPs along with any orphan shares.⁶⁶ Although EPA has

⁵⁹ See *id.* § 9622(e)(1)-(2).

⁶⁰ See *id.* § 9622(e)(3).

⁶¹ See 42 U.S.C. § 9622(f)(1). EPA is also authorized to require the inclusion of re-openers covering unforeseen future circumstances in these covenants, but the re-openers obviously apply only to claims by the government against settling PRPs and not other private parties. See *id.* § 9622(f)(6).

⁶² See *id.* § 9622(g). "De minimis" PRPs are defined as those PRPs who have only "minimally" contributed to a site's contamination (measured either by volume or toxicity) or were essentially just innocent owners/operators of the site. See *id.* § 9622(g)(1)(A)-(B).

⁶³ See PLATER, *supra* note 3, at 843, 852. The cost estimate provided is the middle-range value for NPL site cleanups as analyzed by the Congressional Budget Office in a February 1994 report entitled "The Total Cost of Cleaning Up Nonfederal Superfund Sites." See *id.* at 852.

⁶⁴ See generally Organ, *supra* note 4; DeMeo, *supra* note 5; Douglas A. Henderson, *Environmental Liability and the Law of Contracts*, 50 BUS. LAW. 183 (1994).

⁶⁵ See MAZMANIAN & MORELL, *supra* note 39, at 36-37.

⁶⁶ See Organ, *supra* note 4, at 1139-40. Organ's central thesis is that the sheer difficulty of cost recovery/contribution actions, combined with differing judicial interpretations of key sections of CERCLA, particularly 42 U.S.C. §§ 9607(a) and 9613(f)(1), so severely pe-

shown an increasing willingness to address the problem of orphan shares through reimbursement from the Superfund, the lack of a specific statutory mandate to do so, and the uncertainty of year-on-year funding for this practice continue to provide a disincentive to settlement.⁶⁷ However, given the underlying "polluter-pays" philosophy of CERCLA and the obvious inadequacies of the Superfund itself, most observers agree that negotiated settlements will continue to be EPA's method of choice for resolving site cleanup responsibility.⁶⁸

B. CERCLA, Federalism and the States

Unlike its approach with similar national environmental programs including the Clean Water Act⁶⁹ and the Clean Air Act,⁷⁰ Congress has never officially permitted EPA to delegate independent enforcement responsibility for CERCLA to the states.⁷¹ Instead, EPA and its state counterparts have worked in a relatively informal fashion regarding the cleanup of hazardous waste sites across the country.⁷²

Despite the informality in the working relationship, CERCLA does include specific language regarding the role of states in enforcing its statutory scheme.⁷³ Two of the most important and wide-

nalizes settling PRPs that settlements are almost always eliminated as a truly equitable, fair way of addressing PRP liability apportionment. *See id.* In addition, the issue of financially insolvent PRPs, while addressed directly by the United States Supreme Court in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, remains a significant problem. *See* 474 U.S. 494, 506-07 (1986). Even with the edict of the Court that bankruptcy trustees may not abandon property in contravention of state environmental statutes or regulations, the reality remains that bankrupt PRPs are in a very poor position to contribute their equitable portion of cleanup costs at a given site. *See id.* at 507.

⁶⁷ *See* Herman, *supra* note 2, at 197. Herman noted that over \$100 million was spent by EPA in FY1996 and FY1997 to reimburse settling PRPs for orphan shares at various federal Superfund sites, representing a significant commitment from EPA in the first two years after adoption of its orphan shares policy. *See id.* Still, the continued lapse in renewal (since 1995) of the chemical feedstock taxes that were meant to provide a dedicated funding source for Superfund has increased the uncertainty surrounding the program, despite signs of a willingness in Congress to allocate significant General Fund revenues to the Fund. *See* *Republicans Reiterate Commitment to Comprehensive Reform of Superfund*, 28 ENV'T REP. (BNA) 18, 18 (May 2, 1997).

⁶⁸ *See* Organ, *supra* note 4, at 1046-48.

⁶⁹ *See* Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (1994 & Supp. II 1996).

⁷⁰ *See* Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994 & Supp. II 1996).

⁷¹ *See* Mark D. Anderson, *The State Voluntary Cleanup Program Alternative*, 10 NAT. RESOURCES & ENV'T 22, 22 (1996). Instead, EPA has only been specifically authorized to agree to site-by-site cooperative agreements with states. *See* 42 U.S.C. § 9604(d).

⁷² *See* HIRD, *supra* note 4, at 21; MAZMANIAN & MORELL, *supra* note 39, at 39.

⁷³ *See* MAZMANIAN & MORELL, *supra* note 39, at 39-40; WHITMAN, *supra* note 24, at 92.

ranging state-related CERCLA provisions are found at sections 104(c) and (d).⁷⁴ Section 104(c) mandates that any remedial action at a CERCLA site (in practice, a site that is formally listed on the NPL) must be cooperatively agreed-upon by EPA and the state and political subdivision in which the site is located.⁷⁵ Under section 104(d), states are authorized to act as the principally responsible or "lead" agency in selected CERCLA cleanups.⁷⁶ In these cases, EPA and the state work out site-specific agreements outlining the specific responsibilities of the relevant agencies and guaranteeing that the state has the requisite intention and resources required to see the cleanups through.⁷⁷

State laws parallel to CERCLA, often referred to as "State Superfund" laws, are designed to go after smaller and theoretically less complicated or immediately threatening sites than CERCLA.⁷⁸ As a result, few states have included a significant commitment of funding in their hazardous waste cleanup laws.⁷⁹ Instead, the states have focused on crafting liability schemes similar to CERCLA's strict joint and several liability structure.⁸⁰ In the early 1990s, many states, recognizing some of the drawbacks of their own State Superfund schemes, began to seek new ways to encourage voluntary settlement and cleanup of sites.⁸¹

⁷⁴ See 42 U.S.C. §§ 9604(c), (d); MAZMANIAN & MORELL, *supra* note 39, at 39-40; WHITMAN, *supra* note 24, at 92.

⁷⁵ See 42 U.S.C. § 9604(c)(2) ("The President shall consult with the affected State or States before determining any appropriate remedial action to be taken pursuant to the authority granted under this . . . section."); FOGLEMAN, *supra* note 30, at 46-47.

⁷⁶ See 42 U.S.C. § 9604(d)(1)(A) ("If the President determines that the State . . . has the capability to carry out any or all such actions [authorized by § 9604], . . . the President may enter into a contract or cooperative agreement with the State. . . ."); FOGLEMAN, *supra* note 30, at 46-47.

⁷⁷ See 42 U.S.C. § 9604(c)(3), (d)(1)(B); 40 C.F.R. § 300.505 (1998) (cooperative agreements must be reached between EPA and a given state before EPA can take any action using the Superfund to pay for cleanup; a single NPL facility or a group of facilities may be covered by a single cooperative agreement); WHITMAN, *supra* note 24, at 53-55.

⁷⁸ See DANIEL P. SELMI & KENNETH A. MANASTER, *STATE ENVIRONMENTAL LAW* 9-3 (1998); Anderson, *supra* note 71, at 22.

⁷⁹ See MAZMANIAN & MORELL, *supra* note 39, at 39.

⁸⁰ See Anderson, *supra* note 71, at 22; SELMI & MANASTER, *supra* note 78, at 9-4.

⁸¹ See Anderson, *supra* note 71, at 22-23. Most particularly, the states became concerned about the counterproductive chilling effect that their liability regimes were having on the redevelopment of centrally located "brownfield" sites. See *id.* EPA has defined "brownfields" as "abandoned, idled, or under-used industrial and commercial sites where expansion or redevelopment is complicated by real or perceived environmental contamination that can add cost, time, or uncertainty to a redevelopment project." PLATER, *supra* note 3, at 921. The brownfields issue has begun to reach critical mass in the mid- to late-1990s as State Superfund programs have aggressively attempted to address the problems of these sites. See *id.*

In response to this trend, EPA began to rethink its approach and attempted to rationalize and streamline its relationship with the various State Superfund programs.⁸² Rather than wait for Congress's anticipated reauthorization of CERCLA to bring about the change, EPA issued its *Final Draft Guidance for Development of Superfund Memoranda of Agreement Concerning State Voluntary Cleanup Programs (Final Voluntary Program Guidance)*.⁸³ While the *Final Voluntary Program Guidance* contained more stringent participation requirements than earlier versions, it also finally promised the possibility of a single Superfund-related agreement for each state, thereby delegating most of EPA's enforcement power under CERCLA to the state agencies administering their individual hazardous waste cleanup programs.⁸⁴ In response to widespread protest from state environmental agencies regarding the strictness of the *Final Voluntary Program Guidance's* approval requirements, EPA officially withdrew the *Final Voluntary Program Guidance* and returned to its case-by-case approach under CERCLA, although a handful of states have managed to come to terms with EPA and sign statewide Memoranda of Agreement.⁸⁵

The bottom line is that the vast majority of states do not have statewide Memoranda of Agreement and therefore their relationships with EPA regarding CERCLA enforcement remain informal.⁸⁶ In practice, this means that the precise legal effect of exclusive state agency approval of a cleanup in most cases remains clouded by the possibility (albeit remote in most cases) that EPA will revisit the cleanup and make its own independent determination of liability under CERCLA.⁸⁷ Although the likelihood of EPA "overfiling" or revisiting an apparently closed state-supervised cleanup action can be gauged reasonably well by perceptive PRPs, even a relatively low level

⁸² See David P. Littell and Kenneth F. Gray, *Contaminated Property*, TACKLING ENVIRONMENTAL ISSUES IN MAINE (1998 Update), 10-1, 10-16.

⁸³ OSWER Directive, Notice of availability and request for comments, Sept. 9, 1997, 62 Fed. Reg. 47,495 (1997).

⁸⁴ See *Final Voluntary Program Guidance*, 62 Fed. Reg. at 47,497.

⁸⁵ See Littell & Gray, *supra* note 82, at 10-16; *ECOS Asks EPA to Withdraw Guidance, Begin Dialogue With States on Brownfields*, 28 Env't Rep. (BNA) 989, 989-90 (Sept. 26, 1997). In New England, only Rhode Island has signed a statewide Superfund Memorandum of Agreement with EPA. See Littell & Gray, *supra* note 82, at 10-16.

⁸⁶ See *id.*

⁸⁷ See *Final Voluntary Program Guidance*, 62 Fed. Reg. 47,497 (1997) (purpose of the *Final Voluntary Program Guidance* was at least partially to allow "Regions and States [to] agree that EPA will not exercise cost recovery authority and does not generally anticipate taking a removal or remedial action at . . . sites . . . addressed by a State's voluntary cleanup program . . ."); Littell & Gray, *supra* note 82, at 10-16.

of uncertainty over EPA's potential course of action in the future can scare away most PRPs, including even the most risk-tolerant.⁸⁸

C. *Illustrative State Law: Maine's Uncontrolled Hazardous Substance Sites Act*

Adopted in 1983, Maine's Uncontrolled Hazardous Substance Sites Act⁸⁹ was modeled closely on CERCLA.⁹⁰ In most respects, the Maine Superfund Act parallels and even exceeds CERCLA's liability scheme.⁹¹ In addition, a wider range of hazardous substances is covered by the Maine Superfund Act, including some petroleum by-products.⁹² In other instances, however, the Maine Superfund Act is arguably less stringent than CERCLA, including a more permissive third-party action defense to the imposition of strict liability.⁹³ Even though a revolving state cleanup fund is provided for in the Maine Superfund Act, it is relatively small in comparison to the magnitude of the state's hazardous waste site cleanup needs.⁹⁴ Maine DEP, charged with administering the Maine Superfund Act, therefore strives to arrange for voluntary, negotiated settlements in nearly all cases, rather than expend scarce state funds directly on cleanup.⁹⁵

⁸⁸ See SELMI & MANASTER, *supra* note 78, at 9–104. Regarding the value of state-issued liability limitations vis-à-vis ultimate CERCLA liability, Selmi and Manaster observed that “[w]hile these signals [i.e., removal of a site from the NPL, or issuance of a comfort letter by EPA to the PRP] will likely indicate that EPA has no interest in the property, ultimately the question depends on the client’s ‘comfort level’ in proceeding in the absence of legally binding assurances by EPA.” *Id.*; see also *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 669–72 (S.D.N.Y. 1996) (holding that compliance with state law does not preclude liability under CERCLA). The case of *Harmon Industries, Inc. v. Browner* recently provided an interesting counterpoint to the informal situation in CERCLA by holding that EPA was barred from overfiling in a RCRA action by the nature of its delegation of enforcement power to the state in question and by principles of *res judicata*. See 19 F. Supp. 2d 988, 996–98 (W.D. Mo. 1998).

⁸⁹ 1983 Me. Laws 569, ME. REV. STAT. ANN. tit. 38, §§ 1361–1371 (West 1998).

⁹⁰ See Littell & Gray, *supra* note 82, at 10–17.

⁹¹ See *id.* at 10–17 to 10–18. To give just two examples: (1) the Maine Superfund Act considers intermediate landowners to be PRPs, while CERCLA does not; and (2) the Maine Superfund Act statutorily imposes joint and several liability, while CERCLA leaves that issue to judicial interpretation. See ME. REV. STAT. ANN. tit. 38, §§ 1362(2), 1367; 42 U.S.C. § 9607(a)(2), (4) (1994 & Supp. II 1996).

⁹² See ME. STAT. REV. ANN. tit. 38, § 1362(1). Specifically, waste oil is included under section 1362(1)(G).

⁹³ See *id.* § 1367.

⁹⁴ See *id.* § 1364(6). The fund is called the “Uncontrolled Sites Fund.” See *id.* In November 1996, Maine voters approved a \$2.5 million bond issue to replenish the fund. See Maine DEP, Bureau of Remediation and Waste Management, *1996 Annual Report*, at 1.

⁹⁵ See HIRD, *supra* note 4, at 21–22; Littell & Gray, *supra* note 82, at 10–17.

In seeking voluntary private-party cleanups, Maine DEP is guided by its Voluntary Response Action Program (VRAP), adopted ten years after the initial passage of the Maine Superfund Act.⁹⁶ Modeled on similar programs in a number of other states,⁹⁷ the VRAP operates in roughly the same fashion as section 122 of CERCLA:⁹⁸ PRPs who agree to fund and perform qualifying cleanup activities themselves are given liability protection from the state and contribution protection from non-settling PRPs.⁹⁹ In addition to providing the same protection that EPA can offer at federal Superfund sites, the VRAP also provides for partial cleanup, which ties the remaining level of post-remediation contamination to the site's future use,¹⁰⁰ and statutorily extends liability protection to subsequent purchasers of such property.¹⁰¹

II. TRENDS AND ISSUES POINTING TOWARD SUPER SETTLEMENTS

In this section, four policy/industry and legal trends that have come together to make Super Settlements possible are examined: (1) future use-based cleanup standards; (2) the increasing size and sophistication of the environmental cleanup industry; (3) the emergence of a new environmental insurance market with suddenly eager providers and more sophisticated consumers; and (4) continued and growing dissatisfaction with current settlement models.

A. Future Use-Based Cleanup Standards

One of the harshest and most enduring criticisms of the hazardous waste cleanup process at both the federal and state levels has been the use of allegedly overprotective and needlessly expensive cleanup standards by regulators, particularly at the federal level.¹⁰² Even putting aside expense and overzealousness, cleanup standards were also long derided as too confusing, especially those related to CERCLA sites.¹⁰³ In response, federal and state regulatory agencies have begun

⁹⁶ See 1993 Me. Laws 569, ME. STAT. REV. ANN. tit. 38, § 343-E (1998).

⁹⁷ See Anderson, *supra* note 71, at 23; SELMI & MANASTER, *supra* note 78, at 39.

⁹⁸ See 42 U.S.C. § 9622 (1994 & Supp. II 1996).

⁹⁹ See ME. STAT. REV. ANN. tit. 38, § 343-E(9). Rather than style this protection a "covenant not to sue," as in CERCLA, the VRAP uses the term "no action assurance." See *id.*

¹⁰⁰ See *id.* § 343-E(2).

¹⁰¹ See *id.* § 343-E(6).

¹⁰² See, e.g., Anderson, *supra* note 71, at 22-23; Klee & Rosenberg, *supra* note 8, at 451.

¹⁰³ See WHITMAN, *supra* note 24, at 81; but cf. Richard L. Revesz & Richard B. Stewart, *The Superfund Debate*, in ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW 14-16

to loosen up the strict cleanup standards of the 1980s and are making more use of risk or future-use based cleanup approaches.¹⁰⁴

State regulators took the first steps toward more flexible standards in the early 1990s by revising their own State Superfund laws to permit cleanup standards that matched the level of hazardous waste-related risk remaining at a given property to its anticipated future re-use.¹⁰⁵ By the mid-1990s, EPA began to get into the act, but only haltingly, allowing for streamlined, pre-packaged "presumptive remedies" for a limited number of site types.¹⁰⁶ In 1997, however, EPA went further and issued a directive of its own allowing the consideration of a site's future use in deciding on cleanup standards for NPL sites.¹⁰⁷ In short, there is now no appreciable difference in the objective cleanup standards that will be applied to a site, whether it is under EPA or state supervision pursuant to either CERCLA or a State Superfund law, and those standards are now noticeably more flexible and less expensive than earlier, more one-size-fits-all standards from the viewpoint of the parties attempting to remediate a given site.¹⁰⁸

The introduction of more flexible, risk-based cleanup standards is regarded as having important implications for the success of site cleanups generally and the Super Settlement concept particularly.¹⁰⁹ Tying remediation to future use of a site can significantly lower the cost to remediate that site.¹¹⁰ In addition, risk-based cleanup standards can be more easily structured into definite and easily understood guidelines on cleanup than the more amorphous standards of the past.¹¹¹

(Revesz & Stewart eds., 1995) (questioning critiques of time and cost required by remediation and suggesting that public health should perhaps be the paramount concern, regardless of cost).

¹⁰⁴ See Anderson, *supra* note 71, at 23.

¹⁰⁵ See *id.* at 23-24. Massachusetts and Michigan were the early leaders in this move away from strict residential-based cleanup standards. See *id.* at 24. The Maine Superfund law was revised in 1993 to allow for what it referred to as "partial cleanup" protection for parties voluntarily remediating sites. See ME. REV. STAT. ANN. tit. 38, § 343-E(2).

¹⁰⁶ See generally OSWER Directives (Sept. 1993), *Presumptive Remedies: Policy and Procedures* (9355.0-47FS); *Presumptive Remedies: Site Characterization and Technology Selection for CERCLA Sites with Volatile Organic Compounds in Soils* (9355.0-48FS); *Presumptive Remedies for CERCLA Municipal Landfill Sites* (9355.0-49FS).

¹⁰⁷ See OSWER Directive, May 25, 1997: *Land Use in the CERCLA Remedy Selection Process* (9355.7-04); Littell & Gray, *supra* note 82, at 10-10.

¹⁰⁸ See Interview with David H. Critchfield, CEO, Emsource, in Portland, Me. (Jan. 8, 1999) (hereinafter Critchfield Interview).

¹⁰⁹ See Gray, *supra* note 9, at 298.

¹¹⁰ See Littell & Gray, *supra* note 82, at 10-9.

¹¹¹ See Gray, *supra* note 9, at 298.

B. *Increasing Technological Sophistication and Maturity of the Environmental Cleanup Industry*

According to a recent report by industry consultants, the on- and off-site hazardous waste management market in the United States now exceeds \$15 billion in gross revenue.¹¹² The phenomenal growth in the industry since the inception of CERCLA in 1980 has been accompanied by an increasing level of proficiency and sophistication in dealing with hazardous waste site cleanup.¹¹³ Gone are the days of uncertainty and resistance to the introduction of advanced cleanup technologies that led to the frustrating shuffling of waste from one site to another through most of the 1980s.¹¹⁴ Further, as experience has grown with various technologies and cleanup methods, state and federal regulators have begun to achieve a higher comfort level when answering the question of "How clean is clean?"¹¹⁵ In some states, the level of comfort has become so great that the entire remedial process has been privatized through the use of licensed site professionals or other regulatory stand-ins who supervise cleanup and take the place of government regulators at most State Superfund sites.¹¹⁶

The implications of this increased sophistication and comfort level for the prospects of the Super Settlement concept are twofold.¹¹⁷ First, the environmental cleanup industry has arguably advanced to the point where many of the more established and capable firms can safely forecast the most likely remedial alternative at a given site much earlier in the process than has previously been acknowledged. This means that negotiated settlements can occur even before formal selection of that alternative, and, in some cases, even before an

¹¹² See *U.S. Hazwaste Market Worth \$15,000m in '96*, HAZNEWS, Oct. 1, 1997, available in 1997 WL 8662332. The article reports on the results of a 1996 survey conducted by Frost & Sullivan, Inc., which estimated that the environmental cleanup industry would, however, grow at a relatively flat rate of just 1.6 percent per year in the near-term. See *id.*

¹¹³ See Gray, *supra* note 9, at 299.

¹¹⁴ See MAZMANIAN & MORELL, *supra* note 39, at 12-15, 117-42. In 1992, Mazmanian and Morell illustrated some of the more pointless cleanups of the 1980s, including the shuffling of waste from one site to the next, simply creating two problems instead of one. For example, waste from the Stringfellow Superfund site in Riverside, California was simply hauled away and redumped at another landfill in Los Angeles County, which subsequently became a Superfund site of its own. See *id.*

¹¹⁵ See *id.* at 47-48; SELMI & MANASTER, *supra* note 78, at 9-99-102. State law tends to be ahead of federal law in this area. See Klee & Rosenberg, *supra* note 8, at 453.

¹¹⁶ See Anderson, *supra* note 71, at 24. Anderson cites Massachusetts, Ohio, and North Carolina as the three states that have adopted the fully-privatized approach. See *id.*

¹¹⁷ See Gray, *supra* note 9, at 299.

RI/FS is completed.¹¹⁸ The costs to the PRPs resulting from the site can therefore be considerably lessened simply by reducing the amount of time for which they must confront the situation.¹¹⁹ Second, the greater size and stability of the firms now doing business in the environmental cleanup industry has, on its own, begun to garner the industry a higher level of respect.¹²⁰ When major environmental cleanup firms come forward with an innovative idea like the Super Settlement concept, federal and state regulators are increasingly willing to hear them out and explore their recommendations instead of dismissing them out of hand.¹²¹

C. Reemergence of the Environmental Insurance Industry

At the same time that the environmental cleanup industry has begun to acquire greater sophistication and respect, the insurance industry has been slowly reemerging as an interested player in helping environmental cleanup firms and PRPs at federal and state sites to better manage hazardous waste-related risk and potential liability.¹²² Early experiences among PRPs and their insurers during the early years of CERCLA-related litigation were certainly not pleasant.¹²³ As courts began to interpret the terms of CERCLA's strict liability structure and to frequently apply the judicial gloss of joint and several liability, insurers became increasingly unwilling to honor claims related to cleanup costs for hazardous waste contamination. As a consequence, insurers began writing complete pollution exclusions into their new corporate insurance policies.¹²⁴

Although relations have gradually improved in the 1990s, PRPs and their insurers continue to have a somewhat uneasy relationship.¹²⁵ Despite the lingering skepticism, however, environmental cleanup firms and large insurers have begun to strike deals for spe-

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See Fialka, *supra* note 5, at A28.

¹²¹ See *id.*

¹²² See Gray, *supra* note 9, at 298; Rodney J. Taylor, "Environmental Insurance Market Analysis and Forecast," Sept. 1998, at 2 (on file with author).

¹²³ See Wojcik, *supra* note 10; Interview with Robert E. Cleaves, partner, Verrill & Dana, LLP in Portland, Me. (Nov. 13, 1998) (hereinafter Cleaves Interview).

¹²⁴ See Wojcik, *supra* note 10; AMERICAN BAR ASSOCIATION, YOUNG LAWYERS DIVISION, CERCLA PRIMER 25-27 (Susan K. Wiens & Lisa S. Keyes eds., 1995); Revesz & Stewart, *supra* note 103, at 9-10.

¹²⁵ See Wojcik, *supra* note 10; Cleaves Interview, *supra* note 123.

cialized environmental liability insurance.¹²⁶ Some observers have pointed to the growing use of such insurance in the straightforward cleanup contracting sector of the industry, where a cleanup firm backed with an environmental insurance policy is hired by EPA, a state regulatory agency, or by a group of settling PRPs to provide specific site remediation services, as evidence indicating that the insurers' existing role in that context can be transferred to the Super Settlement concept.¹²⁷

The presence of specialized insurance, tailored to the environmental cleanup context, and offered by major, multinational insurance providers, is widely viewed as a crucial piece in promoting the use of Super Settlements; with sufficient insurance coverage, almost any risk, even hazardous waste-related risk, can be accurately priced and addressed.¹²⁸ In the last four years, several large insurance companies have shown themselves increasingly eager to enter the environmental insurance market.¹²⁹ In fact, the environmental insurance market area is one of the very few sectors of the overall insurance industry that is growing at a healthy clip.¹³⁰ One of the concerns cited by regulators at both the state and federal levels has been the relatively limited loss experience of insurers in this area.¹³¹ However, as claims are filed over time, and are honored, these concerns can be expected to diminish.¹³²

¹²⁶ See Taylor, *supra* note 122, at 3; Wojcik, *supra* note 10.

¹²⁷ See Gray, *supra* note 9, at 298-99; Wojcik, *supra* note 10.

¹²⁸ See Fialka, *supra* note 5, at A28; Wojcik, *supra* note 10. The value of environmental insurance has been keenly felt in the corporate merger and asset acquisition field, where the use of finite environmental insurance instead of open-ended indemnities has been increasingly used to deal with potential environmental liabilities. See Taylor, *supra* note 122, at 8, 10.

¹²⁹ See *id.* at 2. Major insurers who have entered the market include American International Group, Willis Corroon, Kemper Environmental, Zurich, and ECS/Reliance. See *id.* at 2-4.

¹³⁰ See *id.* at 4-5.

¹³¹ See Wojcik, *supra* note 10.

¹³² See Taylor, *supra* note 122, at 6-7; see also Kathy McCabe, *A Bumpy Ride to the Top*, BOSTON GLOBE, July 14, 1999, at E4. Ms. McCabe's article describes how a Boston area Harley-Davidson dealership confronted with much greater than expected environmental contamination cleanup costs was able to avoid a disaster because it had purchased \$1,000,000 worth of environmental insurance for just \$53,000. See *id.*

D. Sustained and Increasing Dissatisfaction With Existing Settlement Models

There are significant problems with the way settlements are currently reached at both the state and federal levels.¹³³ Settlements are generally criticized most harshly for their very high transaction costs and the excessive duration of the negotiation period.¹³⁴

The most commonly used settlement paradigm has been the bifurcated small PRP/large PRP cash-out settlement.¹³⁵ Under this settlement model, very large and heavily responsible PRPs at a multi-party site settle with EPA or the lead agency after the smaller (or "de minimis") PRPs do so.¹³⁶ The cash-out for the de minimis parties usually occurs fairly early on in the remediation process, allowing them to escape the net that the more heavily involved PRPs realize they cannot.¹³⁷ However, as part of the cash-out deals, the smaller PRPs are expected to pay premiums over and above their estimated proportional share in the site's contamination.¹³⁸ The premiums from the smaller PRPs are intentionally required in order to lighten the load on the larger PRPs, who must assume a much more open-ended cleanup-related liability in order to obtain their ultimate release.¹³⁹ Although non-settling parties have occasionally attempted to challenge the fairness of these premium-required large party/small party deals, they have been a well settled part of the Superfund landscape since the late 1980s, following the adoption of SARA and a series of favorable court decisions.¹⁴⁰

¹³³ See Organ, *supra* note 4, at 1044–45.

¹³⁴ See *id.*; Klee & Rosenberg, *supra* note 8, at 451. Klee and Rosenberg note that "[e]ven those willing to conduct voluntary cleanups find themselves stymied by excessive legal and analytical processes." Klee & Rosenberg, *supra* note 8, at 451.

¹³⁵ See Gray, *supra* note 9, at 298; WHITMAN, *supra* note 24, at 207–14, 222–35.

¹³⁶ See Gray, *supra* note 9, at 298; WHITMAN, *supra* note 24, at 207–14, 222–35.

¹³⁷ See Gray, *supra* note 9, at 298; WHITMAN, *supra* note 24, at 207–14, 222–35.

¹³⁸ See Gray, *supra* note 9, at 298; WHITMAN, *supra* note 24, at 207–14, 222–35.

¹³⁹ See Gray, *supra* note 9, at 298; WHITMAN, *supra* note 24, at 207–14, 222–35.

¹⁴⁰ Although the United States Supreme Court has not yet directly addressed the issue, several of the circuit courts of appeals have dealt with the question. See, e.g., *In re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2d Cir. 1992); *United States v. Hercules, Inc.*, 961 F.2d 796 (8th Cir. 1992). The leading case among the circuit courts of appeals regarding the validity of such settlement deals is *United States v. Cannons Engineering Corp.* See 899 F.2d 79 (1st Cir. 1990). Although some of the language in *Cannons* suggests that the First Circuit was somewhat concerned about the wisdom of requiring premiums from smaller PRPs, it has generally been followed for the proposition that EPA and other lead agencies are to be given considerable deference under CERCLA in deciding how to reach multi-party settlements. See *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994). Thus, in *George Trucking*, the First Circuit, which hewed closely to the standard it

While the large PRP/small PRP settlement has been the most common settlement method used in recent years, other methods, including the use of prospective purchaser agreements and growing use of the Superfund by EPA to account for large orphan shares in some settlements, have been given increasing emphasis.¹⁴¹ Despite this slowly widening settlement universe, few of the parties involved appear satisfied with the progress.¹⁴² Smaller PRPs often feel pushed around and extorted by both the government regulators and the larger PRPs, the larger PRPs must deal with a continuing, open-ended cleanup responsibility, and government regulatory agencies must manage a public and unwieldy negotiation process.¹⁴³ Further, even after these negotiations are concluded, they remain open to judicial review, despite the clear unwillingness of the federal courts of appeals to overturn such public, complicated, and delicate agreements.¹⁴⁴

Proponents of the Super Settlement concept claim that such agreements hold out the promise of terminating all cleanup-related liability for all PRPs, large as well as small, in the present, instead of projecting it into a long-range future.¹⁴⁵ Of course, for each PRP, the value of settling in the near-term instead of holding out for the longer-term depends on several individual factors.¹⁴⁶ These factors can include a PRP's level of involvement and responsibility, its ability to pay now or later, and its overall understanding of the potential total cost for dealing with its cleanup-related liability.¹⁴⁷

III. CASE EXAMPLE: THE WELLS SUPER SETTLEMENT

This section presents the nearly completed settlement at a State Superfund site in Wells, Maine, as the prototype Super Settlement. A general background subsection is followed by a more detailed subsec-

established in *Cannons*, noted that "[d]espite appellants' [George Trucking, the site's non-settling owner/operator PRPs] animadversions, Cannons has not rusted. It teaches that CERCLA consent decrees must be reasonable, faithful to the statute's objectives, and fair (both procedurally and substantively)." See *id.* at 1084; see also *United States v. Kramer*, 19 F. Supp.2d 273, 280-81 (D.N.J. 1998).

¹⁴¹ See Herman, *supra* note 2, at 197-98.

¹⁴² See *Kramer*, 19 F. Supp.2d at 277; Gray, *supra* note 9, at 298.

¹⁴³ See *George Trucking*, 34 F.3d at 1085; Organ, *supra* note 4, at 1061-64.

¹⁴⁴ See *George Trucking*, 34 F.3d at 1085 ("[A]n appellate tribunal may overturn a district court's decision to approve or reject the entry of a CERCLA consent decree only for manifest abuse of discretion.").

¹⁴⁵ See Gray, *supra* note 9, at 298; Cleaves Interview, *supra* note 123.

¹⁴⁶ See Gray, *supra* note 9, at 299; Organ, *supra* note 4, at 1068.

¹⁴⁷ See Gray, *supra* note 9, at 299; Organ, *supra* note 4, at 1068.

tion describing the key parties and, to the extent currently available, the details of the proposed agreement. Finally, a concluding subsection critiques the progress of the Super Settlement concept as it has worked thus far at the Wells site.

A. Background

Operated by Portland Bangor Waste Oil (Portland Bangor) as an industrial waste oil facility from the early 1950s until 1980,¹⁴⁸ when the firm went bankrupt, the Wells, Maine, state hazardous waste site has been involved in full-blown multi-party negotiations and litigation since 1995.¹⁴⁹ Given the wide range of contaminants at the site, including lead and industrial solvents in addition to various waste oil components,¹⁵⁰ EPA and Maine DEP took several years to decide whether to list the site on the NPL pursuant to CERCLA or to use the Maine Superfund Law.¹⁵¹ Maine DEP has estimated that there are between 2500 and 3000 PRPs related to the site, although it has notified and brought into the process only the 400 or so parties who top the list.¹⁵²

Although the identified PRPs initially showed some reluctance to come forward and clean up the site voluntarily, they eventually formed a PRP Site Steering Committee for that purpose in 1997.¹⁵³ The Site Steering Committee has been responsible for working on behalf of the identified PRPs with Maine DEP officials and the Superfund Entity to bring the Wells site through the negotiation process

¹⁴⁸ See Jacques Whitford Company, *Feasibility Study—Portland Bangor Waste Oil Site—Wells, Maine* (Jan. 25, 1999), at 4 (hereinafter *Wells FS*).

¹⁴⁹ See Maine DEP, Division of Remediation, Bureau of Remediation & Waste Management, *1997 Annual Report*, at 1–2 (hereinafter *1997 Annual Report*).

¹⁵⁰ See *1997 Annual Report*, *supra* note 149, at 1; *Wells FS*, *supra* note 148, at 6–9. Among the several waste oil-related pollutants identified at the site, the *Wells FS* cites very high concentrations of lead, polychlorinated biphenyls (PCBs), and volatile organic compounds (VOCs) (including benzene, ethylbenzene, toluene and xylene), primarily in the site's four waste lagoons. See *Wells FS*, *supra* note 148, at 6–9.

¹⁵¹ See *1997 Annual Report*, *supra* note 149, at 1; Interview with Clayton Maybee, Wells Site Project Manager, Maine DEP, in Augusta, Me. (Mar. 19, 1999) (hereinafter *Maybee Interview*).

¹⁵² See Gray, *supra* note 9, at 298; Fialka, *supra* note 5, at A28. The numbers are slightly different in the two articles: Gray cites 2,400 total PRPs, while Fialka cites 2,900, and Gray identifies the involved PRP total as around 350, while Fialka puts it at 397. See *id.* The *1997 Annual Report* notes only that the total number of notified PRPs is "close to 400." See *1997 Annual Report*, *supra* note 149, at 2.

¹⁵³ See Letter from Kenneth F. Gray, partner, Pierce Atwood, to Dennis Harnisch, Assistant Attorney General, State of Maine (June 13, 1997) (hereinafter *Gray-Harnisch Letter*) (on file with author).

and arrive at an equitable settlement agreement among all the parties under the Maine Superfund Law.¹⁵⁴

Complicating factors related to the Wells site have included both contamination-related and organization-related difficulties.¹⁵⁵ At this point in the cleanup process, the migration of contamination from the site into groundwater and thereby to nearby residential wells has emerged as a significant issue.¹⁵⁶ It is unclear how the final settlement agreement will address the concern over groundwater, although it now looks as if expensive pumping and treatment will not be required given the relatively sparse settlement area affected and the limited impact of the contamination.¹⁵⁷

Regarding organization-related complications, the listing of the Town of Wells and several other governmental entities, who sent some quantity of their waste oil to the facility prior to its closure, as well as the United States Department of Defense (DOD), as identified PRPs has posed some difficulty throughout the negotiation process.¹⁵⁸ The site has bedeviled the Town since its closure; when Portland Bangor went bankrupt and stopped paying taxes, the Town voted to legally excuse itself from foreclosing and assuming further liability as the owner of the site.¹⁵⁹ DOD's involvement reportedly increased the amount of bureaucratic delay inherent in any Superfund-related negotiation process in at least two ways: (1) simply through the added difficulty of dealing with a massive federal agency with several layers of

¹⁵⁴ See 1997 Annual Report, *supra* note 149, at 2; Gray-Harnisch Letter, *supra* note 153, at 2. The 1997 Annual Report notes: "The responsible parties formed a technical review group to provide comment on technical issues relating to the Remedial Investigation and Feasibility Study. The technical review group changed from in house review [and essentially became the Site Steering Committee] when the responsible parties hired Woodard and Curran [as their environmental cleanup consultants] late in 1997." 1997 Annual Report, *supra* note 149, at 2.

¹⁵⁵ See Wells FS, *supra* note 148, at 8-9; Cleaves Interview, *supra* note 123; see also Fialka, *supra* note 5, at A28.

¹⁵⁶ See Wells FS, *supra* note 148, at 8-9.

¹⁵⁷ See Maybee Interview, *supra* note 151. Extensive groundwater monitoring has been conducted around the site, and it appears that if the contamination level in the handful of nearby residential wells is significant enough to warrant their closure, the final settlement agreement may include funding for the piping of municipal water to replace that supply. See *id.*; Wells FS, *supra* note 148, at 29-30.

¹⁵⁸ See 1997 Annual Report, *supra* note 149, at 1; Draft Letter from Mark Hyland, Director, Division of Site Investigation and Remediation, Maine DEP, to identified PRPs (draft dated Sept. 23, 1997), with attached "Data List for Category CB1" (hereinafter PRP Notice Letter) (on file with author).

¹⁵⁹ See Fialka, *supra* note 5, at A28.

bureaucracy;¹⁶⁰ and (2) as the Super Settlement concept arose, contracting issues became more complicated as some Steering Committee members expressed concern over whether DOD could legally participate in the streamlined selection process that produced the eventual selection of the Superfund Entity to carry out the cleanup.¹⁶¹ Finally, although some PRPs could clearly be identified as deep pockets and be made to bear a larger share of the remedial burden, Maine DEP's information indicated that the level of responsibility for contamination among all of the parties was relatively low. In short, there was no single, solvent large PRP or small group of such PRPs who could obviously be made to bear the brunt of the burden for cleanup because of their much higher level of responsibility.¹⁶²

As the negotiations wore on into mid-1997 and an agreement continued to elude Maine DEP and the Site Steering Committee, a relatively new local environmental cleanup and consulting firm made a proposal to wrap up the process for the existing PRPs in an innovative way.¹⁶³ The proposal was for a "Super" Settlement to the site's ongoing negotiations.¹⁶⁴ In capsule form, the deal was as follows: the consulting firm, Emsource, Inc., would sign a binding agreement with Maine DEP and as many as possible of the approximately 400 identified PRPs that would release them from further cleanup-related liability under the Maine Superfund Law, thereby making itself the sole PRP responsible for remediating the site, in exchange for an upfront cash payment for the total estimated cleanup cost and some premium.¹⁶⁵ In order to provide the greatest level of security to the PRPs and the regulators at Maine DEP, Emsource was also prepared to purchase environmental cleanup insurance from a major insurance

¹⁶⁰ See Interview with Kenneth F. Gray, partner, Pierce Atwood, LLP in Portland, Me. (Jan. 8, 1999) (hereinafter Gray Interview).

¹⁶¹ See Fialka, *supra* note 5, at A28; Cleaves Interview, *supra* note 123.

¹⁶² See Cleaves Interview, *supra* note 123.

¹⁶³ See Letter from Mark Hyland, Director, Division of Site Investigation and Remediation, Maine DEP, to David Critchfield, President, Emsource, Inc. (May 13, 1997), at 1-2 (hereinafter Hyland-Critchfield Letter) (on file with author).

¹⁶⁴ See *id.* at 1-2. Mr. Hyland's letter attempted, to the extent possible at that time, to clarify issues related to the Emsource proposal from the State of Maine's point of view. See *id.* at 1.

¹⁶⁵ See Fialka, *supra* note 5, at A28; Maybee Interview, *supra* note 151; Draft Letter from David Critchfield, President, Emsource, Inc., to identified Wells site PRPs (draft dated Sept. 11, 1997) (hereinafter Emsource Information Letter) (on file with author). Even at this relatively early date, Emsource clearly believed in its concept, and had already packaged it as "PRP Free" and trademarked it. See Emsource Information Letter, *supra*, at 1. Total cleanup costs for the site are currently estimated at somewhere between \$8 and \$10 million. See Maybee Interview, *supra* note 151.

company and to enter into a simultaneous consent decree with the State of Maine identifying the selected cleanup and a timetable for completion.¹⁶⁶ Although Maine DEP and the Site Steering Committee were receptive to the idea in the abstract, they were not entirely receptive to Emsource.¹⁶⁷ In the spring of 1998, they entertained competing bids from Emsource and another environmental cleanup firm, TRC Companies (TRC) of Windsor, Connecticut, and selected TRC, apparently because of its lower up-front price, greater size, established reputation, and its backing by multinational insurance giant American International Group (AIG).¹⁶⁸

B. *The Wells Super Settlement: Key Players and Details*¹⁶⁹

At the center of the Super Settlement is the Superfund Entity, which in the Wells case is TRC.¹⁷⁰ TRC is known as a nationally established, reputable firm that has the experience and resources needed to perform the selected remedy.¹⁷¹ In exchange for payment from the settling PRPs, TRC will fully assume their past and present cleanup liability related to the site and indemnify them against all further costs.¹⁷² At the same time, TRC itself will become the sole PRP related to the site, through its new status as the site's operator under the Maine Superfund Law, and become the recipient of all settling PRPs' rights to contribution from non-settling PRPs.¹⁷³ In addition, TRC will purchase an environmental cleanup insurance policy from AIG, most likely a "cost-cap" policy, that will probably name the site's PRPs and the State of Maine as co-insureds along with TRC.¹⁷⁴

¹⁶⁶ See Fialka, *supra* note 5, at A28; Emsource Information Letter, *supra* note 165, at 2.

¹⁶⁷ See Gray-Harnisch Letter, *supra* note 153, at 1-2. Even at this early point (June 1997), just as Emsource's proposal was being circulated, it became clear that some PRPs were uncomfortable with Emsource's relative newness as an incorporated entity (the company was founded in 1996) and its failure to keep key PRPs completely apprised of its ongoing discussions with Maine DEP. See *id.*; Maybee Interview, *supra* note 151.

¹⁶⁸ See Fialka, *supra* note 5, at A28; Letter from Edward O. Sullivan, Commissioner, Maine Department of Environmental Protection, to Francis I. Hall, Triangle Motor Sales, Inc. (May 29, 1998) (on file with author); Maybee Interview, *supra* note 151.

¹⁶⁹ As of this writing, the final deal has yet to be struck between the parties involved in the Wells Super Settlement, but the basic contours of the settlement are unlikely to change significantly in the next few months. See Gray Interview, *supra* note 160.

¹⁷⁰ See Gray, *supra* note 9, at 298; Fialka, *supra* note 5, at A28.

¹⁷¹ See Gray, *supra* note 9, at 298.

¹⁷² See *id.*

¹⁷³ See ME. STAT. REV. ANN. tit. 38, § 1362(2)(A) (West 1998); Gray Interview, *supra* note 160.

¹⁷⁴ See Gray, *supra* note 9, at 299; Fialka, *supra* note 5, at A28. Under a "cost-cap" environmental insurance policy, the insurer agrees to provide some fixed amount of protec-

Crucial to the success of the Wells Super Settlement as a whole is the active and enthusiastic cooperation of Maine DEP.¹⁷⁵ Simultaneous with the contractual indemnification agreement between TRC and the settling PRPs, Maine DEP must provide the settling PRPs with liability releases,¹⁷⁶ and agree not to pursue them in the future for cleanup costs related to the site borne by the State of Maine, as well as all claims for natural resources damages under the Maine Superfund Law.¹⁷⁷ Maine DEP's provision of releases to the PRPs will most likely be accomplished through a multi-party, court-supervised consent decree.¹⁷⁸ Observers and participants view this piece as crucial for the PRPs; without the liability protection of such a decree or order, the value of the Super Settlement would be greatly reduced.¹⁷⁹ The incentive for Maine DEP is seen as inhering primarily in the reduction of the total PRP universe for the Wells site from nearly 400 to just one: TRC.¹⁸⁰ Included with the consent decree will be a separate settlement agreement between TRC and Maine DEP outlining the selected remedy and specifying the steps that will be taken to construct and maintain the selected remedy.¹⁸¹

A large portion of the identified PRPs must agree to the Super Settlement in order for it to be truly attractive as a profit-making venture to TRC.¹⁸² Observers believe that the incentive for the PRPs to

tion to the Superfund Entity. See Critchfield Interview, *supra* note 108. To illustrate: if the estimated cleanup cost is \$10 million, the Superfund Entity may purchase a cost-cap insurance policy for an additional \$10 million, meaning that should the cleanup cost exceed the estimate, the insurer will provide funding for the next \$10 million worth of remediation. See *id.* Once that next \$10 million is exhausted, however, the Superfund Entity again becomes directly responsible for any additional costs. See *id.*

¹⁷⁵ See Gray, *supra* note 9, at 298.

¹⁷⁶ Releases are referred to as "no action" assurances under the Maine Superfund Law. See ME. STAT. ANN. tit. 38, § 343-E(g) (West 1998).

¹⁷⁷ See Gray, *supra* note 9, at 298; Letter from R. Scott Mahoney, Central Maine Power, to Dennis Harnisch, Deputy Attorney General, State of Maine, and Mark Hyland, Director, Division of Site Assessment and Remediation, Maine DEP (Apr. 17, 1998), at 1-2 (hereinafter Mahoney Letter) (on file with author). One key issue that caused early bumps in the ride to a completed Super Settlement was PRP resistance to Maine DEP's request that reopener provisions be included in the releases provided to the settling PRPs in addition to the standard reopener used with TRC's portion of the agreement. See Mahoney Letter, *supra*, at 2.

¹⁷⁸ See Gray, *supra* note 9, at 298.

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See Maybee Interview, *supra* note 151. Early indications are that TRC is having satisfactory success in convincing a sufficient number of PRPs to officially sign on to the agreed-upon Super Settlement. See *id.* TRC, seeking to get as many PRPs on board as early

participate in the Super Settlement will be strong in most such cases,¹⁸³ and is certainly very strong in the Wells case; with the cooperation of Maine DEP, the Super Settlement promises to permanently and comprehensively terminate the liability of all participating PRPs.¹⁸⁴ Liability related to all past and future cleanup costs, as well as natural resource damages, will be completely transferred from the PRPs to TRC.¹⁸⁵ To put it bluntly, the anticipated attraction for the PRPs is that they are able to walk away from the site and never look back, except under extreme circumstances.¹⁸⁶

The insurer, AIG, is another important player whose role in the Super Settlement must not be overlooked.¹⁸⁷ By providing the guarantee to fund potential cleanup cost overruns, AIG will allow the state and the PRPs to conclude the deal with TRC and not feel as if the entire agreement rests on the shoulders of a single company, which may go bankrupt or become less cooperative if the initial cost estimate proves inaccurate.¹⁸⁸ Further, AIG will oversee all funds (including TRC's fee/premium) made available to TRC by the PRPs. Such funds will be held in trust for use solely in cleaning up the site until the selected remedy has been certified by Maine DEP.¹⁸⁹

One player not explicitly mentioned yet is EPA. In exclusively state-administered hazardous waste site cleanup cases, EPA's role is generally quite limited.¹⁹⁰ Although it is unclear at this point what exactly EPA's involvement in the Wells Super Settlement will be,¹⁹¹ its

as possible, is reportedly using varied settlement rates depending upon the time of sign-up. *See id.*

¹⁸³ *See* Critchfield Interview, *supra* note 108.

¹⁸⁴ *See* Gray, *supra* note 9, at 298-99.

¹⁸⁵ *See id.*; Emsource Information Letter, *supra* note 165, at 1. The Emsource Information Letter was particularly forceful in its description of the concept: "The EMSOURCE solution, called PRP Free™, will save you thousands of dollars. PRP Free™ allows you to transfer your liability for future cleanup costs to EMSOURCE and walk away from the liabilities at the site . . . forever." *See* Emsource Information Letter, *supra* note 165, at 1.

¹⁸⁶ *See* Gray, *supra* note 9, at 298-99.

¹⁸⁷ *See id.* at 299.

¹⁸⁸ *See* Fialka, *supra* note 5, at A28; Gray, *supra* note 9, at 299.

¹⁸⁹ *See* Fialka, *supra* note 5, at A28.

¹⁹⁰ *See* Gray Interview, *supra* note 160.

¹⁹¹ *See* Maybee Interview, *supra* note 151. Although the picture is somewhat unclear, it does appear that EPA has resisted doing more than issuing a comfort letter to the settling PRPs. *See id.*; Letter from Harley Lang, Director, Office of Site Remediation and Restoration, EPA Region I, to Mark Hyland, Director, Division of Site Assessment and Remediation, Maine DEP (Nov. 13, 1997), at 1-2 ("[C]ontingent upon the state's continued effective management of this site [the Wells site], EPA Region I has determined that no further steps will be taken to list this site on the NPL.") (emphasis in original) (on file with author).

participation in some way is still important.¹⁹² The ramifications for the wider settlement should EPA fail to be involved at all are discussed in the next section.¹⁹³

C. Critiquing the Super Settlement Concept in Action to Date

The promise of the Super Settlement concept has apparently become clear to all of the participants in the Wells site negotiations, including, most importantly, the Site Steering Committee and Maine DEP.¹⁹⁴ Nonetheless, the participants already have begun to critique the process as it is developing.¹⁹⁵

The primary critique emerging at this point is that, even putting the concept's newness aside, the complexity of the concept requires greater sophistication and patience than the standard settlement process.¹⁹⁶ Indeed, it has been observed that while the concept was supposed to bring the pain and expense of settlement negotiations to a quick and happy ending for the settling PRPs, it has now been discussed and analyzed for over a year and a half without producing a final agreement among the parties at the Wells site.¹⁹⁷ Is this really the relief everyone caught in the Superfund liability web has been hoping for?

IV. ANALYSIS: LEGAL ISSUES SURROUNDING SUPER SETTLEMENTS

This section provides an analysis of four legal issues surrounding the Super Settlement concept. First, are regulatory agencies and the courts likely to approve of the Super Settlement concept, considering its obvious for-profit motivation, under the current legal framework

¹⁹² See Gray Interview, *supra* note 160.

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*; Email from Hank D. Aho, Maine DEP, to Susan Johnson, Senior Policy Specialist, National Conference of State Legislatures (Aug. 14, 1998), at 1 (hereinafter Aho-Johnson Email) (hard copy of Email on file with author).

¹⁹⁶ See Gray, *supra* note 9, at 299; Aho-Johnson Email, *supra* note 195. Mr. Gray, one of the key PRP attorneys directly involved in the Wells site negotiations and a member of the Site Steering Committee, observed that the typical settlement negotiation process was already complicated enough, and inserting an additional party directly into the middle of the regime necessarily creates greater complexity, even as it promises an earlier end to the ordeal for the settling PRPs. See Gray Interview, *supra* note 160. Regarding just the basic concept of Super Settlements, Mr. Aho commented in his email to Ms. Johnson that "[I]ike most things that sound simple, this can get pretty complicated." Aho-Johnson Email, *supra* note 195.

¹⁹⁷ See Cleaves Interview, *supra* note 123.

for Superfund? Second, can sufficient safeguards be built into the cluster of agreements at the heart of the Super Settlement concept to protect the public interest in seeing cost-efficient and protective cleanup despite the potential recalcitrance or bankruptcy of one of the principal remaining private parties (i.e., the Superfund Entity or the insurer)? Third, what role can and/or should EPA play in making Super Settlements happen at the state level? Fourth, and finally, are there other areas of environmental liability where something like the Super Settlement concept can be employed productively?

A. Will Super Settlement Consent Decrees Stand Up to Review?

As noted at Section II.D of this Comment, the underlying posture of courts reviewing settlement agreements through the consent decree process has generally been one of deference.¹⁹⁸ The standard applied has been based primarily on the First Circuit's opinion in *United States v. Cannons Engineering Corp.*, which held that settlements must be reasonable, fair, and faithful to the governing statute, in this case CERCLA (or the appropriate state Superfund law).¹⁹⁹ This approach reflects not only the traditional deference of reviewing courts to agency action, but also the clear intent of section 122 of CERCLA that cleanups be implemented quickly and therefore settlements be encouraged, unless the results are manifestly unfair or arbitrary.²⁰⁰ As a consequence, the kind of reasonableness and fairness sought by courts when reviewing consent decrees under CERCLA is more in line with concerns over the inclusion of fair procedural steps; a rough allocation of responsibility for bearing the costs of cleanup is all that is required for substantive fairness.²⁰¹

¹⁹⁸ See WHITMAN, *supra* note 24, at 235; see also *United States v. Cannons Eng'g Corp.*, 899 F.2d 79 (1st Cir. 1990). Whitman observes that "[i]n most cases, the courts have ultimately approved . . . decrees over objections from the other [non-settling] parties." WHITMAN, *supra* note 24, at 225.

¹⁹⁹ See *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1084 (1st Cir. 1994); *Cannons*, 899 F.2d at 85.

²⁰⁰ See 42 U.S.C. § 9622(a) (1994 & Supp. II 1996). The President (i.e., EPA) is specifically directed, when he so determines it is appropriate to do so, to "act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation." *Id.*

²⁰¹ See *George Trucking*, 34 F.3d at 1089 ("[S]o long as the basis for a sensible classwide approximation is at hand—an approximation 'roughly correlated with some acceptable measure of comparative fault' [citation omitted]—difficulties in achieving precise measurements of comparative fault will not preclude a trial court from entering a consent decree.").

Given this relatively permissive standard of judicial review, the first-cut propriety of the Super Settlement concept comes into focus. The incentives for EPA and state environmental protection agencies to be enthusiastic about the Super Settlement concept have already been mentioned.²⁰² The use of Super Settlements can accelerate and ultimately simplify the oversight process for responsible state agencies and EPA, helping them to achieve the goals of their governing cleanup statutes while allowing them to shift active assessment and cleanup responsibilities to private parties at the earliest possible point in time. If Maine DEP's obvious enthusiasm for the concept is any indication, it appears that these anticipated advantages for state agencies will be quickly recognized and Super Settlements will be routinely entered into.

Ultimately, the PRPs bear the responsibility for deciding how to allocate liability among themselves, and neither the courts nor the responsible agencies have shown themselves to be interested in disturbing private agreements that produce sufficient public benefits in the form of fast and efficient cleanup of hazardous waste sites. This attitude, which borders on a kind of benign neglect, is well reflected by First Circuit Judge Selya's observation in *United States v. Charles George Trucking, Inc.* that:

[t]here is little need for a court to police the substantive fairness of a settlement as among settling parties of a particular class. Sophisticated actors know how to protect their own interests, and they are well equipped to evaluate risks and rewards.²⁰³

In the end, despite its for-profit motivation, the Super Settlement concept is likely to be viewed as merely an innovative and potentially very useful twist on the settlement process that is different only in degree and not kind from the traditional multi-party settlement described in Section II.D. The only difference is that a single private party, the Superfund Entity, is acquiring the premium associated with early cash-out, and not the state agency or EPA. At the same time, the Superfund Entity is assuming a heavy risk that would otherwise have to be borne either by the settling PRPs or the government.

²⁰² See *supra*, notes 176–181 and accompanying text.

²⁰³ 34 F.3d at 1088.

B. What If the Deal Goes Very Wrong?

Although Super Settlements ultimately promise to simplify the negotiation and settlement process under CERCLA and State Superfund laws, the interlocking web of contracts required to make Super Settlements happen must necessarily become fairly complicated.²⁰⁴ A number of separate, but nearly simultaneous, deals must be struck between several parties.²⁰⁵ The lead agency, whether state or federal, must agree to a consent decree with the Superfund Entity, through which a series of cleanup actions and financial obligations are specified.²⁰⁶ At the same time, the lead agency must provide releases, or no action assurances, to the settling PRPs at the site, effectively allowing them to walk away from their liability regarding the cleanup.²⁰⁷ Finally, the insurance company must agree to provide the necessary cleanup insurance policy to the Superfund Entity, and, most likely, agree to allow the lead agency and the settling PRPs to be named as co-insureds on the policy.²⁰⁸ Any one or several of these mutually supporting agreements could, under enough pressure, begin to unravel.²⁰⁹

Addressing the potential for dysfunction in the Super Settlement concept requires careful and prudent drafting by the legal advisors to the various parties.²¹⁰ In addition, those who craft the interlocking agreements must pay special attention to the applicable law in two areas: the relationship between PRP bankruptcy and hazardous waste-related liability, and the true scope and durability of private Superfund response action cost apportionment agreements.²¹¹

Under EPA's *Revised Model RD/RA Consent Decree (Revised Consent Decree)*,²¹² the primary mechanism for dealing with the potential for bankruptcy or financial uncertainty on the part of the PRPs who are parties to the settlement is contained in Part XIII: "Assurance of Ability to Complete Work."²¹³ Before the private parties to a CERCLA consent decree in this context are allowed to commence any remedial

²⁰⁴ See Gray Interview, *supra* note 160.

²⁰⁵ See Gray, *supra* note 9, at 298-99.

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ See Fialka, *supra* note 5, at A28.

²¹⁰ See Gray, *supra* note 9, at 299.

²¹¹ See Henderson, *supra* note 64, at 183; WHITMAN, *supra* note 24, at 159-69.

²¹² EPA and United States Department of Justice, July 1995.

²¹³ See *Revised Consent Decree*, *supra* note 212, at 39.

action under its provisions, the *Revised Consent Decree* requires that the settling parties "establish and maintain financial security" in some amount by one of five primary mechanisms: (1) a surety bond; (2) an irrevocable letter of credit equal to the total estimated cost of the work; (3) a trust fund; (4) a guarantee to perform the work by a third party; or (5) proof that at least one of the settling parties meets the same requirements that are demanded of parties attempting to close a Resource Conservation and Recovery Act facility.²¹⁴ Although the majority of the applicable case law is generally in EPA's favor on this issue, EPA still seeks, in essence, to virtually bulletproof its settlement arrangements through the *Revised Consent Decree's* assurance requirements.²¹⁵

Under the proposed Wells Super Settlement, the issue of assurance would appear to be more than adequately covered by the presence of multinational insurance giant AIG and its multi-million dollar environmental cleanup insurance policy.²¹⁶ In addition, AIG's role as trustee for the contributions and fees transferred from the settling PRPs to the Superfund Entity, TRC, provides even further assurance that the cleanup will happen as agreed to by the several parties.²¹⁷ Finally, because CERCLA-related liability cannot be legally transferred, but only apportioned and indemnified, Maine DEP has retained the ability to directly incorporate a special reopener clause in its no action assurances with the settling PRPs such that if TRC and AIG somehow become too recalcitrant or entirely insolvent, and thereby unable to complete the cleanup, the initial PRPs can be hauled back in and made responsible for the cleanup without needing to affect the indemnity agreements between the private parties.²¹⁸ While current in-

²¹⁴ See *id.* at 39-40. Specifically, the applicable provision is identified as 40 C.F.R. section 264.143(f), which relates to the *financial test and corporate guarantee for closure* required of hazardous waste facility owners and operators as defined under RCRA. See Standards For Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 40 C.F.R. § 264 (1998).

²¹⁵ See WHITMAN, *supra* note 24, at 159-76. Whitman notes that even though the Supreme Court declared, with apparent clarity, that bankruptcy trustees may not abandon property in contravention of state environmental statutes or regulations in the case of *Midlantic National Bank v. New Jersey Department of Environmental Protection*, the record among the lower courts has been relatively mixed. See 474 U.S. 494 (1986); WHITMAN, *supra* note 24, at 176; see also *In Re Stevens*, 68 B.R. 774, 780-81 (D. Me. 1987).

²¹⁶ See Gray Interview, *supra* note 160.

²¹⁷ See Gray, *supra* note 9, at 298-99.

²¹⁸ See *supra* note 66, and accompanying text. To reiterate: contribution protection based not only on release from government-related liability but also private party indemnification and release agreements has been upheld by a majority of courts as enforceable. See, e.g., *Mardan Corp. v. C.G.C. Conn, Ltd.*, 804 F.2d 1454, 1465-66 (9th Cir. 1986).

formation suggests that Maine DEP is foregoing this option in exchange for other considerations from TRC and the settling PRPs, this does not preclude the use of such reopeners in the future.²¹⁹

C. How Will State-Level Super Settlements Work Vis-à-Vis EPA?

Although there are specific provisions mandating state participation in various aspects of enforcement and settlement negotiations under CERCLA, there are virtually no such complementary requirements that EPA be involved in exclusively state-administered hazardous waste sites.²²⁰ As a result, EPA has retained wide discretion in deciding whether to join itself as a party to a state-administered settlement agreement.²²¹ Instead of doing so, EPA nearly always has elected only to issue comfort letters to parties involved in state-administered settlements.²²² Such documents are aptly named because they provide a kind of prediction on the part of EPA that it does not see, *at the present time*, any need to take any action under CERCLA²²³ because of the apparently adequate oversight of the state agency administering the site.²²⁴ It is important to note what EPA does not do through its comfort letters; it does not provide any kind of

Further, the courts have found that in such instances, private party agreements in no way eliminate the ability of the government (in this case, EPA) to include reopeners in its own releases, and later pursue any settling PRP, regardless of indemnity agreements between private parties, should any reopener contingency come to pass. See Henderson, *supra* note 64, at 192 n.48.

²¹⁹ See Mahoney Letter, *supra* note 177, at 2; Maybee Interview, *supra* note 151.

²²⁰ See WHITMAN, *supra* note 24, at 209-210; *supra* notes 69 to 88, and accompanying text.

²²¹ See New Jersey Dept. of Env'tl. Protection v. Gloucester Env'tl. Mgmt. Serv., 668 F. Supp. 404, 407 (D.N.J. 1987) ("The EPA's decision as to the timing of an enforcement action is one within its discretion."); WHITMAN, *supra* note 24, at 209. Whitman notes that "[a]s a policy matter, EPA never consents to become a party to a state enforcement action." See WHITMAN, *supra* note 24, at 209.

²²² See, e.g., EPA Region I, Model Region I Comfort Letter (May 3, 1995) (hereinafter Comfort Letter).

²²³ To name just three examples: place the site in question on the NPL; issue notices to the PRPs related to their specific CERCLA-imposed liabilities; or take immediate removal action.

²²⁴ See Comfort Letter, *supra* note 222. Region I's comfort letter is relatively brief, and simply advises the recipient-PRP that "[i]n light of these circumstances [i.e., EPA's satisfaction that the state is currently on top of the matter], EPA New England has determined that no further steps will be taken at this time to list this site on the NPL." *Id.* The next sentence, however, states: "Please be advised that EPA New England, in consultation with the [State Agency], reserves the right to reactivate NPL listing activities at this site if new information or substantially changed site conditions make a recommendation for listing appropriate at a later time." *Id.*

binding promise that it will refrain from taking action under CERCLA on the site in question.²²⁵

The question for those involved in Super Settlements is therefore two-fold. First, given the promise and novelty of the Super Settlement concept, would it be possible to persuade EPA that something more than a comfort letter makes sense when dealing with exclusively state-administered sites, primarily to remove the potential for a chilling effect on otherwise cooperative PRPs? Second, if that is not possible, what is the likelihood of EPA returning to such an innovative agreement that has been struck under state law and unraveling it through a separate enforcement action under CERCLA?

EPA appears to want to move toward a more complete delegation of CERCLA enforcement power to the states, despite the widespread criticism of the *Final Voluntary Program Guidance* and its supposedly too-strict delegation criteria, as described *supra*.²²⁶ Although an EPA provision of a full release from CERCLA liability under a covenant not to sue would appear to be unattainable under the current statutory scheme, it is possible that EPA could be more willing than it has been in the past to issue its own "no action assurance" letters that would be more restrictive of EPA enforcement discretion than standard comfort letters.²²⁷ Absent such a beefed-up indication of EPA's intention regarding a particular site, the settling PRPs in any instance, but particularly those involved in a new and relatively untried settlement model like the Super Settlement concept, must make their own best estimate on the value of the standard comfort letter and the probability that EPA may return to the site later, for whatever reason.²²⁸

²²⁵ See *id.*

²²⁶ See EPA, Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions, OSWER Directive 9375.6-11 (May 3, 1995) (hereinafter *Deferral Guidance*); *supra* notes 69 to 88, and accompanying text.

²²⁷ Historically, EPA has been reluctant to issue even their own middle-ground no action assurances. See generally EPA, Office of Enforcement Compliance Monitoring, Policy Against "No action" Assurances (1994) (hereinafter *No Action Policy*). Indeed, the No Action Policy prohibits such assurances except under very limited circumstances, including: (1) "where expressly provided by applicable statute or regulation"; and (2) "in extremely unusual cases in which a no action assurance is clearly necessary to serve the public interest." *Id.* However, under the pressure of the Brownfields Initiative, EPA has begun to be more flexible in issuing analogous releases to a variety of parties who would normally be arguably within the CERCLA liability web, most conspicuously prospective purchasers. See EPA, Office of Enforcement and Compliance Assurance, Guidance on Settlements with Prospective Purchasers of Contaminated Property (May 24, 1995).

²²⁸ See SELMI & MANASTER, *supra* note 78, at 9-104. Selmi and Manaster recommend that the practitioner be careful in dealing with state-level covenants not to sue and related devices, and provide further cautionary information regarding EPA's role: "The practitio-

Technically, there are no statutory barriers to prevent EPA from seeking to enforce the provisions of CERCLA on top of an ongoing, or even a concluded, State Superfund enforcement action. Given the informal relationship between the states and the federal government under CERCLA, it would not even technically be defined as "overfiling."²²⁹ Still, courts may be unwilling to permit EPA to reopen a closed state enforcement action based on something like the prudential doctrine of res judicata, as seen recently in *Harmon Industries, Inc. v. Browner*,²³⁰ a case which confronted a similar context under the Resource Conservation and Recovery Act (RCRA).

The court in *Harmon* found that EPA's civil enforcement action against the plaintiff corporation, which had admittedly violated RCRA but had settled with the state's environmental agency, was not permitted under RCRA because EPA had authorized the state agency to carry out the statute with the same "force and effect" as EPA.²³¹ The court further found that EPA was prohibited from attempting to assess civil penalties by res judicata as well.²³² The sticking point for a res judicata analysis here is primarily the privity requirement, which the court in *Harmon* decided to find in EPA's authorization of the Missouri agency to enforce RCRA.²³³ Putting aside the exact legal and statutory structure of the federal-state relationship in this context, the court also noted that "EPA does not and should not have the authority to impose its own separate penalties after Plaintiff [*Harmon*] negotiates a settlement with an authorized state agency and that settlement is approved by an appropriate state judicial authority."²³⁴ Ultimately, the implication of *Harmon* may be that the federal courts have clear public policy concerns about EPA overfiling when it is done with an apparent disregard for the true nature of state action in the particular case. As the *Harmon* court noted in its opinion:

ner must always keep in mind that a covenant not to sue or a 'no action' letter from a state agency cannot bind the federal Environmental Protection Agency from taking action. In deciding whether to proceed despite the lack of concrete legal assurance that no CERCLA liability is possible, . . . [the PRP] must rely on signals from the Agency about its intentions" *Id.*

²²⁹ See *supra* notes 69 to 88, and accompanying text for a description of the informal federal-state relationship under CERCLA.

²³⁰ 19 F. Supp.2d 988 (W.D. Mo. 1998).

²³¹ See *id.* at 997.

²³² See *id.* at 997-98.

²³³ See *id.* at 998.

²³⁴ *Id.* at 996 (emphasis added).

In argument and in its brief, EPA urges the Court to believe that MDNR [the state agency] was inappropriately lenient to Harmon because of some undefined self-interest. The EPA vaguely hints that Missouri may have sought to avoid appearing hostile to the interests of business and industry in general. . . . The position taken by EPA in this proceeding is puzzling.²³⁵

Although one obviously should not place too much emphasis on the language of the district court in *Harmon*, the fact remains that EPA faces significant practical and political obstacles whenever it actually attempts to second-guess finalized state enforcement actions.²³⁶ In this sense, settling PRPs in a Super Settlement dealing only with a state agency may be able to take some comfort in the final result, if not the exact context, of *Harmon*.²³⁷

D. *Are There Other Contexts Where the Assumption of Environmental Liability Along the Lines of the Super Settlement Concept Would Make Sense?*

Environmental contamination-related liability extends to many contexts in the United States, from federal liability related to failure to adhere to point-source emission permits under the Clean Water Act, to exceedances of Clean Water Act effluent limitations under the National Pollutant Discharge Elimination System (NPDES), as well as the proper handling of solid and hazardous waste under RCRA.²³⁸ Super Settlements represent a new, relatively sophisticated method for dealing with environmental contamination-related liability.²³⁹ The potential for widespread efficiencies can be quite high in such contexts. For instance, instead of being left with parties who have neither the expertise nor interest in confronting their environmental contamination-related liabilities (it is normally not at all their primary business), government regulatory agencies would be able to deal with a single, technically-sophisticated player whose sole business goal is to comply with applicable regulations and thereby produce profit for its investors.²⁴⁰

²³⁵ *Id.* at 998 n.12.

²³⁶ See SELMI & MANASTER, *supra* note 78, at 9–104; Gray Interview, *supra* note 160.

²³⁷ See *Harmon*, 19 F. Supp.2d at 1000.

²³⁸ See Cleaves Interview, *supra* note 123.

²³⁹ See Gray, *supra* note 9, at 298–99.

²⁴⁰ See *id.*; Fialka, *supra* note 5, at A28.

Although numerous examples of potential contexts for such liability transfers could be provided, two seem to be most promising at first glance. The first entails the transfer of CERCLA-related liability (federal or state) at the time of a commercial transaction between two corporations that includes the transfer of essential, but environmentally contaminated real property.²⁴¹ How to accomplish a transfer of liability under such circumstances in such a way that it will withstand scrutiny from the court system has been a difficult question, but has largely been resolved in favor of allowing such transfers when the language is sufficiently broad or exact.²⁴² While the initial prevailing wisdom on the Super Settlement concept sees Super Settlements as limited primarily to the negotiation phase of identified multi-party hazardous waste sites, it is entirely possible that an enterprising Superfund Entity could insert itself earlier in the process, providing indemnification to the parties in such a commercial transaction, and simultaneously arranging an agency release for the original parties in exchange for up-front compensation.²⁴³

A second ready-made context for the transfer of environmental contamination-related liability is found under the National Pollutant Discharge Elimination System (NPDES) program of the Clean Water Act.²⁴⁴ The current arrangement in such cases usually entails an industrial firm directly applying for a NPDES permit and being forced to constantly monitor and maintain the applicable control technology to stay within its effluent limitations.²⁴⁵ Using the Super Settlement concept, a Superfund Entity could insert itself between the industrial firm and the regulatory agency responsible for administering the applicable NPDES permit by taking on the liability related to the control technology and entering into a consent decree or other contractual arrangement that would transfer the liability for exceedances of the permit to the Superfund Entity.²⁴⁶ One can immediately see the advantages of such an arrangement: the Superfund Entity would be able to bring its superior technological capability to bear, and its sole re-

²⁴¹ See Mary K. Ryan, *Can You Ever Contract Your Liability Away?*, 75 MASS. L. REV. 131, 131, 133-137 (1990).

²⁴² See Henderson, *supra* note 64, at 192-95. See also, *supra* notes 69 to 88, and accompanying text.

²⁴³ See Gray, *supra* note 9, at 299.

²⁴⁴ See 33 U.S.C. § 1342 (1994); Cleaves Interview, *supra* note 123.

²⁴⁵ See 33 U.S.C. § 1342(a)(1)-(2); Cleaves Interview, *supra* note 123.

²⁴⁶ See Cleaves Interview, *supra* note 123.

sponsibility would be to maintain the effluent discharged from the point source at the amount specified in the NPDES permit.²⁴⁷

CONCLUSION

It is likely that the Super Settlement concept will be put into widespread use across the United States as its advantages become better known. While CERCLA reauthorization unfortunately remains little more than a faint hope for the foreseeable future, Super Settlements may provide the best response to the most significant drawbacks of the current voluntary settlement paradigm. From the very inception of Superfund in 1980, parties caught within its liability web have sought an efficient and timely way to extricate themselves, while regulatory agencies, particularly EPA, have been concerned about the slow pace of progress toward cleanup.

Although Super Settlements are still in their infancy and crucial issues remain to be ironed out, it seems likely that their potential to drastically simplify and reduce the long-run costs of the settlement process for all of the involved parties—from federal and state government agencies to private PRPs to the Superfund Entity to society at large—will make them a powerful tool in streamlining and facilitating the cleanup of more hazardous waste sites than would be possible under other settlement paradigms.

²⁴⁷ *See id.*