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## CERCLA: The Problems of Limiting Contribution Claims for Potentially Responsible Parties

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# CERCLA: THE PROBLEMS OF LIMITING CONTRIBUTION CLAIMS FOR POTENTIALLY RESPONSIBLE PARTIES

## I. INTRODUCTION

From the time Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>1</sup> in 1980, it has been plagued by many problems and controversies.<sup>2</sup> One major source of controversy concerns the ability of potentially responsible parties to sue for contribution without first facing a section 106 administrative order<sup>3</sup> or a section 107(a) cost recovery action<sup>4</sup> under CERCLA. This Comment will specifically focus on these issues.

Part I of this Comment discusses the background and goals behind CERCLA. Part II of this Comment will discuss whether the proper interpretation of "contribution" within the CERCLA text requires that parties seeking contribution first be subject to some action against them. It will also examine Congress' intent in including the "savings clause" within section 113(f)(1). Finally, Part II will identify the consequences and ramifications of closing off the contribution option to those parties who are not subject to a section 106 or section 107(a) action.

Part III of this Comment will discuss Congress' intent in allowing parties to seek contribution under CERCLA. Specifically, it will analyze and clarify House and Senate Reports that address the issue of contribution. Moreover, Part III will look at Congress' rejection of early versions of CERCLA's contribution provisions and identify what impact, if any, they have on congressional intent.

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1. 42 U.S.C. §§ 9601-9675 (1994).

2. See Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83 (1997).

3. See 42 U.S.C. § 9606 (1994).

4. See 42 U.S.C. § 9607(a) (1994).

Finally, Part IV will identify CERCLA's two primary policy goals and discuss how limiting contribution actions may be inconsistent with these goals. This section will also discuss how limits on contribution may undermine the contribution provision's own incentives for parties to quickly cleanup their own environmental contamination.

### *A. Background of CERCLA*

The overarching goals of CERCLA are twofold. The first goal, as its name suggests, is to facilitate the prompt cleanup of environmentally contaminated waste sites, such as old landfills, industrial sites, and mining sites, and to shift the costs of these cleanup efforts from taxpayers to parties responsible for the environmental harm.<sup>5</sup> In other words, CERCLA aims to make parties, such as large industrial, chemical, and mining companies, pay for the cleanup of environmentally contaminated sites they create. CERCLA's second goal is to encourage the careful handling of hazardous wastes by spreading liability over all responsible parties.<sup>6</sup> As might be expected from these very far-reaching and ambitious goals, since its inception twenty years ago, CERCLA has had enormous impact on commercial, private, and environmental interests.<sup>7</sup>

The huge increase in the cost of environmental cleanup makes the allocation of cleanup costs among parties under CERCLA very important. For example, during the 1980s the average cost for the cleanup of hazardous waste ranged from six to ten million dollars per site.<sup>8</sup> Now, however, the cost has increased to nearly thirty to fifty million dollars.<sup>9</sup> The cost of restoring areas of environmental

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5. See *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997); Susan R. Poulter, *Cleanup and Restoration: Who Should Pay?*, 18 J. LAND RESOURCES & ENVTL. L. 77, 84-85 (1998); Barbara J. Gulino, Note, *A Right of Contribution Under CERCLA: The Case for Federal Common Law*, 71 CORNELL L. REV. 668, 681-82 (1986).

6. See Gulino, *supra* note 5, at 681.

7. See Hernandez, *supra* note 2, at 83.

8. See *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349 n.9 (6th Cir. 1998); Thomas C. L. Roberts, *Allocation of Liability Under CERCLA: A "Carrot and Stick" Formula*, 14 ECOLOGY L.Q. 601, 604 (1987).

9. See *Centerior Serv. Co.*, 153 F.3d at 349 n.9; JEFFERY G. MILLER & CRAIG N. JOHNSTON, *THE LAW OF HAZARDOUS WASTE DISPOSAL AND*

damage to their natural state under the natural resources damages provision of CERCLA may be even bigger.<sup>10</sup> For example, the cost of restoring one of the larger mining sites in the Western United States to its natural state was 1.2 billion dollars.<sup>11</sup>

Along with its great impact, CERCLA is also plagued by many problems within the courts system. Many of these controversies stem from the lack of clarity with respect to its provisions.<sup>12</sup> As stated above, one major controversial issue concerns the ability of a party to assert a section 113(f) contribution claim under CERCLA without first facing a prior or pending section 106 administrative order or a section 107(a) cost recovery action. CERCLA's section 106, section 107(a), and section 113(f) contribution actions are briefly explained below.

*B. The Big Three Defined: CERCLA's Section 106 Administrative Orders, Section 107(a) Cost Recovery Actions, and Section 113(f) Contribution Actions*

A section 106 administrative order under CERCLA allows a federal agency, such as the Environmental Protection Agency (EPA), to order polluters to undertake and complete environmental cleanups.<sup>13</sup> Specifically, the EPA may issue a section 106 order when it finds an "imminent and substantial endangerment to the public health or welfare or environment" due to site contamination.<sup>14</sup> For example, in *Centerior Serv. Co. v. Acme Scrap Iron*,<sup>15</sup> following

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REMEDICATION 9 (1996); Poulter, *supra* note 5, at 78.

10. See Poulter, *supra* note 5, at 78.

11. See *id.*

12. See *United States v. Mottolo*, 605 F. Supp. 898, 902, 905 (D.N.H. 1985) (describing CERCLA as a "last-minute compromise" between three competing bills that has "acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history"); *Hernandez*, *supra* note 2, at 83.

13. See 42 U.S.C. § 9606(c) (1994) (stating that the EPA shall "establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes . . . to effectuate the responsibilities and powers created by this chapter"); see also *Centerior Serv. Co.*, 153 F.3d at 346 (stating that the EPA issued a section 106 administrative order which required Centerior to complete an emergency cleanup of its contaminated site).

14. 42 U.S.C. § 9606(a) (1994); see *Centerior Serv. Co.*, 153 F.3d at 346 n.4.

15. 153 F.3d 344 (6th Cir. 1998).

an investigation into heavily polluted industrial sites, the EPA issued a section 106 order forcing the plaintiffs to pay almost ten million dollars in cleanup costs.<sup>16</sup>

In comparison, a section 107(a) cost recovery action under CERCLA permits the government or private parties who are not responsible for the environmental contamination to recover cleanup costs from potentially responsible parties.<sup>17</sup> Potentially responsible parties are those parties that may have contributed to the environmental harm. Thus, parties who incur millions of dollars in environmental cleanup costs may recover some of that amount from other private parties, such as current or past owners of the contaminated facility.<sup>18</sup>

A contribution claim under CERCLA<sup>19</sup> allows a party who is partially responsible for an environmentally contaminated site, and hence a potentially responsible party, to "spread out" the costs of the cleanup by suing other parties who may also be responsible for the contamination.<sup>20</sup> In contrast to a section 107 cost recovery action, a party who is potentially responsible for the environmental contamination may assert a contribution claim.<sup>21</sup>

A typical scenario is as follows: Company *A* purchases an industrial site from Company *B*. Company *B*'s industrial activities contaminated the site, a fact not known earlier to Company *A*. Company *A* continues to contaminate the site. Company *A* is subsequently forced by the State (not Federal) Environmental Agency to undergo a multi-million dollar cleanup of its site to

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16. *See id.* at 346.

17. *See* 42 U.S.C. § 9607(a)(4)(A)-(B) (1994) (stating that current and past owners of a contaminating facility, as well as those who transport or arrange for the transport of hazardous substances, may be liable for ensuing costs); *see also* *Aviall Servs. Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 137 (5th Cir. 2001) (stating that parties who incur environmental cleanup costs are allowed to recover from "potentially responsible parties"); *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1238 (7th Cir. 1997) (holding that claims brought by one potentially responsible party must be brought as a contribution claim).

18. *See Aviall Servs. Inc.*, 263 F.3d at 136-37.

19. This right to contribution is codified in section 113(f) of CERCLA. *See Aviall Servs. Inc.*, 263 F.3d at 139, 148.

20. *See OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1581 (5th Cir. 1997).

21. *See Rumpke of Ind. Inc.*, 107 F.3d at 1238.

comply with the *state's* environmental laws.<sup>22</sup> To recover some of this money, Company *A* sues Company *B* for contribution under CERCLA's section 113(f).<sup>23</sup>

In light of the above, many courts hold that a potentially responsible party seeking contribution under section 113(f) must first be subject to a prior or pending section 106 or section 107(a) action against it. These courts base their view on their interpretation of certain provisions within CERCLA and an analysis of its legislative history. However, it is this author's opinion that these courts are wrong. A more accurate interpretation of CERCLA and an analysis of legislative intent and other factors lead to the conclusion that a potentially responsible party may assert a contribution claim under CERCLA in the absence of a section 106 or section 107(a) claim against that party.

### *C. The Importance of Asserting a Contribution Claim in the Absence of a Section 106 or Section 107(a) Action*

The ability for parties to assert a contribution claim under CERCLA in the absence of a section 106 or section 107(a) action against them is important because, as is consistent with CERCLA's policy, it provides parties with incentives to undergo voluntary environmental cleanups.<sup>24</sup> The importance of this can be seen in the example given above. In the above example, Company *A*, as a partial contributor to the environmental contamination of the site, will most likely be considered a potentially responsible party by the courts.<sup>25</sup> As such, it will probably be barred from recovering the cleanup costs from Company *B* through a section 107(a) cost recovery action since most federal courts only allow "innocent" parties to assert this action.<sup>26</sup> Company *A* also cannot use section 106 because it is not a federal agency.<sup>27</sup> To recover some of its

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22. See *Aviall Servs. Inc.*, 263 F.3d at 136.

23. See *id.*

24. See H.R. REP. NO. 99-253, pt. 1, at 188 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2862.

25. See *Rumpke of Ind. Inc.*, 107 F.3d at 1238.

26. See *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349 n.9 (6th Cir. 1998); Karl Tilleman & Shane Swindle, *Closing the Book on CERCLA Section 107 "Joint and Several" Claims by Liable Private Parties*, 18 VA. ENVTL. L.J. 159, 174 (1999).

27. See *Centerior Serv. Co.*, 153 F.3d at 347.

cleanup costs under CERCLA, the only option left for Company A is to bring a section 113(f) contribution claim against Company B.<sup>28</sup> However, if Company A is required to be subject to a prior or pending section 106 or section 107(a) action, then it is also barred from asserting a contribution claim against Company B. In effect, Company A which undertook an extremely expensive cleanup at the order of the State Environmental Commission, is left "holding the bag," and unable to recover any of the cleanup costs from Company B, a party partially responsible for the contamination.

## II. THE CORRECT INTERPRETATION OF "CONTRIBUTION" WITHIN THE MEANING OF CERCLA ALLOWS CONTRIBUTION CLAIMS EVEN IN THE ABSENCE OF A SECTION 106 OR SECTION 107(A) ACTION

### A. *The Common Law Provides the Definition of Contribution Within CERCLA*

The text of the section 113(f) contribution provision states: Any person may seek contribution from any other person who is liable or potentially liable under [section 107(a)], during or following any civil action under [section 106 or under section 107(a)] . . . . Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [section 106] or [section 107(a)].<sup>29</sup>

Nowhere in CERCLA does Congress define "contribution."<sup>30</sup> As such, it is a well established principle that when Congress does not define terms of art in a statute, the term should be defined according to the common law.<sup>31</sup> Furthermore, courts may feel

28. CERCLA provides two causes of action for parties to recover cleanup costs: section 107(a) cost recovery actions and section 113(f) contribution actions. See 42 U.S.C. § 9613(f)(1) (1994); *Centerior Serv. Co.* 153 F.3d at 347.

29. 42 U.S.C. § 9613(f) (1994).

30. See *Avial Servs. Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 138, 148 (5th Cir. 2001).

31. See *Morissette v. United States*, 342 U.S. 246, 263 (1952). Indeed, even before the inclusion of the contribution provision in CERCLA, remarks made before Congress suggested that issues of liability not resolved by CERCLA, such as joint and several liability, be resolved by federal common law. See *Gulino*, *supra* note 5, at 673.

constrained to “take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except ‘when a statutory purpose to the contrary is evident.’”<sup>32</sup>

Proponents of the view that a party must face a section 106 or section 107(a) action prior to asserting contribution suggest that this party must first incur “liability” through some sort of prior judgment or suit against it.<sup>33</sup> *Aviall Servs., Inc. v. Cooper Indus.* provides a typical illustration of this approach. Aviall Services (Aviall), an aircraft maintenance business, bought what turned out to be environmentally contaminated industrial sites from the defendant, Cooper Industries (Cooper).<sup>34</sup> Several years after the purchase, Aviall discovered the contamination and notified the Texas Natural Resource Conservation Commission, who in turn ordered Aviall to undergo a comprehensive multi-million dollar environmental cleanup of the sites.<sup>35</sup> After completing the cleanup, Aviall then sued Cooper for contribution under section 113(f) of CERCLA to recover part of the cleanup costs.<sup>36</sup> The court rejected Aviall’s contribution claim, stating that Aviall faced neither a prior or pending section 106 federal abatement action against it, nor a section 107(a) cost recovery action by the government or a private party.<sup>37</sup>

The majority’s opinion in *Aviall*, and others like it, are incorrect because according to the common law principles of contribution set forth under the *Second Restatement of Torts*, Black’s Law Dictionary, and American Jurisprudence, parties seeking contribution do not need to have a prior judgment or even a prior suit against them.<sup>38</sup>

The *Second Restatement of Torts’* (*Restatement*) definition of contribution is particularly important because many courts use it as

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32. *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991)).

33. *See Aviall Servs. Inc.*, 263 F.3d at 138 (stating “we believe that the commonly accepted definition of contribution requires a tortfeasor to first face judgment before it can seek contribution from other parties.”); *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574 (5th Cir. 1997) (defining common law contribution as requiring a pending or prior judgment).

34. *See Aviall Servs. Inc.*, 263 F.3d at 136 (Wiener, J., dissenting).

35. *See id.*

36. *See id.*

37. *See id.* at 137.

38. *See id.* at 148.



persuasive authority for the definition of contribution under CERCLA.<sup>39</sup> The *Restatement* defines contribution as “when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them.”<sup>40</sup> The comment to this section reinforces the idea that a previous judgment or suit is not necessary for contribution by stating that “contribution is allowed in favor of [a tortfeasor] without either judgment or suit against him, if he pays more than his equitable share of the (common) liability.”<sup>41</sup> Nowhere in the *Restatement’s* definition does it require that a party be sued or face judgment prior to a claim for contribution. To the contrary, the *Restatement* is explicit in stating that a judgment or suit is not necessary against a party seeking contribution.<sup>42</sup>

Admittedly, at first glance the *Restatement’s* definition of contribution and its comments do seem to suggest that a party seeking contribution needs to first face some sort of claim against it. After all, how else do parties “become liable in tort” or become “tortfeasors”? The answer lies in how the *Restatement* uses the word “liability” in its definition of contribution. The *Restatement* uses the phrase to “become liable” in the definition because it is addressing only tort situations.<sup>43</sup> In other contexts, however, the *Restatement* also allows contribution where the party merely has a legal obligation or is compelled to act.<sup>44</sup> Thus, when a company is compelled to act due to an order issued by a State Environmental Commission, this order satisfies the requirements for contribution even though the company does not face a legal claim.

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39. See Hernandez, *supra* note 2, at 102. Many courts have used the *Restatement* to interpret CERCLA in contribution claims. See *United States v. Colorado & E. R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994); *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1515 (10th Cir. 1991). The *Restatement* has also aided the Supreme Court in interpreting other federal statutes. See *Northwest Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 87-92 (1981).

40. RESTATEMENT (SECOND) OF TORTS § 886(a) (1977).

41. RESTATEMENT (SECOND) OF TORTS § 886(a) cmt. b (1977).

42. See *id.*

43. See Hernandez, *supra* note 2, at 104 n.138.

44. See *id.* at 103.

Similarly, the Black's Law Dictionary definition of "contribution" is in sharp conflict with a requirement that a party needs to face judgment before seeking contribution.<sup>45</sup> Black's Law Dictionary defines contribution as the "right that gives one of several persons who are liable on a common debt the ability to recover ratably from each of the others when that one person discharges the debt."<sup>46</sup> Furthermore, the definition of "liability" is "[t]he quality or state of being legally obligated" and "legal responsibility to another or to society."<sup>47</sup> Liability therefore does not require that a party face some action (i.e., a section 106 or section 107(a) action) in order to be liable. Applying these definitions to the contribution provision within CERCLA, it is clear this provision does not require a prior or pending section 106 or section 107(a) action before a party can assert a contribution claim.

Finally, American Jurisprudence 2d also rejects the argument that a judgment is required before asserting a contribution claim.<sup>48</sup> According to American Jurisprudence 2d:

To entitle one co-obligor to contribution from the others, it is the general rule that the payment made by him must have been compulsory in the sense that he must have been under legal obligation to pay . . . . A payment is deemed in law to be compulsory when the party making it cannot legally resist it.<sup>49</sup>

Moreover, a party may face this compulsory payment even in the absence of a suit against him or her.<sup>50</sup> Parties therefore have a right to contribution so long as they have compulsory obligations to pay,

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45. See *Aviall Servs. Inc.* 263 F.3d at 148 (Wiener, J., dissenting).

46. BLACK'S LAW DICTIONARY 329 (7th ed. 1999).

47. *Id.* at 925.

48. See *Aviall Servs. Inc.*, 263 F.3d at 148 (Wiener, J., dissenting).

49. 18 AM. JUR. 2D *Contribution* § 15 (1985).

50. See *Hawkeye-Security Ins. Co. v. Lowe Constr. Co.*, 99 N.W.2d 421, 427 (Iowa 1959) (holding that "[o]ne confronted with an obligation that he cannot legally resist is not obliged to wait to be sued."); see also *Centerior Serv. Co. v. Acme Scrap Iron of Metal Corp.*, 153 F.3d 344, 351 (6th Cir. 1998) (stating that "[u]nder the common law, however, there was no requirement that a party be 'adjudged' liable before seeking contribution. . . . It was enough that a plaintiff act under some compulsion or legal obligation to an injured party when he or she discharged the payment."); *Zontelli Bros. v. N. Pac. Ry. Co.*, 263 F.2d 194, 199 (8th Cir. 1959) (holding that there is no requirement that a party face judgment before being entitled to judgment).

and they may have compulsory obligations to pay even in the absence of a judgment or suit against them. Applying this rule to the situations addressed here, it is quite likely that this compulsory payment might come in the form of a cleanup order from a State Environmental Commission, since the party to which the order is directed faces a legal obligation that it cannot realistically resist. If this is the case, then these parties may assert contribution claims even in the absence of a section 106 or section 107(a) action against them.

*B. Section 113(f) Contains No Textual Requirement that Contribution Actions Must Be Preceded by Section 106 or Section 107(a) Actions*

Proponents of the view that a section 106 or section 107(a) action is needed for a contribution claim point to the text of section 113(f)(1), which states that “[a]ny person *may* seek contribution . . . during or following any civil action under [section 106] or under [section 107(a)].”<sup>51</sup> According to this argument, the word “may” must mean “shall [or] must”<sup>52</sup> and hence indicates that Congress intended to allow contribution suits only if there is a prior or pending section 106 or section 107(a) action.<sup>53</sup> Furthermore, this argument rejects the possibility that the word “may” might alternatively mean “have liberty to,”<sup>54</sup> as defined in Webster’s Third New International Dictionary.<sup>55</sup> This alternative and extremely plausible meaning of “may” would allow a contribution claim without the need for a prior or pending section 106 or section 107(a) action.

However, to construe section 113(f) so as to allow a contribution claim *only* in conjunction with a section 106 or section 107(a) action would be, so to speak, to put words into the mouth of CERCLA. As Judge Wiener stated in his dissenting opinion in *Aviall*, “nowhere does the plain language of the statute specify that actions for contribution are allowed ‘only’ during or following litigation under

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51. 42 U.S.C. § 9613(f)(1) (1994) (emphasis added).

52. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1986).

53. See *Aviall Servs. Inc.* 263 F.3d at 138, 148.

54. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 52, at 1396.

55. See *Aviall Servs. Inc.*, 263 F.3d at 138.

CERCLA.”<sup>56</sup> Thus, courts implying that section 113(f)(1) demands a section 106 or section 107(a) action—when it plainly does not—are impermissibly rewriting the language of the statute.<sup>57</sup>

The court in *Mathis v. Velsicol Chemical Corp.*<sup>58</sup> explicitly rejected the idea that any civil action was needed before a party could seek contribution under CERCLA.<sup>59</sup> In that case, Mathis contracted with Velsicol to allow Velsicol to dispose thousands of drums of industrial waste on Mathis’ land.<sup>60</sup> After Mathis learned that the drums were actually filled with hazardous waste, they brought a trespass suit against Velsicol seeking compensatory and punitive damages.<sup>61</sup> In a counterclaim, Velsicol brought a contribution claim against Mathis under CERCLA.<sup>62</sup> Mathis argued that this contribution claim was precluded by the lack of a pending civil action under section 106 or section 107(a).<sup>63</sup> In rejecting this argument, the court stated:

This statute by its plain terms and meaning prevents Plaintiffs from maintaining a defense concerning the pendency of a civil action under CERCLA. Because this Court has already determined that Plaintiffs are liable parties under CERCLA, Velsicol has a cause of action for contribution against Plaintiffs regardless of the existence of a civil action under sections [section 106] or [section 107(a)].<sup>64</sup>

The idea that a section 106 or section 107(a) action is required before a party can seek contribution is made even more improbable by Congress’ inclusion of the savings clause.

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56. *Id.* at 146 (Wiener, J., dissenting).

57. *See id.*

58. 786 F. Supp. 971 (N.D. Ga. 1991).

59. *See id.* at 975-76.

60. *See id.* at 973.

61. *See id.*

62. *See id.*

63. *See id.* at 975.

64. *Id.* at 975-76.

*C. The Savings Clause Expresses Congress's Intent to Allow Parties to Bring Contribution Actions Absent a Section 106 or Section 107(a) Action Against Them*

The savings clause refers to the part of the contribution provision which states: "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] or section [107]. . . ."<sup>65</sup> Thus, the plain meaning of the text suggests that even without a section 106 or section 107 action, a party may still seek contribution under CERCLA.<sup>66</sup>

*Johnson County Airport Commission v. Parsonitt Co.*<sup>67</sup> illustrates how the savings clause may save a party's contribution claim in the absence of a prior or pending section 106 or section 107(a) claim against it.<sup>68</sup> In that case, Johnson County Airport leased some of its property to the defendant, Parsonitt Company, Inc. (Parsonitt), for use in its industrial glove dry cleaning business.<sup>69</sup> Johnson County Airport alleged that Parsonitt stored hazardous chemicals in leaky tanks adjacent to the property and were responsible for the release of these chemicals onto the property.<sup>70</sup> Johnson County Airport subsequently asserted a section 113(f) contribution claim against Parsonitt for their allocable share of the environmental cleanup costs.<sup>71</sup> The court rejected Parsonitt's argument that the contribution claim was premature because a section 106 or section 107(a) action was not filed against Johnson County Airport.<sup>72</sup> As the court stated:

Nothing in the language of section 113(f) restricts contribution actions to parties who have incurred liability under section 107. To the contrary, the statute provides that 'nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of

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65. 42 U.S.C. § 9613(f)(1) (1994).

66. *See Aviall Servs. Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 149 (Wiener, J., dissenting).

67. 916 F. Supp. 1090 (D. Kan. 1996).

68. *See id.* at 1095.

69. *See id.* at 1091-92.

70. *See id.* at 1092.

71. *See id.* at 1095.

72. *See id.*

a civil action under [section 106] or [section 107(a)] of this title.<sup>73</sup>

In effect, the savings clause “saved” the plaintiff’s contribution claim even absent a section 106 or section 107(a) claim against it.

In spite of the saving clause’s lack of ambiguity, however, some courts have stated that the savings clause just enables parties to bring contribution claims under state law, and therefore section 106 and section 107(a) actions remain necessary prerequisites to contribution claims.<sup>74</sup> These courts base this argument on the premise that interpreting the savings clause to allow contribution suits in the absence of section 106 or section 107(a) actions would render redundant the first sentence of section 113(f), which allows parties to seek contribution “during or following” section 106 or section 107(a) actions.<sup>75</sup>

This analysis is flawed for two reasons. First, despite their insistence that the savings clause merely allows parties to seek contribution under state law, nothing in the text of the clause mentions anything about limiting contribution actions to state law.<sup>76</sup> Second, limiting the savings clause to state law remedial measures is inconsistent with CERCLA’s intention to create a uniform rule of law.<sup>77</sup>

First, by thrusting the word “state” into the statutory language of the savings clause, the courts are impermissibly rewriting statutory language.<sup>78</sup> Further, even if Congress intended to limit the savings clause to contribution claims based on state law, it is difficult to imagine why they would intentionally omit the distinction. This would be especially bizarre given how Congress made the express distinction between federal and state law in other areas of CERCLA, such as its general savings clause.<sup>79</sup>

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73. *Id.* (citing to *Mathis v. Velsicol Chemical Corp.*, 786 F. Supp. 971, 975 (N.D. Ga. 1991)).

74. *See Aviall Servs. Inc.*, 263 F.3d at 140.

75. *See id.* at 139-40; *see also* *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998) (noting that the savings clause is not intended to nullify provisions of the statute that contains it).

76. *See Aviall Servs. Inc.*, 263 F.3d at 140.

77. *See* *Gulino*, *supra* note 5, at 684.

78. *See Aviall Servs. Inc.*, 263 F.3d at 146 (Wiener, J., dissenting).

79. *See id.* The general savings clause states: “[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person

Second, the view that the savings clause merely enables parties to bring contribution suits under state law is also inconsistent with CERCLA's intention to create a uniform rule of law.<sup>80</sup> While thirty-nine states have contribution laws or allow contribution by judicial decision, the parameters of these contribution claims may be very different.<sup>81</sup> For example, the timing of these contribution claims vary and some states may only allow contribution claims once a judgment or payment of plaintiff's claims are made.<sup>82</sup> A nonuniform contribution rule may create the incentive for companies that deal with hazardous wastes to do business in those states that have favorable contribution laws, or no contribution law at all.<sup>83</sup>

Congressional fear of this outcome was evident in a statement made before the House: "To insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law. . . ."<sup>84</sup> Given this statement, it seems highly unlikely that Congress restricted the savings clause to mean that parties can only bring contribution claims under state law, since the ultimate effect of this meaning is contrary to their intent to develop a uniform rule of law!

#### D. *The Two Avenues of CERCLA*

As stated earlier, once a site is cleaned up, CERCLA provides two causes of action for parties to recover the response costs incurred by the cleanup effort: joint and several cost recovery actions governed exclusively by section 107(a),<sup>85</sup> and contribution actions as set forth in section 113(f).<sup>86</sup> Closing off the ability to seek

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under other Federal or State law. . . ." 42 U.S.C. § 9652(d) (1994).

80. See Gulino, *supra* note 5, at 673.

81. See *id.* at 684.

82. See *id.*

83. While it may be argued that Congress intended to supplement state contribution laws through the savings clause, and hence close the gap between federal and state environmental laws, it is argued here that interpreting the savings clause as merely a device for contribution actions under state law goes far beyond supplementing. See *id.*

84. *Id.* at 673.

85. See 42 U.S.C. § 9607(a) (1994).

86. See 42 U.S.C. § 9613(f)(1) (1994); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d at 344, 347 (6th Cir. 1998).

contribution for parties that are not subject to a section 106 or section 107(a) action would be to deny both of these avenues to parties that might otherwise recover costs incurred by the cleanup effort.

Potentially responsible parties are already precluded from seeking a section 107(a) recovery action in the First, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, thus blocking the first avenue by which these parties can seek recovery for their cleanup costs.<sup>87</sup> Moreover, while the Eighth Circuit has never directly ruled on this issue, it too has suggested that potentially responsible parties are precluded from seeking a section 107(a) action.<sup>88</sup>

In closing off the section 107(a) avenue, many of these courts rely upon the availability of section 113(f) to provide a course of action for potentially responsible parties. For example, in *New Castle County v. Halliburton Nus Corp.*<sup>89</sup> (*New Castle County*), the court rejected New Castle's argument that a party responsible for environmental contamination could assert its own section 107(a) claim against another potentially responsible party.<sup>90</sup> In denying New Castle's section 107(a) claim, the court did point out the availability of section 113(f) contribution claims.<sup>91</sup> As the court stated, "[s]ection 113 provides potentially responsible persons with the appropriate vehicle for such recovery."<sup>92</sup>

But the requirement of a section 106 or section 107(a) action before a contribution claim could be brought effectively closes off this second avenue for potentially responsible parties that courts such as *New Castle County* rely upon. As a result, parties that are partially at fault for the contamination of the site face the real possibility of having both causes of action denied under CERCLA.

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87. See *Centerior Serv. Co.* 153 F.3d at 349; *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 (8th Cir. 1995); *United Techs. Corp. v. Browning-Ferris Indus. Inc.*, 33 F.3d 96, 101 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989); *Tilleman & Swindle*, *supra* note 26, at 174.

88. See *Centerior Serv. Co.*, 153 F.3d at 349; see also *Control Data Corp.*, 53 F.3d at 936 (commenting on the parties' liability for "any other necessary cost of response incurred by any other person."); *Amoco Oil Co.*, 889 F.2d at 672 (discussing relevant factors in determining party's share of costs).

89. 111 F.3d 1116 (3d Cir. 1997).

90. See *id.* at 1121.

91. See *id.* at 1122.

92. *Id.*



### III. THE INCONCLUSIVENESS OF LEGISLATIVE HISTORY

At best, legislative history is murky as to whether Congress intended for a party seeking contribution under CERCLA to first be subject to a prior or pending section 106 or section 107(a) action against it.

#### *A. Neither House nor Senate Reports Definitively Indicate Congressional Intent*

Proponents of the view that a section 106 or section 107(a) action is required for a contribution action point to two statements made within the House of Representatives and Senate Reports to support their claim that legislative history "overwhelmingly" supports their view.<sup>93</sup> As will be seen, however, these statements do not mandate this view.

Advocates of this view point to the House Conference Report on amendments to CERCLA to support their proposition that a party seeking contribution must first incur liability pursuant to section 106 or section 107(a).<sup>94</sup> According to this Report, "[t]his section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties. . . ."<sup>95</sup> However, to infer from this language that the House intended to make section 106 or section 107(a) actions a prerequisite to contribution claims is faulty because this statement does not say *only* a person who is held jointly and severally liable can seek contribution.<sup>96</sup> Instead, it merely reaffirms the right of a person who is jointly and severally liable to seek contribution.

The Senate Report on the CERCLA amendments is similarly ambiguous. According to the Report, the contribution provision allows "parties found liable under sections 106 or 107 have a right of contribution, allowing them to sue other liable or potentially liable parties to recover a portion of the costs paid . . . ."<sup>97</sup> The language of this report is not definitive on this issue because, as discussed above,

93. See *Aviall Servs. Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 140 (5th Cir. 2001).

94. See *id.* at 141.

95. H.R. REP. NO. 99-253, pt. 1, at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861; see *Aviall Servs. Inc.*, 263 F.3d at 141.

96. See *Aviall Servs. Inc.*, 263 F.3d at 146 (Wiener, J., dissenting).

97. S. REP. NO. 99-11, at 43 (1985); see *Aviall Servs. Inc.*, 263 F.3d at 141.

action for contribution or indemnity against any other person liable to [sic] potentially liable."<sup>101</sup> Like the contrast between the version of the contribution provision the Senate rejected and the current provision, here the contrast also suggests that Congress did not intend to limit contribution actions to only those parties who faced a section 106 or section 107(a) action. The substitution of the word "person" in place of "defendant" in the current provision is particularly telling because by rejecting the "defendant" label, Congress also seemed to be rejecting the requirement that the person be a party to some prior or current judicial action before asserting a contribution claim.

#### IV. CERCLA POLICY

##### *A. Requiring a Section 106 or Section 107(a) Action Before a Party Can Seek Contribution Is Inconsistent with CERCLA's Two Primary Policy Goals*

CERCLA has two primary policy goals: (1) "to facilitate the prompt cleanup of hazardous waste sites and to shift the cost of environmental response from the taxpayers to the parties who benefitted [sic] from the wastes that caused the harm;"<sup>102</sup> and (2) to "encourag[e] [the] careful handling of hazardous wastes."<sup>103</sup> An interpretation that a section 106 or section 107(a) action is required before a party may seek a contribution claim is inconsistent with both of these policy goals.

##### 1. The first policy goal

Some courts acknowledge that the section 106 or section 107(a) requirement for contribution does provide parties with a disincentive to voluntarily undertake cleanup operations, yet have nonetheless made this a requirement.<sup>104</sup> These courts make the rather incredulous statement that this is nevertheless consistent with the

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101. *Aviall Servs. Inc.*, 263 F.3d at 151 (quoting H.R. REP. NO. 99-253, pt. 1, at 188 (1985)).

102. *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997).

103. Gulino, *supra* note 5, at 681.

104. See *Aviall Servs Inc.*, 263 F.3d at 144; *Rumpke of Ind., Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1240 (7th Cir. 1997).

for parties seeking contribution under CERCLA it is enough that they are “liable” in the sense that they face some legal compulsion, not in the sense they faced some judgment or suit.<sup>98</sup> In other words, under the common law, parties can seek contribution even in the absence of a judgment or suit. Accordingly, the Senate Report’s use of the word “liability” does not indicate their intent one way or the other.

While this report does not make it clear whether the Senate intended to allow parties to assert contribution claims in the absence of section 106 or section 107(a) actions against them, it certainly does not rule this possibility out. In any event, the report is hardly determinative as to whether these two actions are required.

*B. Congress’s Rejection of Early Versions of CERCLA’s Contribution Provision Suggests Their Approval of Contribution Claims Made Even Absent Section 106 or Section 107(a) Actions*

The Senate rejected an early version of the contribution clause that stated “[a]fter judgment in any civil action under section 106 or [section 107(a)], any defendant held liable or potentially liable in the action may bring a separate action for contribution against any other person liable or potentially liable under [section 107(a)].”<sup>99</sup> In contrast, the current version of the contribution clause provides that “[a]ny person may seek contribution from any other person who is liable or potentially liable under section [107(a)] . . . , during or following any civil action under section [106] . . . or under section [107(a)].”<sup>100</sup> Congressional intent to allow parties to seek contribution in the absence of a section 106 or section 107(a) action against them is suggested by their omission of the phrase “after judgment in any civil action” and the replacement of “defendant” with “person” in the final version of the provision.

The House also rejected an early version of the contribution clause. That version provided that “any defendant alleged or held to be liable in an action under section 106 or section 107 may bring an

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98. For a discussion of how the common law definition of contribution does not require that parties face judgment or suit before seeking contribution see *supra* Part II.A.

99. *Aviall Servs. Inc.*, 263 F.3d at 151 (quoting S. REP. NO. 99-11, at 103 (1985)).

100. 42 U.S.C. § 9613(f) (1994).

policy goals of CERCLA because Congress did not want to include an expansive cause of action when it amended CERCLA to explicitly include contribution.<sup>105</sup>

This approach is found in *Rumpke of Indiana v. Cummins Engine Co.*<sup>106</sup> (*Rumpke*). In that case, Rumpke bought a 273-acre landfill from the sellers, believing it to be free from hazardous waste.<sup>107</sup> Several years later, Rumpke discovered that the landfill was heavily contaminated with toxic waste from a nearby recycling plant.<sup>108</sup> Without prompting from either the State of Indiana Department of Environmental Management or the Federal Environmental Protection Agency, Rumpke expressed its intent to cleanup the landfill.<sup>109</sup> Rumpke subsequently brought a section 107(a) cost recovery and a section 113(f) contribution action against the defendants, who in the past sent hazardous waste to the recycling plant that ended up being dumped at the landfill.<sup>110</sup> In considering Rumpke's section 113(f) contribution claim, the court stated that a prior or pending section 106 or section 107(a) action against Rumpke was required before any contribution suit could be brought.<sup>111</sup> It continued by making the puzzling statement that this requirement "seems to provide a disincentive for parties voluntarily to undertake cleanup operations . . . . This appears to be what the statute requires, however."<sup>112</sup> Still other courts have argued that this requirement will not necessarily discourage voluntarily cleanups because these parties can also rely on state law to assert contribution.<sup>113</sup> Both of these arguments are incorrect.

In regard to the *Rumpke* court's statement, there are two possibilities. First, it is possible that *Rumpke* is correct, and Congress does expect parties to voluntarily undertake cleanup operations while it simultaneously throws a section 113(f) roadblock

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105. See *Aviall Servs. Inc.*, 263 F.3d at 144.

106. 107 F.3d 1235 (7th Cir. 1997).

107. See *Rumpke of Ind. Inc.*, 107 F.3d at 1236.

108. See *id.* at 1236-37.

109. See *id.* at 1239.

110. See *id.* at 1238.

111. See *id.* at 1241.

112. *Id.*

113. See *Aviall Servs. Inc.* 263 F.3d at 144-45. For a discussion of how limiting the savings clause to state law actions would be inconsistent with CERCLA policy see *supra* Part II.C.

in their way. This would be puzzling indeed and, judging by the tone of the *Rumpke* court's statement, they seemed puzzled by this possibility as well.<sup>114</sup>

The second, more plausible possibility is that the *Rumpke* statement is wrong, and Congress intended to allow parties to assert contribution claims in the absence of section 106 or section 107(a) actions. This is more plausible for two reasons. First, as discussed above, CERCLA's text and much of its legislative history strongly suggest that Congress had no intention of requiring either a section 106 or section 107(a) action. Hence, the *Rumpke* court is incorrect when it states that "[t]his appears to be what the statute requires."<sup>115</sup> Second, and perhaps most importantly, this possibility is far more consistent with CERCLA's stated goals. To force parties to wait until they are subject to a section 106 or section 107(a) action "encourages [potentially responsible parties] to postpone, defer, or delay remediation and to 'lie behind the log' until forced to incur cleanup costs."<sup>116</sup> By allowing parties to assert contribution claims in the absence of section 106 or section 107(a) actions against them, parties now have the incentive to undergo voluntarily cleanup operations, an outcome perfectly in line with CERCLA's policy goals.

## 2. The second policy goal

Restrictions on contribution would also be a disincentive for hazardous waste companies to carefully manage their waste. Contribution encourages such companies to carefully manage their hazardous waste because it spreads the cleanup costs across all the responsible parties.<sup>117</sup> If claims for contribution are restricted by the section 106 and section 107(a) requirement, then many of these parties may escape liability given the federal government's difficulty in tracking down and suing the responsible parties.<sup>118</sup>

The government faces this difficulty because there may be decades between the time of the pollution and the cleanup.<sup>119</sup> In the

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114. See *Rumpke of Ind. Inc.*, 107 F.3d at 1241.

115. *Id.* at 1241.

116. *Aviall Servs. Inc.*, 263 F.3d at 156.

117. See Gulino, *supra* note 5, at 682.

118. See *id.*

119. See Poulter, *supra* note 5, at 90.

meantime, those responsible for the pollution may be unavailable, out of business, or unable to pay for the tremendous costs of the cleanup.<sup>120</sup> Furthermore, where the polluter is a large corporation, the shareholders who reap the benefits of the polluting activities may be different from the shareholders who face losses due to CERCLA liability.<sup>121</sup> In light of the government's difficulties (and presuming that would-be polluters know about these difficulties), it is very possible that would-be polluters have little incentive to carefully manage their wastes unless they face the real possibility of paying for their carelessness following contribution suits against them.

*B. The Section 106/107(a) Requirement Undermines the Contribution Provision's Own Incentive for Quick Cleanups*

In addition to the general CERCLA goals of the quick and careful cleanup of hazardous wastes, the contribution provision itself provides companies with incentives to conduct quick cleanups and to cooperate with the government.<sup>122</sup> The provision expressly authorizes courts to take into account "equitable factors," such as a company's level of cooperation with the government, when allocating costs between responsible parties, thus encouraging parties to act quickly.<sup>123</sup> As a consequence of a section 106 or section 107(a) prerequisite for contribution, companies facing huge environmental cleanup costs would drag their feet, knowing that a section 106 or section 107(a) suit must be filed against them before they could diffuse the tremendous cost by seeking contribution against other responsible companies. This seems clearly contrary to the contribution provision's emphasis on quick cleanups.

Other courts argue, however, that potentially responsible parties have other incentives other than contribution claims to conduct quick and careful cleanups. For example, the court in *Pinal Creek Group v. Newmont Mining Corp.*<sup>124</sup> (*Pinal Creek*) held that regardless of any possibility of contribution, a company would engage in a

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120. *See id.*

121. *See id.*

122. *See* Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 354 (6th Cir. 1998).

123. *See id.*; Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672-73 (5th Cir. 1989).

124. 118 F.3d 1298 (9th Cir. 1997).

cleanup effort itself to protect its ongoing interests and could control these cleanup costs better if it did not have to wait for government intervention.<sup>125</sup>

There is very little evidence, however, to support the extremely optimistic proposition that polluting companies would be willing to undergo extremely expensive cleanup efforts for the sake of any of its ongoing interests. In fact, the opposite seems to be true. For example, in the *Aviall* case, Aviall voluntarily contacted the Texas Natural Resource Conservation Commission after discovering the contaminated state of its industrial sites.<sup>126</sup> As a result, the Commission ordered Aviall to undergo a decade-long, multi-million dollar cleanup of these sites despite the fact that Cooper Industries, the previous operator of the sites, was also heavily responsible for the contamination. Since the court denied Aviall's contribution claim against Cooper Industries, Aviall failed to recover any of the cleanup costs from them under CERCLA.

From the harsh lesson of the *Aviall* case, it is not difficult to imagine why companies in the future might be unwilling to voluntarily report environmental problems with their sites. Despite the holding in *Pinal Creek*, without the possibility of contribution it is unlikely that industrial companies in the future will voluntarily report any sort of environmental contamination to government agencies. This is true because they have no incentive to report if they know they cannot recover some of the cleanup costs from other potentially responsible parties. This outcome is clearly contrary to the contribution provision's incentive for quick cleanups.

The optimistic proposition that a company would voluntarily undergo cleanups to avoid the increased costs associated with government intervention is similarly doubtful. As stated above, many parties escape liability because it is very difficult for the federal government to locate and sue all the responsible parties.<sup>127</sup> These companies may find it more economical to try to escape liability rather than voluntarily undergo expensive cleanups. Furthermore, many companies will not voluntarily undergo cleanups

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125. See *id.* at 1305.

126. See *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 136 (5th Cir. 2001).

127. For a discussion of the federal government's difficulty in tracking down and suing the appropriate parties see *supra* Part IV.A.2.

for fear of government intervention, precisely because they know that only through a section 106 or section 107(a) intervention will they be able to seek contribution. Absent the possibility of a contribution claim without being subject to either of these two actions, these companies will face tremendous disincentives to voluntarily undergo expensive cleanups.

## V. CONCLUSION

In summary, there are three major reasons why it is incorrect to require potentially responsible parties seeking contribution under CERCLA to first face a prior or pending section 106 or section 107(a) action against them.

First, it is clear that since CERCLA does not define "contribution," the courts should adopt its common law meaning. The common law interpretation of "contribution" does not require a prior or pending action or suit against a party for that party to seek contribution. Accordingly, the requirement that a party seeking contribution must face a section 106 or section 107(a) action flies in the face of the common law.

Second, legislative history is unclear as to whether Congress even intended this requirement. Indeed, if anything can be drawn from the House and Senate Reports, Congress leaned away from any such limitation on parties seeking contribution. This is evident in how Congress rejected the versions of CERCLA's contribution provision that would clearly require section 106 or section 107(a) as prerequisites to contribution.

Finally, this requirement is totally inconsistent with the stated policies of CERCLA. The whole premise behind CERCLA is to make parties who are responsible for environmental contamination pay for the cleanup. This goal is not fulfilled by requiring parties wishing to undergo environmental cleanups to first face a section 106 or section 107(a) action. The requirement not only takes away the incentives for polluting parties to voluntarily undergo cleanups, it actually provides them with a disincentive to even report contamination to environmental agencies.

With the skyrocketing costs of environmental cleanup in recent years, the issue of who pays for what is likely to come to center stage in the coming years. While CERCLA does an admirable job of trying to fairly allocate the costs of cleanup among the tens or even



hundreds of possible parties that might be responsible for the contamination, it must not be allowed to be shackled by unintended and unnecessary limits.

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