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## Dealing with the Complexity of Settling Private CERCLA Claims:

*Due Process, Article III,  
and Sovereign Immunity*

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DEALING WITH THE COMPLEXITY OF SETTLING PRIVATE  
CERCLA CLAIMS: DUE PROCESS, ARTICLE III, AND SOVEREIGN  
IMMUNITY

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ABSTRACT

The inaugural issue of the St. Thomas Law School's Journal of Complex Litigation, provides an opportunity to describe in a more comprehensive way the complex constitutional and practical problems with CERCLA's private cause of action. Part I explains the evolution of the EPA and the DOJ's position regarding the private cause of action under CERCLA Section 107, the right of contribution under CERCLA Section 113(f), and the effects of a settlement between the Government and potentially responsible parties ("PRPs") on those rights of action. Part II elaborates constitutional difficulties with the Government's positions regarding CERCLA's private cause of action in light of *Atlantic Research*. First, the article explains how the Government's position that it can extinguish private party claims constitutes a "protection racket," because its interpretation of the "contribution protection" provisions of the statute is erroneous and violates Due Process. Second, it explains constitutional difficulties associated with contribution protection arising from the administrative nature of many CERCLA settlements. The constitutionality of Congress's assignment of possible resolution of a dispute to a non-Article III tribunal is limited to situations where the dispute is "closely integrated into a public regulatory scheme." While the resolution of the Government's own cost recovery claims and the extinguishment of related contribution claims clearly involves "public rights," administrative (i.e. non-judicial) resolution of private CERCLA claims remains questionable. Where a private CERCLA plaintiff is unwilling to

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submit his response costs claim against other PRPs to the EPA for resolution, the EPA’s administrative extinction of such claim may fall outside of the “public rights” exception to the requirement for Article III-court adjudication of claims. Finally, the article explains why the Eleventh Amendment poses a constitutional obstacle to the resolution of CERCLA claims, whether the resolution is administrative or judicial. Since states are not liable under CERCLA where the plaintiff is not the Government or a state, whether a state is liable and therefore must participate in a CERCLA settlement depends on the prosecutorial discretion of the United States. Part III discusses practical and strategic considerations in litigating CERCLA cases in light of the complexities caused by the private cause of action and these constitutional limitations. Finally, the article offers the EPA some advice in how to settle or resolve CERCLA cases in light of these complexities.

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## INTRODUCTION

In a 2012 symposium for the the *Southwestern Law Review*, Professor Ronald Aronovsky introduced the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)<sup>1</sup> with the comment, “Few statutory schemes—environmental or otherwise—have generated such complex litigation.”<sup>2</sup> CERCLA even has its own chapter in the Manual for Complex Litigation.<sup>3</sup> This is not surprising. The statute creates a unique liability regime, imposing retroactively a strict, and potentially joint and several, responsibility on multiple parties somehow associated with hazardous substances that end up at a particular location. Owners or operators of facilities who terminated their connection with a facility decades ago, even decades before CERCLA was enacted in 1980, may be liable.<sup>4</sup> Multiple generators of materials ending up at a site may be liable for the release,<sup>5</sup> as well as those whose involvement was merely to select a disposal site and transporting materials to it.<sup>6</sup> Moreover, the remedies CERCLA envisions are massive, injunctive relief at the behest of the United States imposed by federal courts,<sup>7</sup> the spending of billions by the Environmental Protection Agency (“EPA”) and State followed by recovery of cleanup costs and natural resource damages,<sup>8</sup> as well as administrative cleanup orders outside the judicial process, backed by civil penalties and punitive damages.<sup>9</sup>

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<sup>1</sup> 42 U.S.C. §§ 9601–9675 (2012).

<sup>2</sup> Ronald Aronovsky, *CERCLA and the Future of Liability-Based Environmental Regulation*, 41 SW. L. REV. 581, 584 (2012); Keri Holle Hotaling, et al., *EPA Administrative Orders on Consent, CERCLA § 113(f) Contribution Actions, and the Operative Statute of Limitations After Atlantic Research*, 43 ENVTL. L. REP. 10973, 10973 (2013).

<sup>3</sup> MANUAL FOR COMPLEX LITIGATION (FOURTH) § 34 (2004).

<sup>4</sup> 42 U.S.C. § 9607(a)(2) (2012).

<sup>5</sup> 42 U.S.C. § 9607(a)(3) (2012).

<sup>6</sup> 42 U.S.C. § 9607(a)(4) (2012).

<sup>7</sup> 42 U.S.C. § 9606 (2012).

<sup>8</sup> 42 U.S.C. §§ 9604, 9607(a)(4)(A)–(B) (2012).

<sup>9</sup> 42 U.S.C. §§ 9606(b), 9607(c)(3) (2012).

I have recounted elsewhere the legislative disaster of the original CERCLA in the lame duck session of Congress leading to the explosion of federal district court litigation in the 1980s. The EPA and the Department of Justice (“DOJ”) sought to shape interpretations of the statute to favor the Government’s recovery and the Government’s convenience regarding claims under the statute.<sup>10</sup> Many issues in litigation were eliminated or reshaped when CERCLA was amended in 1986.<sup>11</sup>

In this article, we focus on one dimension of CERCLA’s litigative history: recognition and elaboration of a private cause of action for “response costs” under Section 107.<sup>12</sup> This is not the first time I have offered commentary on the provision. In 1993, I wrote about the uneasy fit of such a right of action within the context of the overall statute.<sup>13</sup> Three years ago, I revisited and updated this topic in the Southwestern Law School symposium.<sup>14</sup> This inaugural issue of my law school’s Journal on Complex Litigation, however, provides an opportunity to describe in a more comprehensive way the complex constitutional and practical problems with CERCLA’s private cause of action. While the United States Supreme Court over the last decade has sought to impose a uniform sense of order and reason in CERCLA interpretation,<sup>15</sup> the EPA and the DOJ remain intent on pursuing their recovery and convenience objectives even where those

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<sup>10</sup> Alfred R. Light, *Clean Up of a Legislative Disaster: Avoiding the Constitution Under the Original CERCLA*, 47 ENVIRON: UC-DAVIS ENV’T L. & POL’Y J. 197, 198–99 (2014).

<sup>11</sup> *Id.* at 212–14; see Alfred R. Light, *The Importance of “Being Taken”: To Clarify and Confirm the Litigative Reconstruction of CERCLA’s Text*, 18 B.C. ENV’T L. AFF. L. REV. 1, 4 (1990).

<sup>12</sup> 42 U.S.C. § 9607(a)(4)(B) (2012).

<sup>13</sup> Alfred R. Light, *Superfund’s Second Master: The Uneasy Fit of Private Cost-Recovery within CERCLA*, 6 ST. THOMAS L. REV. 97, 133–34 (1993).

<sup>14</sup> See Alfred R. Light, *Regressing toward Federal Common Law: The Catalytic Effect of CERCLA’s Private Cause of Action*, 41 SW. L. REV. 661 (2012).

<sup>15</sup> See generally *Burlington N. v. United States*, 556 U.S. 599 (2009) (applying a plain language analysis to CERCLA interpretation in order to minimize inconsistent results under a fact intensive analysis); see also *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007); *Cooper Indus. Inc. v. Avial Serv., Inc.*, 543 U.S. 157 (2004).

objectives are in tension with these Supreme Court precedents and the principles of statutory interpretation and constitutional law which underlie them. My hope is that this Article's more comprehensive treatment of CERCLA's complexities will assist the courts and, potentially, the Government itself, to find a better road for the efficient and effective resolution of CERCLA claims.

Part I explains the evolution of the EPA and the DOJ's position regarding the private cause of action under CERCLA Section 107, the right of contribution under CERCLA Section 113(f), and the effects of a settlement between the Government and potentially responsible parties ("PRPs") on those rights of action. Under the original CERCLA, it was not clear that there was a private cause of action under Section 107(a)(4)(B). The 1980 statute could have been read narrowly only to provide for reimbursement of the Government when it paid claims to private parties out of the Superfund or, in the alternative, to establish a private right of recovery only for projects approved by the EPA as part of its National Contingency Plan ("NCP") for cleanup. But in the 1980s, the EPA encouraged the acknowledgement of a private cause of action independent of the EPA's cleanup plans and response actions.<sup>16</sup> First, in the early 1980s, the EPA wanted there to be a private cause of action under Section 107(a)(4)(B) because it needed some statutory language on which to hang its application of joint and several liability (there was no express right of contribution under the original CERCLA)—it used Section 107(a)(4)(B) as the "right of contribution" under CERCLA that made joint and several liability equitable and therefore plausible.<sup>17</sup> Then, the EPA decided it did not want to become involved in collateral litigation among defendants in its CERCLA cases, so it clarified in the 1990 National Contingency Plan that the agency did not need to approve claims asserted under Section 107(a)(4)(B) prior to their assertion in court.<sup>18</sup> Under this NCP, still in force

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<sup>16</sup> Light, *supra* note 13, at 98.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

today, a private party's "substantial compliance" with the regulation's procedures is all that is needed for private party recovery under Section 107(a)(4)(B).

The EPA, however, changed its position in CERCLA litigation somewhat after the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). The EPA and the DOJ began arguing that the language of Section 113(f), added by SARA to provide an express right of contribution, meant that parties could not bring a contribution action unless and until the EPA had actually filed suit.<sup>19</sup> In the *Cooper Industries, Inc. v. Aviall Services, Inc.*<sup>20</sup> decision in 2004, the Supreme Court adopted this recommended view, determining that no right of contribution arose except "during or following" the main "civil action" by the EPA against a defendant or defendants.<sup>21</sup> The EPA did not want private parties to be able to sue in contribution before the EPA chose to file its own suit. As seriously, the EPA interpreted the language of the contribution provision to extinguish rights of any non-settling person against a settling party for any "response costs claims" at a Superfund site. This led to the internal EPA memos and model settlement documents in the 1990s embodying its position that the statute extinguished all such claims so long as the claims were addressed in the CERCLA settlement between the Government and settling parties. This position turned on the EPA's interpretation that PRPs could only have "claims for contribution" against other PRPs. Only non-PRPs, which the EPA called "volunteers" might have the separate cause of action under Section 107.

The Supreme Court's *United States v. Atlantic Research Corp.*<sup>22</sup> decision in 2007, however, went against the EPA's interpretation of the statute. Over the Government's objection, the Court acknowledged that the independent Section 107(a)(4)(B) private cause of action is available even to potentially responsible parties.<sup>23</sup>

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<sup>19</sup> Light, *supra* note 13, at 113.

<sup>20</sup> 543 U.S. 157 (2014).

<sup>21</sup> *Aviall Serv., Inc.*, 543 U.S. at 160.

<sup>22</sup> 551 U.S. 128 (2007).

<sup>23</sup> *Id.* at 35.

This Supreme Court decision led the EPA to revise its settlement policy guidance and model settlement documents again in 2009.<sup>24</sup> The revised materials clarify that it would include as “matters addressed in the settlement” protection of settling parties from PRP Section 107(a)(4)(B) claims as well as from Section 113(f) contribution claims.<sup>25</sup> In other words, the agency persisted with its position that it had authority to extinguish all “response costs” claims at a site in its CERCLA settlements. It read *Atlantic Research* only to require it to be expressed that both “response costs” claims and “contribution” claims against settling parties were to be extinguished, that both types of claim could be “matters addressed in the settlement.”

Part II elaborates on constitutional difficulties with the Government’s positions regarding CERCLA’s private cause of action in light of *Atlantic Research*. First, I explain how the Government’s position that it can extinguish private party claims constitutes a “protection racket,” because its interpretation of the “contribution protection” provisions of the statute is erroneous.<sup>26</sup> A private cause of action under Section 107 is not a “claim for contribution” within the meaning of CERCLA Section 113(f)(2), and therefore is not extinguished by operation of that provision. Since the private cost recovery claim in many cases may not be part of or even related to claims of the Government, to extinguish a non-settlor’s cost recovery claim because of a settlement between the Government and another person, would violate the Due Process Clause of the Fifth Amendment. Second, I explain constitutional difficulties associated with contribution protection arising from the administrative nature of many CERCLA settlements. The constitutionality of Congress’s assignment of

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<sup>24</sup> See *infra* note 40 and accompanying discussion.

<sup>25</sup> *Id.*

<sup>26</sup> Alfred R. Light, *The CERCLA Contribution Protection Racket: EPA Can Only Settle Its Own Claims, Not Private Party Claims*, 29 TOXICS L. REP. (BNA) 984, 984–85 (2014) (tracking a short note published in Bloomberg BNA’s Toxics Law Reporter late last year). The complete article originally appeared in Toxics Law Reporter, 29 TXLR 984 (Nov. 6, 2014). Copyright 2014 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>.



possible resolution of a dispute to a non-Article III tribunal is limited to situations where the dispute is “closely integrated into a public regulatory scheme.”<sup>27</sup> While the resolution of the Government’s own cost recovery claims and the extinguishment of related contribution claims clearly involves “public rights,” administrative (i.e. non-judicial) resolution of private CERCLA claims remains questionable. Where a private CERCLA plaintiff is unwilling to submit his response costs claim against other PRPs to the EPA for resolution, the EPA’s administrative extinction of such claim may fall outside of the “public rights” exception to the requirement for Article III-court adjudication of claims. Finally, the Eleventh Amendment poses a constitutional obstacle to the resolution of CERCLA claims, whether the resolution is administrative or judicial, which Congress may not have considered adequately either when it enacted or when it amended CERCLA. Since states are not liable under CERCLA where the plaintiff is not the Government or a state, whether a state is liable and therefore must participate in a CERCLA settlement depends on the prosecutorial discretion of the United States.

Part III discusses practical and strategic considerations in litigating CERCLA cases in light of the complexities caused by the private cause of action and these constitutional limitations. Owners and operators of CERCLA sites who discover contamination may have conducted investigations and incurred some cleanup costs before the Government even became aware of the problem or, even if it were aware, before it had an opportunity to address the site under its cumbersome administrative process. Since under the NCP, a person conducting a cleanup is only required to comply “substantially” with requirements set forth in that regulation, such a PRP may have a claim under CERCLA separate and apart from activities it is required to undertake under an EPA administrative order or judicial decree. Moreover, such costs may be appropriately reimbursable even after the EPA has negotiated or mandated that the same PRPs incur other costs at the same site under such an order or decree. In other words, costs

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<sup>27</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54–55 (1989).

may be consistent with the NCP even if they are not a part of the EPA-mandated activities under the order or decree. This complexity is the inevitable result of having two causes of action available for the same release of hazardous substance, for cleanup costs outside the EPA enforcement process under Section 107, and for contribution to the Government-imposed cleanup costs under Section 113(f). Part III thus offers the EPA some advice in how to settle or resolve CERCLA cases in light of these complexities.

## I. Evolution of the Two Private Rights of Action

### a. *The Early History: EPA Encourages the Section 107 Private Cause of Action*

In 1993, my article in the *St. Thomas Law Review* discussed the uneasy fit of a private cost recovery action within CERCLA.<sup>28</sup> There, I describe the evolution of the private cause of action under the original CERCLA and the probable effect of amendments to the statute added by SARA. That article lays out, in some detail, the case that Congress did not, in 1980 or in 1986, clearly envision a private cause of action under Section 107(a)(4)(B). In the alternative, CERCLA's text, even as amended by SARA, can be read simply to establish a federal cause of action for the United States to recover response costs where the government uses the Superfund to pay claims for "necessary response costs incurred by any other person as a result of carrying out the national contingency plan."<sup>29</sup> The statute only declares that certain classes of persons "shall be liable" under the statute. The provision does not clearly state that private parties may sue other private parties directly under the Act. Critically, the "lame duck" compromise leading to CERCLA deleted what sponsors called "the federal cause of action," i.e., provisions authorizing the award of damages, and added a requirement that "response costs" claims be

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<sup>28</sup> LIGHT, *supra* note 13, at 97–134.

<sup>29</sup> 42 U.S.C. § 9607(a)(4)(B) (2012).

“consistent with the [NCP],” CERCLA’s regulation setting cleanup priorities.<sup>30</sup> The NCP is a regulation that lays out procedural and some substantive requirements for the EPA’s direction of cleanups undertaken under CERCLA’s authorities.<sup>31</sup>

The presumption against private causes of action is related to several other canons of statutory construction, which evolved in Supreme Court jurisprudence during the 1980s and 1990s. First, in areas where there is extensive government regulation, establishing a fairly comprehensive regime with express remedies such as statutory penalties for regulatory violations, it is less likely that a federal court will infer additional remedies. Under the Clean Water Act (“CWA”), for example, the Supreme Court in 1981 read the Clean Water Amendments of 1972 to preclude a federal common law right of action it had previously acknowledged in 1972 prior to those amendments.<sup>32</sup> *Expressio unius est exclusio alterius*—the express mention of one thing excludes all others.

Frankly, though, the language of Section 107(a)(4)(B) of the original CERCLA is equivocal. Congress might also have envisioned that persons other than the United States or a State could sue to recover costs they had incurred “consistent with the national contingency plan” without requiring that the Fund have first paid those costs. This would ensure that liable parties paid the entire costs of cleanup, whether or not the EPA or a state government financed those costs. The structure of “other person” costs in a separate paragraph from government costs of CERCLA’s liability section<sup>33</sup> is there simply to allocate the burden of proof regarding consistency with the plan differently for the two classes of plaintiffs (“not inconsistent” for governments; “consistent” for “any other person”).<sup>34</sup> Even under this approach,

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<sup>30</sup> See 42 U.S.C. § 9607(a)(4)(B) (2012); S. Res. 1480, 126th Cong. (1980) (enacted).

<sup>31</sup> 42 U.S.C. § 9605 (2012).

<sup>32</sup> *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317–21 (1981).

<sup>33</sup> 42 U.S.C. § 9607(a)(4)(A).

<sup>34</sup> 42 U.S.C. § 9607(a)(4)(A)–(B) (2012).

however, the statute’s text seems only to contemplate “response” under the direction of the EPA under their “national contingency plan.”<sup>35</sup>

Over the past quarter century since the original CERCLA was enacted, the United States Supreme Court has firmly established a presumption against implied private rights of action. For example, in the context of holding that no private right of action exists to enforce the disparate impact regulations promulgated under Title VI, the Court in 2001 said that a right of action “does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”<sup>36</sup> This led Justice Scalia and Professor Bryan Garner to conclude in their landmark treatise *Reading Law*, “So a private right of action cannot be found to be ‘implied’ unless the implication both is clear and is based on the text of the statute—not exclusively on its purpose.”<sup>37</sup> On balance, CERCLA’s text probably does provide the basis for a private right of action, as a unanimous Supreme Court found in 2007.<sup>38</sup> Since then, that interpretation of CERCLA is the law of the land.

In the 1980s, the EPA urged federal courts to acknowledge a private cause of action under CERCLA Section 107. In part, the EPA probably did this for tactical litigation reasons—to shore up its advocacy of joint and several liability. If liable parties had claims against other private parties, the absence of an express right of contribution prior to SARA would not imply the non-existence of joint and several liability to the plaintiff. The absence of an express right of contribution, from the perspective of Supreme Court precedent of the time, was quite serious because of several decisions finding the lack of an express right to indicate the lack of

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<sup>35</sup> *E.g.*, *United States v. E.I. DuPont de Nemours & Co.*, 432 F.3d 161, 178 (3d Cir. 2005); *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1232 n.13 (9th Cir. 2005); *Cnty Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1515 (10th Cir. 1991).

<sup>36</sup> *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

<sup>37</sup> ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 317 (2012).

<sup>38</sup> *United States v. Atl. Research Corp.*, 551 U.S. 128, 140–41 (2007).

a contribution right under other federal statutes.<sup>39</sup> After SARA added an express right of contribution in 1986, the EPA continued in its regulations (e.g., the 1990 revisions to the national contingency plan) to acknowledge a private right of action under Section 107.

b. *Muddling the 107 Private Right of Action with 113 Contribution: The Contribution Protection Racket*

In the late 1990s, the EPA changed its posture in litigation to claim that potentially responsible parties did *not* have a Section 107 cause of action—only non-labile “volunteers” had such a claim in its revised view.<sup>40</sup> The EPA probably revised its litigation position for two reasons. First, after SARA Section 107 was no longer needed to plug the hole of the absence of a right of contribution in light of the addition by SARA of Section 113(f).<sup>41</sup> In addition, if PRPs were limited to suit under Section 113(f), then the EPA could delay a court’s hearing of such claims until it chose to sue. Section 113(f) only permits claims “during or following” a “civil action” under CERCLA.<sup>42</sup> Private parties would be unable to sue other private parties under CERCLA until the proper plaintiff, the United States, chose to sue. The EPA sold its interpretation regarding the timing of contribution claims to the Supreme Court in *Cooper Industries, Inc. v. Aviall Services, Inc.*<sup>43</sup>

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<sup>39</sup> LIGHT, *supra* note 10, at 205–06.

<sup>40</sup> Memorandum from Bruce S. Gelber, Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Dep’t of Justice and Sandra L. Conner, Director, Regional Support Division, Office of Site Remediation Enforcement, U.S. Env’tl. Prot. Agency, to All Attorneys and Paralegals, EPA Regional Counsel Branch Chiefs, Regions I–X, Defining “Matters Addressed” in CERCLA Settlements 2 (Mar. 14, 1997), *available at* <http://www2.epa.gov/sites/production/files/2013-09/documents/defin-cersett-mem.pdf>.

<sup>41</sup> 42 U.S.C. § 9613(f)(1) (2012).

<sup>42</sup> *Id.*

<sup>43</sup> Brief for United States as Amicus Curiae Supporting Petitioner at 12–13, *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157 (2004) (No. 02-1192), 2014 WL 354181.

Concurrently with its change of position in litigation that PRPs liable to the EPA had no private right of action under CERCLA outside of their contribution rights under Section 113(f), in its internal policy guidance and model settlement documents, the EPA “clarified” its position on contribution protection.<sup>44</sup> Until the late 1990s, CERCLA settlements had generally not included a definition of “matters addressed” in the settlement, but simply contained a statement that the “Settling Defendants are entitled to such protection from contribution actions or claims as is provided in CERCLA Section 113(f)(2) or the equivalent.”<sup>45</sup> The DOJ and EPA changed this in 1997 to expressly include in settlements language defining the “matters addressed in the settlement.”<sup>46</sup> They explained, “At a minimum, these will be the response actions or costs the settling parties agree to perform or pay; however, ‘matters addressed’ can be broader if the settlement is intended to resolve a wider range of response actions or costs, regardless of who undertakes work or incurs those costs.”<sup>47</sup> While acknowledging that some judges had ruled that “CERCLA allows [the] EPA to settle claims only for costs incurred by the government”<sup>48</sup> in the context of administrative settlements under CERCLA Section 122(h), the EPA advised its regional offices, as a result, to avoid that Section and instead to embody broader agreements in “an administrative settlement based on the Attorney General’s inherent authority to settle or a judicially approved consent decree.”<sup>49</sup> Structured properly, the DOJ and the EPA plainly took the position in 1997 that its settlements could resolve CERCLA claims “regardless of who undertakes the work or incurs such costs” and that they were not limited to costs incurred by the Government.<sup>50</sup> This 1997 policy publicized the EPA’s view that

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<sup>44</sup> Memorandum from Bruce S. Gelber, *supra* note 40.

<sup>45</sup> *Id.* at 4.

<sup>46</sup> *Id.* at 12.

<sup>47</sup> *Id.* at 4.

<sup>48</sup> *Id.* at 10 n.9 (citing *Waste Mgmt. of Pa., Inc. v. City of York*, 910 F. Supp. 1035 (M.D. Pa. 1995)).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 4.

PRP claims for response costs necessarily were “claims for contribution” within the meaning of CERCLA Section 113(f)(2), which would be extinguished by operation of law upon resolution between the settling party and the Government.<sup>51</sup>

In 2007, however, the United States Supreme Court clarified that private party response cost claims asserted by PRPs were *not* claims for contribution.<sup>52</sup> But the EPA and the DOJ did not abandon their “matters addressed in the settlement” approach after *Atlantic Research*. They simply clarified in their model settlement documents that they intended to extinguish both private party response cost claims and contribution claims in their CERCLA settlements.<sup>53</sup> In essence, the Government continued to run a protection racket. Let me explain.

A protection racket is not the same as extortion. In an extortion racket the racketeers agree not to attack a business. In a protection racket the racketeers agree to defend a business from any attack. A protection racketeer cannot tolerate competition within its sphere of influence from another racketeer. As a result, racketeers negotiate territories in which they can monopolize the use of violence in settling disputes. These territories may be geographical, or they may be a certain type of business or form of transaction. More generally, a racket is a service that fraudulently offers to solve a problem. An archetype of the protection racket where the racketeer indicates that he will protect a store from potential damage that the same person or group would otherwise inflict.

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<sup>51</sup> *Id.* at 4, 12 n.11.

<sup>52</sup> *United States v. Atl. Research Corp.*, 551 U.S. 131, 136 (2007) (emphasis added).

<sup>53</sup> Memorandum from Susan E. Bromm, Director of Office of Site Remediation Enforcement, U.S. Env'tl. Prot. Agency, and Bruce S. Gelber, Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Dep't of Justice, to Directors, Office of Site Remediation and Restoration et al. 2–3 (Aug. 3, 2005), *available at* <http://www2.epa.gov/sites/production/files/2013-09/documents/interim-rev-aoc-mod-mem.pdf>.

The territory the Government seeks to monopolize is the Superfund site; for example, the sites listed on CERCLA's national priorities list under the national contingency plan.<sup>54</sup> Once such a territory is designated, the EPA negotiates settlements with certain parties associated with the territory, such as those who arranged for disposal of wastes found there, as well as past and present owners and operators of the site. In the settlement agreement, under the post-*Atlantic Research* version of its "Matters Addressed in the Settlement" policy, the Government includes a provision from its model settlement agreement addressing all "response costs" incurred or to be incurred in connection with releases of hazardous substances at the site.<sup>55</sup> The Government thereby purports to "protect" the settling defendant from claims by others in connection with any response costs at the site. This is a protection racket because the Government apparently does not know (or has blinded itself to the reality) that it does not have the legal authority to provide the protection its settlements contemplate. This scheme is a "racket" because of the provisions of the settlement agreement guaranteeing that "response costs" claims of persons other than the United States addressed in the settlement were eliminated.

In the words of the EPA's model settlement that the settling party is "entitled, as of the [effective date], to protection" from claims for "matters addressed" to include "all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States *or any other person.*"<sup>56</sup> The problem is that the United States lacks the legal authority to extinguish another person's claims for

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<sup>54</sup> 40 C.F.R. § Pt. 300, App. B (2014).

<sup>55</sup> See Memorandum from Marcia E. Mulkey, Director, Office of Site Remediation Enforcement, U.S. Environmental Protection Agency and Bruce S. Gelber, Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice to Directors, Office of Site Remediation and Restoration et al. 5 (Mar. 16, 2009) [hereinafter March 16, 2009 Memo], *available at* [http://www2.epa.gov/sites/production/files/documents/interim-settle-arc-mem\\_0.pdf](http://www2.epa.gov/sites/production/files/documents/interim-settle-arc-mem_0.pdf).

<sup>56</sup> *Id.* at 4.



response costs under CERCLA. As the district court put the matter in *United States v. Hardage*,<sup>57</sup> “CERCLA provides the United States with no authority to settle private party response cost claims.”<sup>58</sup> Moreover, as I show below, were CERCLA or other federal law to purport to authorize such settlement authority for the United States, the statute would violate the Constitution’s Due Process Clause.<sup>59</sup> The Government should know better.

Imagine a simple three-party scenario outside environmental law, with which practically all lawyers are familiar—the automobile accident. There is a three-car collision, the driver of Car 1 has \$10,000 in medical expenses; the passenger in Car 1 also has \$10,000 in medical expenses. The driver of Car 2 is uninjured (he was driving a Hummer); the driver of Car 3 has \$100,000 in medical expenses. The driver and his passenger in Car 1 sue the driver of Car 2. They do not sue the driver of Car 3. The driver of Car 1 then enters into a settlement agreement with the driver of Car 2. The settlement contains a provision which states, “the Parties agree, and by entering this Consent Decree this Court finds, that each Defendant is entitled, as of the effective date of this settlement, to protection from contribution actions or claims as provided by [a tort law provision identical to Section 113(f)(2)] for ‘matters addressed’ in this settlement.” The matters addressed in this settlement are all claims relating to the accident that is the subject of plaintiff’s claim, including claims for medical expenses incurred by the driver of Car 1 *or any other person*, except for the passenger in Car 1. In subsequent litigation by the driver of Car 3 against the driver of Car 2, the driver of Car 2—with the support of the Car 1 plaintiff—asserts that the Car 3 claim must be dismissed because of the Car 1/Car 2 settlement.

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<sup>57</sup> 750 F. Supp. 1460 (W.D. Okla. 1990).

<sup>58</sup> *Hardage*, 750 F. Supp. at 1495.

<sup>59</sup> See discussion *infra* p. 24.

Let me introduce the *dramatis personae*: the accident is the release of a hazardous substance from a facility within the meaning of CERCLA.<sup>60</sup> Medical expenses are response costs.<sup>61</sup> The driver of Car 1 is the United States (EPA).<sup>62</sup> The passenger in Car 1 is the State.<sup>63</sup> The driver of Car 2 is a generator defendant.<sup>64</sup> The driver of Car 3 is the site owner.<sup>65</sup> In exchange for a settlement payment—presumably its \$10,000 and some “premium” [shall we call it the “protection” money]—the Car 1/Car 2 Settlement agreement extinguishes the right of the Car 3 driver to recover for her own medical expenses, or response costs.<sup>66</sup> The Settlement would have also extinguished the passenger’s right to sue, but for the exception included in the settlement document.<sup>67</sup> The waiver provision in the Settlement would require the driver of Car 2, if he had medical expenses, or response costs, to give up his claim against the Car 3 driver as well.<sup>68</sup> This is the contribution protection racket.

By addressing in a settlement all response costs incurred in connection with a release, the Government believes that a CERCLA settlement between it and one party can extinguish the private party response costs claims of persons who are not a party to the settlement, whether or not the Government has asserted a

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<sup>60</sup> See 42 U.S.C. § 9607(a)(4) (2012); 42 U.S.C. § 9601(22) (defining “release”).

<sup>61</sup> See 42 U.S.C. § 9601(23)–(25) (2012) (defining “removal,” “remedy,” and “respond”).

<sup>62</sup> See 42 U.S.C. § 9601(21) (2012) (allowing CERCLA to treat the “United States Government” as a “person” under the statute).

<sup>63</sup> See *id.* (explaining a State will be deemed a “person” under the statute).

<sup>64</sup> See 42 U.S.C. § 9607(a)(3) (2012) (providing a statutory definition for the generator defendant in this hypothetical as a person “who arranged for disposal” of a hazardous substance found on a facility owned or operated by another).

<sup>65</sup> See 42 U.S.C. § 9607(a)(1) (2012).

<sup>66</sup> March 16, 2009 Memo, *supra* note 55, at 2 (supporting why the EPA included express language in its settlement agreements to “address” private party response costs) (“The *ARC* decision could lead PRPs to seek site costs from settling parties despite the protection from claims afforded by Section 113(f)(2) . . .”).

<sup>67</sup> See *id.* at 5–6 (“To obviate any possible misinterpretation post-*ARC*, we are including this exception for state response actions and costs.”).

<sup>68</sup> See *id.* at 6–8.

claim against them in a civil action or otherwise. It boldly claims “that to allow Section 107 claims to overcome contribution protection would emasculate the provisions that Congress had specifically included to encourage settlements and would make it more difficult for the United States (and States) to induce parties to enter into decrees for site cleanup.”<sup>69</sup> It claims a “sanctity of the contribution protection.”<sup>70</sup>

It is quite obvious, however, that the drafters of Section 113(f) were envisioning the conventional definition of *contribution*. Under this conventional definition of “contribution,” the “contribution protection” provision of Section 113(f)(2) is not all that novel. It follows principles set forth in Restatement (Third) of Torts as to the effect of settlement on claims derivative of claims which are the subject of a settlement. The Restatement (Third) of Torts: Apportionment of Liability, for example, states, “*Contribution against a settlor*. A person who settles with the plaintiff before final judgment is not liable for contribution to others for the injury.”<sup>71</sup> It is apparent under the Restatement’s principles that “contribution” means liability derivative of the claim of the original plaintiff. Under the Restatement, a prerequisite of contribution is: “A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment.”<sup>72</sup> The right of contribution derives from the claim of the plaintiff against the defendant; it bears no connection to claims for other injuries arising out of the same transaction or occurrence.

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<sup>69</sup> Brief for Amicus United States in Support of UTC’s Unopposed Motion to Vacate July 2010 Opinion at 3, *Ashland v. Gar Electroforming, et al.*, 729 F. Supp. 2d 526 (2010) (No. 1:08-cv-00227-M-JJM), 2013 WL 6079993.

<sup>70</sup> *Id.*

<sup>71</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 23, cmt. i (2000).

<sup>72</sup> *Id.* § 23, cmt. b.

This is the definition of “contribution” contemplated by the context of the Federal Rules of Civil Procedure, especially Rule 14 or impleader. Let me quote from one of the first-year Civil Procedure course books used at my law school:

Impleader addresses the situation in which a plaintiff’s claim against a defendant triggers a right of the defendant to be *reimbursed* by someone else if it pays the plaintiff’s claim (or part of it). In such cases, it makes sense to litigate the reimbursement claim at the same time as the primary claim by the plaintiff. To implead a third party, the defendant must allege that the new party is or may be liable to the *defendant* for all or part of any judgment the plaintiff recovers from the defendant. It is a claim to *pass on liability* the defendant incurs, not for an independent loss the defendant has sustained.<sup>73</sup>

The critical language in CERCLA is the language in Section 113(f)(2) that states that a settlement resolving claims of the United States bar “claims for contribution regarding matters addressed in the settlement.”<sup>74</sup> Consider the situation in which a party can implead a non-party into a case under the Federal Rules of Civil Procedure. Unless the claim a defendant has against a third-party defendant is derivative of the claim of the plaintiff against it, the defendant may not implead the third-party defendant under Rule 14. To explain how Rule 14 is co-extensive with “contribution,” Professor Glannon uses the following example in one of his study aids for law students:

Rule 14(a) applies where one defendant has a right to force another party to share in a judgment the plaintiff recovers. Suppose that two drivers cause

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<sup>73</sup> JOSEPH W. GLANNON ET AL., CIVIL PROCEDURE: A COURSEBOOK 629–30 (2d ed. 2014).

<sup>74</sup> 42 U.S.C. § 9613(f)(2) (2012).

an accident, and the injured party sues one of the drivers. In many states, that driver, if negligent, would be liable to the injured plaintiff for her full damages, but would have a right to recover “contribution”—part of the damages she pays to the plaintiff—from the other driver if the second driver was negligent too. So Driver 1 could implead Driver 2 under Rule 14(a) for contribution. In this common scenario, the primary defendant is trying to recover from the third-party defendant part of the plaintiff’s claim against the third-party plaintiff [the defendant].<sup>75</sup>

As Professor Glannon elaborates:

Under Rule 14(a)(1), a defendant cannot bring in a person who might be liable to the plaintiff only. Nor can she bring in a person who might be liable to her (the defendant) for some related damage that she has suffered. She may only bring in a third-party defendant who may be responsible to reimburse her for part, or all, of the judgment the plaintiff recovers from her.<sup>76</sup>

In his extensively-used *Examples and Explanation* study aid, Professor Glannon uses the example of a canal construction contract:

Ali sues Bellefonds, the engineer on a canal construction project, for negligence arising out of faulty engineering calculations in planning the canal. . . . Assume that France sues DeLessepse on

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<sup>75</sup> JOSEPH W. GLANNON, *THE GLANNON GUIDE TO CIVIL PROCEDURE: LEARNING CIVIL PROCEDURE THROUGH MULTIPLE-CHOICE QUESTIONS AND ANALYSIS* 253 (3d ed. 2013).

<sup>76</sup> *Id.*

the canal contract, and DeLesseps wishes to recover from Said, his subcontractor, for certain camels Said took away when he left the job. May he implead Said?<sup>77</sup>

Glannon says no:

This is not a proper impleader claim. Here, DeLesseps has a claim against Said, arising out of the same transaction (the construction of the canal) as the main claim, but Said's liability to DeLesseps is not derivative of the main suit. DeLesseps has a totally independent claim against Said, which he could assert whether France wins or loses on the main claim or never sues at all.<sup>78</sup>

Under this Rule 14-type definition of contribution protection, the only claims CERCLA Section 113(f)(2) extinguishes by operation of law are claims for contribution, in this sense claims by defendants to seek the reimbursement of costs derivative of the claims of the plaintiff against those defendants. Simply stated, claims under CERCLA Section 107(a)(4)(B) for a private party's own incurrence of costs are not contribution claims, which are extinguished by operation of law when the United States, as plaintiff, enters into a settlement with the defendant, whatever terms that settlement might contain.

In *United States v. Atlantic Research Corp.*,<sup>79</sup> the Supreme Court unanimously acknowledged a private cause of action under CERCLA Section 107(a)(4)(B), in which a potentially responsible party conducting a cleanup may sue, "at least in the case of reimbursement."<sup>80</sup> It may even sue the Government as another PRP; the Court opined, so the Government as defendant wishing

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<sup>77</sup> JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES & EXPLANATIONS 275–76 (7th ed. 2013).

<sup>78</sup> *Id.* at 278.

<sup>79</sup> 551 U.S. 128 (2007).

<sup>80</sup> *Id.* at 139.

to keep the costs on a private party, must litigate its fair allocation by bringing a “counterclaim” for contribution in the PRP’s cost recovery suit.<sup>81</sup>

The Government’s erroneous interpretation of CERCLA has implications for practically all CERCLA cost recovery cases. Imagine a site where the Government itself is not a PRP but only the plaintiff, which plans to initiate a response action (cleanup) using the federal Superfund. There are two potential defendants: B, the owner of the contaminated site and a single “generator”—a person who arranged for disposal of a hazardous substance elsewhere that ended up on the contaminated site.<sup>82</sup> In such a situation, frequently it will be the site owner who first discovers the contamination. Where the site owner discovers the contamination, as explained in *Atlantic Research*, the owner may sue the “generator” for recovery of costs it incurs under CERCLA Section 107(a)(4)(B), even though the current site owner may also be a PRP liable to remediate contamination.<sup>83</sup> Let’s say the site owner spends \$100,000 and commences suit against the generator. Then, the Government through the EPA, takes an interest in the site and begins to incur its own costs to clean up the site—let’s say \$50,000 for the costs of a remedial investigation and feasibility study.<sup>84</sup> The study suggests the need for a more extensive cleanup of the groundwater—say another \$100,000. The Government sues the generator (but not the site owner) for its \$50,000 in costs incurred and a declaratory judgment for future groundwater cleanup.<sup>85</sup> As

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<sup>81</sup> See *id.* at 141.

<sup>82</sup> See 42 U.S.C. § 9607 (a)(3) (2012).

<sup>83</sup> See 42 U.S.C. § 9607(a)(4)(B) (2012).

<sup>84</sup> See 42 U.S.C. § 9601(23) (2012) (including within the definition “such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances”). A remedial investigation and feasibility study would be a cost of “removal” (i.e., cost of “response”) under CERCLA.

<sup>85</sup> See 42 U.S.C. § 9613(g)(2) (2012) (providing that in cost recovery actions “the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages”).

is always the case, the Government asserts that the party it has sued—the generator—is liable for all costs under its assertion of joint and several liability under CERCLA.<sup>86</sup>

Here is the contribution protection racket. Now the Government settles with the generator for some amount less than its total incurred costs—say \$10,000. In its settlement agreement with the generator it states, the “matters addressed in this Settlement Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person.”<sup>87</sup> In exchange for the generator’s payment of \$10,000, the Government contends that the remaining costs of cleanup must be paid by the PRP that it did not choose to sue (the site owner). More seriously, it contends that the site owner’s claim under CERCLA Section 107(a)(4)(B)—the original \$100,000—against the generator is extinguished by operation of CERCLA Section 113(f)(2), which states that a PRP “who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.”<sup>88</sup>

The “racket” is that the settlement purports to extinguish not only contribution claims derivative of the Government’s own claim but also the claims of the site owner against the generator, who is not part of the Government’s claim. This scheme works like a protection racket because the settling generator has an incentive to pay the Government an excess amount (which it calls a “premium” in the context of some settlements) over the amount of the Government’s claim.<sup>89</sup> The Government is “protecting” its preferred defendant from claims unrelated to the Government’s own claim. Like other protection rackets, the scheme asserts “protection” over a territory, namely the hazardous waste site at issue.

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<sup>86</sup> See March 16, 2009 Memo, *supra* note 55, at 3–5.

<sup>87</sup> See *id.* at 4.

<sup>88</sup> 42 U.S.C. § 9613(f)(2) (2012).

<sup>89</sup> See Memorandum from Gelber & Connors, *supra* note 40, at 7.



A number of courts interpreted the language of Section 113(f)(2) not to address private party response cost claims, even before the Supreme Court decided *Atlantic Research*.<sup>90</sup> This is not surprising. After all, every law student in the country learns about the limited nature of derivative liability in his or her first-year Civil Procedure course. However, the 2009 Memorandum and its model settlement language shows that the Government does not understand the central implication of the Supreme Court's decision in *Atlantic Research*, acknowledging that CERCLA creates a private cause of action for response costs, independent and separate from the derivative contribution claim. In *Ashland Inc. v. GAR Electroforming*,<sup>91</sup> for example, the district judge patiently describes the amicus brief of the United States in a private cost recovery action, advocating its broad reading of contribution protection.<sup>92</sup> The court underlines the word “contribution” in concluding that the claims extinguished do not include independent cost recovery claims.<sup>93</sup> It viewed the mechanics of the liability determination for cost recovery and for contribution as “conceptually different” and requiring a “separate analysis.”<sup>94</sup> This is the opinion the Government went out of its way to vacate because of the opinion's precedential effect for other federal district courts.<sup>95</sup>

Perhaps the most strained feature of the Government's *post-Atlantic Research* position on contribution protection is its “backup” legal contention, where it argues in the alternative in the

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<sup>90</sup> Compare *United States v. Charter Intern. Oil Co.*, 83 F.3d 510, 516–18 (1st Cir. 1996) (finding settlers not shielded by contribution protection for matters undertaken by other PRPs), and *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1538 (10th Cir. 1995) (finding covenant not to sue in EPA settlement did not bar contribution claims for cleanup costs incurred by other liable parties), with *Kelley v. Wagner*, 930 F. Supp. 293, 296–99 (E.D. Mich. 1996) (finding that by defining “matters addressed” in a state settlement to preclude other PRPs from seeking contribution for costs they incurred, the settlement was not fair or reasonable). See LIGHT, *supra* note 14, at 673.

<sup>91</sup> 729 F. Supp. 2d 526 (D.R.I. 2010).

<sup>92</sup> *Ashland*, 729 F. Supp. 2d at 537–38.

<sup>93</sup> *Id.* at 544.

<sup>94</sup> *Id.* at 545.

<sup>95</sup> *Id.*

circumstance that a court rejects its contention that a party's private cost recovery claim is a "claim for contribution" within the meaning of CERCLA Section 113(f)(2).<sup>96</sup> Judge Lisi summarizes the DOJ's "backup" argument, that Government settlements can bar subsequent private claims based on the common law rule that the sovereign is in privity with individual citizens invoking similar remedies and can extinguish private claims.<sup>97</sup> In effect, the Government contends, in the alternative, that the private party, asserting a cost recovery claim and the Government should be treated as the same person, or at least be deemed in "privity"—such that the Government is representing that person to such an extent that it may extinguish or compromise the private party's claim.<sup>98</sup>

The Government does not seem the least embarrassed by its contribution protection racket. As noted above, in January of 2013, it went so far as to urge *vacatur* of the district court's order in *Ashland*, a private party action to which the United States was not even party.<sup>99</sup> The Government expressed concern regarding the decision's precedential effect in other cases regarding contribution protection, continuing to press its argument that it should be able to extinguish private party cost recovery claims.<sup>100</sup> It went so far as to claim, "there are no other cases that have allowed a potentially responsible party with a Section 107 claim to avoid the contribution protection by a CERCLA settlement as happened here."<sup>101</sup> It further exclaimed, as noted above, that to refuse to adopt the Government's position would "emasculate the provisions that Congress has specifically included to encourage settlements and would make it more difficult for the United States

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<sup>96</sup> *Id.* at 538.

<sup>97</sup> *Ashland*, 729 F. Supp. 2d 526, 538 (D.R.I. 2010).

<sup>98</sup> *Id.*

<sup>99</sup> Brief for United States, as Amici Curiae Supporting Petitioner, *Ashland Inc. v. GAR Electroforming*, 729 F. Supp.2d 526 (D.R.I. 2010) (No. 1:08-cv-00227-M-JJM), 2013 WL 6079993.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 6.

(and States) to induce parties to enter into decrees for site cleanup.”<sup>102</sup> The stakes are “the sanctity of contribution protection.”<sup>103</sup>

The Government seems oblivious that the legal position it has advocated since the 1990s violates the Due Process Clause of the Fifth Amendment. First-year law students generally are not so oblivious, because they must confront the due process issue when they are introduced to class actions using the hoary Supreme Court decision, *Hansberry v. Lee*.<sup>104</sup> The facts of that case dealt with a racially restrictive covenant that barred African-Americans from purchasing or leasing land in a Chicago neighborhood.<sup>105</sup> The covenant was upheld in a prior class action lawsuit, which included Lee, along with all the other neighborhood homeowners, as members of the class (though not parties in the case).<sup>106</sup> The defense in *Hansberry* argued that the covenant could not be contested because it had already been deemed valid by the court in the prior lawsuit.

The Supreme Court explained in *Hansberry* at the outset, It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated a party . . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.<sup>107</sup>

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<sup>102</sup> *Id.* at 3.

<sup>103</sup> *Id.* at 4.

<sup>104</sup> 311 U.S. 32 (1940).

<sup>105</sup> *Hansberry*, 311 U.S. at 37–38.

<sup>106</sup> *Id.* at 39.

<sup>107</sup> *Id.* at 40–41 (citations omitted).

There is a limited exception to this principle for class actions, but representative litigation is also limited by the Due Process Clause.<sup>108</sup> In *Hansberry*, the Supreme Court noted the absent parties had “substantial interests which are not necessarily or even probably the same as those who they are deemed to represent, [and thus representation of the absent parties] does not afford that protection to absent parties which due process requires.”<sup>109</sup> It exclaimed:

Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfied the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants.<sup>110</sup>

So the earlier litigation did not bind the absent parties who had been designated members of the class in that earlier litigation.<sup>111</sup>

The United States Supreme Court in *Atlantic Research* acknowledged the private cause of action under CERCLA Section 107(a)(4)(B) separate from derivative claims for contribution.<sup>112</sup> To extinguish such an independent cost recovery claim through a settlement with others violates the sanctity of Due Process. The language of Section 113(f)(2) is plain that only claims for contribution properly understood are extinguished by statute.<sup>113</sup> The Government’s apparent alternative position—that its relationship to non-settling parties implies an ability to represent those parties for the purpose of extinguishing their independent

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 45.

<sup>110</sup> *Hansberry*, 311 U.S. 32, 45 (1940).

<sup>111</sup> *Id.*

<sup>112</sup> *United States v. Atlantic Research Corp.*, 551 U.S. 128, 141 (2007).

<sup>113</sup> 42 U.S.C. § 9613(f)(2) (2012).

cost recovery claims—is *prima facie* absurd.<sup>114</sup> It is as absurd as the notion in *Hansberry*, that the representative of a racist homeowner’s association seeking to enforce a racially restrictive covenant, represented Mr. Burke, who sought to sell his property to Mr. Hansberry, an African-American. In the words of the Supreme Court, to permit such representation would afford opportunities “for the fraudulent and collusive sacrifice of the rights of absent parties.”<sup>115</sup> Eventually, the EPA may recognize its lack of authority to settle private claims. Even if the Government continues to persist in claiming such authority, it appears that the federal courts are uniform in rejecting its view in this regard.<sup>116</sup>

## II. Article III Issues with CERCLA Settlements

Under Supreme Court precedent established shortly after CERCLA was enacted, Congress’s ability to assign adjudication of a dispute to a non-Article III tribunal is limited to situations where the dispute is “closely integrated into a public regulatory scheme.”<sup>117</sup> This is frequently denominated the “public rights/private rights distinction.”<sup>118</sup> As the Court has explained, “If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III Court.”<sup>119</sup>

The Article III issue became relevant to CERCLA during SARA’s reauthorization process due to the EPA’s desire for express congressional endorsement of administrative settlement

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<sup>114</sup> Brief for Petitioner at 26–36, *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007) (No. 06-562), 2007 WL 669263.

<sup>115</sup> *Hansberry*, 311 U.S. at 45.

<sup>116</sup> *See, e.g.*, *Cooper Indus., Inc. v. Avail Serv., Inc.*, 543 U.S. 157 (2004); *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994).

<sup>117</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54–55 (1989).

<sup>118</sup> Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1585 (2013) (stating an excellent general defense of the constitutional distinction, including a discussion in the context of federal agency administrative orders).

<sup>119</sup> *Granfinanciera*, 492 U.S. at 54–55.

authority. An unusual provision deriving from administration proposals includes references to the President's authority to "enter into an agreement with any person . . . to perform any response action."<sup>120</sup> The extensive provision outlines timetables for settlement negotiations, limitations on covenants not to sue, and the role of the Attorney General in the CERCLA settlement process.<sup>121</sup> The statute extinguishes rights of contribution of any "person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement" regarding "matters addressed in the settlement."<sup>122</sup> Congress itself seems to acknowledge concern over assigning final settlement authority to the EPA, a non-Article III tribunal, in a parallel provision of the statute addressing whether an "administrative settlement" that had the effect of preventing a non-settlor "to obtain contribution from any party to such settlement" might constitute a "taking" under the Fifth Amendment.<sup>123</sup>

In the mid-1980s when CERCLA was amended, Congress was especially sensitive about the Article III issues because of the Supreme Court's landmark decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>124</sup> *Northern Pipeline* in 1982 had struck down the adjudication by non-Article III bankruptcy judges of certain claims.<sup>125</sup> In 1984, Congress responded by enacting amendments to the Bankruptcy Code, making bankruptcy judges a unit of the federal district court, and by having district judges review findings of fact and conclusions of law on decisions outside the bankruptcy's core proceeding.<sup>126</sup> The amendments did not fully resolve issues in the area, however, and the Court subsequently has elaborated on the limited circumstances in which the final adjudication of a claim can be assigned to a non-Article

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<sup>120</sup> 42 U.S.C. § 9622(a) (2012).

<sup>121</sup> 42 U.S.C. § 9622(d)-(f) (2012).

<sup>122</sup> 42 U.S.C. § 9613(f)(2) (2012).

<sup>123</sup> 42 U.S.C. § 9657 (2012).

<sup>124</sup> 458 U.S. 50 (1982).

<sup>125</sup> *Id.* at 92.

<sup>126</sup> 28 U.S.C. § 157(b)(1) (2012).

III tribunal under the “public rights” exception.<sup>127</sup> One informative decision of this era is *Granfinanciera, S.A. v. Nordberg*,<sup>128</sup> in which the Court held that a person who is sued by a trustee in bankruptcy for the fraudulent transfer of money, who has not submitted a claim against the bankrupt estate, possesses a constitutional right to a jury trial because the trustee’s cause of action involves a “private right” and is legal, not equitable. Justice Brennan explains:

In our most recent decisions of the “public rights” doctrine . . . we rejected the view that “a matter of public rights must at a minimum arise “between the government and others.” We held, instead, that the Federal Government need not be a party for a case to revolve around “public rights.” The crucial question, in cases not involving the federal government, is whether “Congress, acting for a valid legislative purpose . . . has created a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.<sup>129</sup>

While CERCLA’s settlement provisions added in 1986 require judicial approval of some agreements, for example “remedial actions under section [106],”<sup>130</sup> they also provide for an

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<sup>127</sup> See *Stern v. Marshall*, 131 S. Ct. 2594 (2011); see also *Exec. Benefits Ins. Agcy. v. Arkison*, 134 S. Ct. 2165 (2014) (following *Stern* when deciding how to adjudicate bankruptcy claims).

<sup>128</sup> 492 U.S. 33 (1989).

<sup>129</sup> *Id.* at 54–55 (internal citations omitted).

<sup>130</sup> 42 U.S.C. § 9622(d)(1)(A) (2012).

“administrative” alternative to the “civil action” for many other agreements, such as agreements that involve only a “minor portion of the response costs at the facility concerned.”<sup>131</sup> The statute vests settlement authority in the “head of any department or agency with authority to undertake a response action under the Act” where “the claim has not been referred to the Department of Justice for further action.”<sup>132</sup> The administrative settlement provision reiterates, “A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement.”<sup>133</sup> Instead of judicial supervision, the statute only requires a 30-day comment period after publication of a notice in the Federal Register, after which the agency head may in his or her discretion “withdraw or withhold consent to the proposed settlement.”<sup>134</sup> There are civil penalties for any party to such an agreement, “which fails or refuse to comply with any term or condition of the order.”<sup>135</sup>

Several other Supreme Court decisions from the 1980s complicate the Article III analysis. In *Thomas v. Union Carbide Agricultural Products Co.*,<sup>136</sup> the Court upheld the constitutionality of binding arbitration among pesticide chemical manufacturers participating in Federal Insecticide, Fungicide, and Rodenticide Act’s (“FIFRA”) pesticide registration scheme. It found this arbitration of their rights were “so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”<sup>137</sup> The FIFRA regime limited judicial review of an arbitrator’s decision to fraud, misconduct, or misrepresentation.<sup>138</sup> Similarly,

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<sup>131</sup> 42 U.S.C. § 9622(g)(1) (2012).

<sup>132</sup> 42 U.S.C. § 9622(h)(1) (2012).

<sup>133</sup> 42 U.S.C. § 9622(h)(4) (2012).

<sup>134</sup> 42 U.S.C. § 9622(i)(1)–(3) (2012).

<sup>135</sup> 42 U.S.C. § 9622(l) (2012).

<sup>136</sup> 473 U.S. 568 (1985).

<sup>137</sup> *Id.* at 594.

<sup>138</sup> *Id.* at 573–74.



in *Commodity Futures Trading Commission v. Schor*,<sup>139</sup> the Court upheld a kind of administrative supplemental jurisdiction of the Commodity Futures Trading Commission (“CFTC”) over claims by parties already in a dispute involving enforcement of a party’s rights under the Commodity Exchange Act. The Court found constitutional the agency’s adjudication of claims arising under state law that were “incidental to, and completely dependent upon, adjudication of reparations claims created by federal law, and in actual fact is limited to claims arising out of the same transaction or occurrence as the reparations claim.”<sup>140</sup> The Court concluded “that the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III.”<sup>141</sup>

### III. Sovereign Immunity and CERCLA Settlements

Where the United States or a State is among the potential defendants in a statutory regime, there is a presumption against the waiver of sovereign immunity—requiring that the waiver be “unequivocally clear.”<sup>142</sup> The landmark Supreme Court decision in 1995, *Seminole Tribe of Florida v. Florida*,<sup>143</sup> outlining the limits on Congress’s authority to abrogate the sovereign immunity of the states, actually overruled a CERCLA decision which had endorsed such an abrogation.<sup>144</sup> From the beginning, CERCLA has included within the definition of “person”—the term used to describe liable entities—has included both “the United States Government” and

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<sup>139</sup> 478 U.S. 833, 841 (1986).

<sup>140</sup> *Id.* at 856.

<sup>141</sup> *Id.* at 857.

<sup>142</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (expressing the Court’s “reluctance to infer that a State’s immunity from suit in the federal courts has been negated”).

<sup>143</sup> 517 U.S. 43 (1996).

<sup>144</sup> *Seminole Tribe*, 517 U.S. at 76.

the “State.”<sup>145</sup> This led the Supreme Court in 1989 to conclude that Congress intended to abrogate the Eleventh Amendment immunity of the states, so that Pennsylvania would be liable in contribution to a CERCLA defendant, the Union Gas Company, which the United States had sued.<sup>146</sup> Only five years later, however, the Supreme Court reversed course and held that Congress lacked power to abrogate the Eleventh Amendment immunity of the states, where it was acting as in CERCLA, pursuant to its Commerce Power.<sup>147</sup> To rule otherwise would be to “undermine the accepted function of Article III.”<sup>148</sup>

*Seminole Tribe* holds that Congress cannot abrogate the immunity of the states under CERCLA, even if it wants to because of the Eleventh Amendment.<sup>149</sup> This is because CERCLA’s liability is rooted in the enforcement of the Commerce Clause power, not the Fourteenth Amendment, whose enforcement can abrogate Eleventh Amendment immunity.<sup>150</sup> While on its face, the Eleventh Amendment only restricts federal court jurisdiction, the Court has ruled that state sovereign immunity also restricts the jurisdiction of an administrative agency.<sup>151</sup> So, despite an apparent congressional intent that states share in CERCLA liability, the Constitution prevents imposition of liability on a state where the liability is to a private party.<sup>152</sup> But the Eleventh Amendment

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<sup>145</sup> 42 U.S.C. § 9601(21) (2012).

<sup>146</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989), *overruled by Seminole Tribe*, 517 U.S. at 44.

<sup>147</sup> *Seminole Tribe*, 517 U.S. at 56–57.

<sup>148</sup> *Id.* at 66.

<sup>149</sup> *Id.* at 44.

<sup>150</sup> *Id.* at 59.

<sup>151</sup> *Fed. Maritime Comm’n v. S.C. State Port Auth.*, 535 U.S. 743, 769 (2002) (explaining that the same principle of affording states the dignity and respect due to sovereign entities should be applied in the realm of administrative adjudications).

<sup>152</sup> *Union Gas Co.*, 491 U.S. at 22. A majority of the Supreme Court determined that in CERCLA Congress did intend to abrogate the Eleventh Amendment immunity of the states. The oddity of the decision was that some members of this majority did not think abrogation constitutionally available even if intended. Justice White, however, took the peculiar position that even though he did not think that Congress intended to abrogate immunity, it could do so such that he

immunity of a state only pertains where the plaintiff is not the United States.<sup>153</sup> While the *Northern Pipeline* line of cases suggests that there are special limits on EPA's ability to resolve private party claims without judicial supervision, *Seminole Tribe* eliminates private party claims against a state altogether, whether or not a court adjudicates the claim. In short, Eleventh Amendment immunity means that states do not have to participate in CERCLA settlements unless the United States chooses to pursue them.

#### **IV. How the EPA Should Adjust its Settlement Policies in Light of These Complexities**

Once the independent private cost recovery cause of action is acknowledged, CERCLA cases become more complex, as do settlements of such cases. Since the same contamination situation can cause the Government's, as well as a private party's, response action under CERCLA, a typical CERCLA lawsuit may join both the private party and government claims into one civil action under CERCLA Section 107.<sup>154</sup> CERCLA plaintiffs with claims arising out of the same contamination situation may assert their claims in the same suit, pursuant to Federal Rule of Civil Procedure 20.<sup>155</sup> They may sue multiple parties under the same Rule 20.<sup>156</sup> A private party sued by the Government may have both contribution claims—derivative of the Government's claim as properly understood—as cost recovery claims for its own cleanup actions.<sup>157</sup>

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joined the judgment upholding the abrogation. This oddity is, however, now of only historical interest since the Court overruled its *Union Gas* decision in *Seminole Tribe*.

<sup>153</sup> *United States v. Mississippi*, 380 U.S. 128, 140 (1965).

<sup>154</sup> *See* 42 U.S.C. § 9607(a)(4) (2012). CERCLA Section 107 provides for cost recovery where there is "a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance." *Id.*

<sup>155</sup> *See* FED. R. CIV. P. 20(a)(1) (2014).

<sup>156</sup> *See* FED. R. CIV. P. 20(a)(2) (2014).

<sup>157</sup> *United States v. Atlantic Research Corp.*, 551 U.S. 128, 138 (2007) (defining contribution as "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share,

This is an inevitable consequence of the existence of a separate private cause of action under Section 107(a)(4)(B), as explained in *Atlantic Research*.<sup>158</sup> The complexities do not end with the implications of the Federal Rules for CERCLA adjudication, though, as we have seen.<sup>159</sup> Some private party claims may not be finally resolved administratively because the Constitution prevents the assignment of their resolution to non-Article III tribunals such as the EPA. And some potentially responsible parties that Congress sought to hold liable, cannot be joined because of sovereign immunity, i.e., state agencies protected by the Eleventh Amendment.

If the EPA and the DOJ eventually decide to adjust their enforcement and settlement policies to reflect these complexities, what should the agencies do? I have several obvious recommendations. First, the agencies must end their “contribution protection” racket. The Government cannot extinguish private party response costs claims that are unrelated to the Government’s own cleanup plans and reimbursement claims because of the requirements of Due Process. So, the Government should not even try to address such claims in its settlements with PRPs by manipulating the definition of “matters addressed.” To the extent that it truly wishes to control private party response costs claims, it should amend the national contingency plan to make those controls part of the regulatory requirements for “consistency” with the plan. Where a private party incurs response costs consistently with the plan, the EPA should realize that such party may recover its costs without any need for further EPA approval and that the EPA cannot extinguish the PRPs claim without its consent. CERCLA Section 113(f)(2) only extinguishes claims for contribution in the traditional sense, i.e., claims related

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the shares being determined as a percentage of fault”) (citing BLACK’S LAW DICTIONARY 353 (8th ed.2004)).

<sup>158</sup> *Atlantic Research Corp.*, 551 U.S. at 138 (“We have previously recognized that §§ 107(a) and 113(f) provide two ‘clearly distinct’ remedies . . . *right to cost recovery* in certain circumstances, § 107(a), and *separate rights to contribution* in other circumstances . . .”).

<sup>159</sup> See 42 U.S.C. § 9622(c) (2012).

to costs or requirements imposed on the contribution plaintiff by the Government. Limiting the matters addressed in a CERCLA settlement to resolution of the Government's own claims avoids the due process violation under the Fifth Amendment.

Second, the agencies should leave ultimate resolution of private response costs claims to the Article III courts rather than trying to "resolve" them through administrative settlements. By limiting administrative settlements to the Government's own response costs claims, the EPA may largely avoid the potential Article III controversy. For its own claims, in order to ensure the effectiveness of contribution protection for those with whom it settles, the EPA should seek judicial approval of settlements, which it initially embodies in administrative orders. The effective date of any administrative order should be the date of such judicial approval, so that the settling party will have three years after judicial approval in which to seek contribution from other PRPs regarding their contribution.<sup>160</sup> The orders should, of course, also specify that the matters addressed in the settlement are not "resolved" (and thus no right of contribution arises) until the settling order recipient has actually paid the costs (or performed the tasks) called for in the order.<sup>161</sup> This would be consistent with the "contribution protection" principles of the Restatement of Torts, discussed above.

Finally, where the Government identifies a state or a state agency that possesses Eleventh Amendment immunity, fairness requires that the Government assume the state's equitable responsibilities, for example, by reducing its claims for relief against private PRPs to reflect the state's fair share of the liability. It should also treat the federal government's own agencies who owned, operated, or generated wastes at a site the same as private

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<sup>160</sup> See 42 U.S.C. § 9613(g)(3)(B) (2012).

<sup>161</sup> *HOTALING ET AL.*, *supra* note 2, at §2, 10978–79 (concluding that in the Seventh Circuit that work under an AOC must be complete but before three years after signing the AOC has elapsed in order to obtain contribution under § 113(f)).

entities for purposes of contribution.<sup>162</sup> This reflects the congressional intent that the Eleventh Amendment otherwise might frustrate.

The EPA's acceptance of these three recommendations will require something of an attitude adjustment. Over thirty years after the original enactment of CERCLA, the EPA should realize that courts are not going to permit the imposition of retroactive, strict, or joint and several liability on defendants without taking into consideration the equitable responsibilities of the various potentially responsible parties, both those the Government has chosen to pursue and those it has chosen to ignore. Courts also are not going to ignore principles of constitutional law such as the Due Process Clause, Article III, and the Eleventh Amendment for the sake of the Government's litigation convenience. The Government is involved in the allocation of response costs whenever it decides to settle with a few defendants for less than complete relief. Its settlement allocations are critical whether or not the EPA chooses to use its authority to determine a "nonbinding preliminary allocation of responsibility."<sup>163</sup> It is time for the Government to acknowledge this reality.

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<sup>162</sup> See Alfred R. Light, *More Equal than Others: The United States Government under CERCLA*, in *RETHINKING SUPERFUND: IT COSTS TOO MUCH, IT'S UNFAIR, IT MUST BE FIXED* 43, 49 (Butler et al. eds., 1991).

<sup>163</sup> See 42 U.S.C. § 9622(e)(3) (2012).