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COMMENT: A Call for a New Policy Toward CERCLA Cleanup Costs in the **Eighth** Circuit: Is it Fair to Punish the PRP Who Initiates the Cleanup at a Superfund Site?

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SUMMARY:

... These procedural advantages are joint and several liability, strict liability, limited affirmative defenses, and a six-year statute of limitations. ... The most significant of these advantages is joint and several liability. ... Second, the Group, seeking to avoid paying an unfair share of orphan costs, contended that it should be entitled to recover all of its remediation costs by imposing joint and several liability on the identified parties for the total amount. ... There is no statutory support for such a rule, which would immunize the claimant-PRP from the risk of orphan-share liability. ... If one of many PRPs takes the initiative to begin the work of cleanup, that party should have the benefit of holding the other, inactive parties to joint and several liability. ... Although a PRP should not benefit from its own wrongdoing, the benefit of joint and several liability and the ability to control the cleanup at the site should go to PRPs who take part in the cleanup activities instead of having government entities perform the cleanup and then seek reimbursement from PRPs. ... Fairness should dictate that joint and several liability is available to the PRP who initiates a voluntary cleanup of a CERCLA site. ...

TEXT-1:

[*126] I. INTRODUCTION

The **Eighth** Circuit remains in a minority of federal circuits that have not addressed whether a potentially responsible party ("PRP") performing Superfund cleanup is entitled to bring a recovery action for costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") n1 § 107, thereby affording the same procedural advantages available to innocent parties. On June 22, 1998, the Supreme Court denied a petition for certiorari, which would have determined the issue, n2 leaving the circuits to decide the issue individually. Thus, the Ninth Circuit's decision in *Pinal Creek Group v. Newmont Mining Corp.*, n3 and similar decisions in the majority of circuits still hold that a PRP may only bring a claim for contribution under CERCLA § 113(f), without the additional procedural benefits of § 107.

The CERCLA § 107 claim provides that defendants are jointly and severally liable, under a strict liability theory, and offers a six-year statute of limitations. n4 By contrast, under § 113(f), defendants are only severally liable, causation must be proven specifically for each PRP's damages, and the statute of limitation is only three years. n5 In

effect, a § 113(f) ruling discourages parties who are liable for a portion of environmental damages from initiating cleanup in the area because they will be forced to internalize most of the orphan costs associated with environmental remediation. Public policy and fairness dictates that such parties, whether liable for a portion of the damages or not, should be afforded the substantial procedural advantages of the § 107 claim.

In Part II, this comment introduces the statutory and legal framework within which such a contribution claim normally arises. Part III analyzes this framework in the context of the **Eighth** Circuit to address the split of decisions at the district court level on this issue. Part IV then discusses the reasoning of district and circuit courts in this complex area of environmental law and offers justifications for the **Eighth** Circuit to decide that PRPs should not be penalized for initiating cleanup actions.

II. STATUTORY AND LEGAL BACKGROUND OF CERCLA AND CLEANUP COSTS

A. The Purpose and Applicable Provisions of CERCLA

1. Original Purpose of the Statute

Congress passed CERCLA in December 1980 in response to the major national problem of abandoned hazardous waste sites. n6 In particular the legislation was a response to the Love Canal controversy. n7 The primary purpose of the act was "to effectuate quick cleanups of hazardous waste sites." n8 This remedial solution to the cleanup of hazardous waste sites can take one of two major paths: (1) a cleanup conducted by the government under CERCLA § 104, followed by a cost-recovery action under § 107 against PRPs; or (2) a private party cleanup, ordered by the Environmental Protection Agency ("EPA"), pursuant to CERCLA § 106. n9 This paper will deal exclusively with the second type of cleanup--one by [*127] a private party. Ultimately, the key question is whether such a private cleanup can also be followed by a § 107 action, or if instead the party participating in the cleanup is limited to a contribution action under § 113(f).

When CERCLA was reauthorized in 1986, through the enactment of the Superfund Amendments and Reauthorization Act ("SARA"), Congress expanded the cost-recovery plan described above. n10 Although, the statute originally only contained provisions for the general cost recovery by a private party involved in a cleanup, the right of **contribution** is now guaranteed to PRPs by statute. n11 Together, the **cost-recovery** provision and the **contribution** section of CERCLA provide compensation for parties involved in a Superfund cleanup, a goal accomplished by charging the responsible parties who can be identified (and held liable) as contributing to the pollution at the site.

The cost-recovery provisions of CERCLA provide the framework for the Act to achieve what several courts have identified as two primary goals: (1) to promote prompt and effective response to contaminated hazardous waste sites; and (2) to impose the costs associated with the cleanup on responsible parties. n12 It is the interplay of these two goals that form the basis for the public policy discussion supporting a PRP's right to bring an action under CERCLA § 107.

2. Section 107(a) Response Costs Versus Section 113(f) Contribution Costs

If there were no advantages for a party to bring an action for response costs under § 107, as opposed to a contribution recovery under § 113 of CERCLA, this discussion would be moot. There are, however, several procedural aspects to § 107 that make it particularly appealing to a party who has incurred response costs. n13 These procedural advantages are joint and several liability, strict liability, limited affirmative defenses, and a six-year statute of limitations. n14

The most significant of these advantages is joint and several liability. Although Congress did not expressly provide for it in the statute, courts have interpreted CERCLA § 107 to require joint and several liability. n15 One circuit court explained the judicial response to the absence of Congressional guidance: "Judges abhor vacuums; and the courts filled this lacuna in the statute, reading CERCLA as imposing joint and several liability on the part of all responsible parties to reimburse the government for cleanup expenses and to pay response costs." n16 Courts have relied on common law principles to support this argument. n17

[*128] Closely related is the concept of strict liability: CERCLA does not require the plaintiff to prove that the defendant intended to cause actual harm to the environment at the liability stage. n18 CERCLA is, therefore, a strict-liability statute, imposing liability without regard to the degree of care or motivation involved in the plaintiff's actions in initiating a cleanup." n19 In addition, the only possible affirmative defenses a party may raise are that there was an act of God, an act of war, or an act or omission of a third party. n20 Finally, the statute of limitations for a cost recovery action is six years. n21

There are compatible disadvantages to the contribution claim. n22 Under § 113(f), defendants can only be held severally liable; causation must be proven independently for each defendant's individual share of the pollution costs; there are numerous equitable defenses available to PRPs; and the statute of limitations is only three years. n23 By only allowing defendants to be held severally liable, § 113(f) is much less attractive to plaintiffs because it leaves them open to the possibility of incurring a large portion of the orphan costs. n24 Therefore, this distinction between liability under § 107 and liability under § 113(f) is critically important. n25

3. *Dealing with Orphan Costs*

One of the most important consequences of determining between contribution and response costs is the allocation of orphan shares. Orphan shares are response costs which are either (a) "attributable to bankrupt or financially insolvent PRPs"; or (b) "costs associated with a portion of hazardous waste not traceable to any known or identifiable PRP." n26 Under CERCLA § 107, the orphan costs are borne by all parties except the party seeking recovery. However, under the provisions of the contribution section, the court is given the authority to equitably allocate orphan shares. n27 Since a PRP initiating cleanup would prefer to recover all of its expenditures, the § 107 provision is clearly preferable.

[*129] *B. Legal History of this Issue in the Federal Courts*

1. *The Supreme Court's Decision in Key Tronic*

Although the Supreme Court has never directly addressed the issue of whether a PRP could maintain a response cost action under CERCLA § 107, some courts, particularly at the district level, have cited *United States v. Key Tronic Corp.* n28 to support the proposition that a PRP could do so. n29 Other courts, however, have dismissed the *Key Tronic* decision, holding that any mention of § 107 was not essential to the holding of the case, and the decision provides no guidance on the issue. n30

Key Tronic Corporation ("Key Tronic") was one of a number of parties partially responsible for contaminating a landfill in eastern Washington. n31 One of the other parties was the United States Air Force. n32 Key Tronic disposed of liquid chemicals at the Colbert Landfill, and the Washington Department of Ecology determined that the chemicals had contaminated the surrounding water supply. n33 Key Tronic entered into a consent agreement with the EPA to contribute \$ 4.2 million to site cleanup; thereafter, the company brought an action against the United States and other parties to recover a portion of that amount, pursuant to the contribution provision. n34 Key Tronic also sought to recover \$ 1.2 million incurred from its own efforts at the site in a response cost action under § 107 prior to the settlement. n35 The additional \$ 1.2 million represented the attorney fees accumulated in searching for other PRPs, preparing the settlement agreement with the EPA, and prosecuting this litigation. n36

The district court dismissed Key Tronic's \$ 4.2 million contribution claim because it was precluded from recovering funds from the Air Force, which had settled completely with the EPA. n37 The court, however, authorized Key Tronic to pursue the \$ 1.2 million claim under § 107. n38 The Court of Appeals reversed the decision, based on precedent "prohibiting a litigant in a private response cost recovery action from obtaining attorney fees from a party responsible for the pollution." n39

[*130] The Supreme Court reversed the decision of the court of appeals in part and held that Key Tronic could recover attorney fees accumulated in its search for other PRPs. n40 The district court in this case recognized the role Key Tronic's search for other responsible parties played in uncovering the Air Force's disposal of wastes at the site and in prompting the EPA to initiate its enforcement action against the Air Force. n41 Tracking down other responsible solvent polluters increased the probability that a cleanup would be paid for and effective. n42 Key Tronic is therefore quite right to claim that such efforts significantly benefited the entire cleanup effort and served a statutory purpose apart from the reallocation of costs. n43 These kinds of activities are recoverable costs of response clearly distinguishable from litigation expenses. n44

The court held that Key Tronic--which was a PRP--could, under CERCLA § 107(a)(4)(B), recover the portion of costs related to the identification role. n45 The Supreme Court reasoned that "the statute [CERCLA] . . . expressly authorized a cause of action for contribution in § 113 and impliedly authorized a similar and somewhat overlapping remedy in § 107." n46 This ruling would seem to imply that a PRP has standing to assert a response cost claim under CERCLA § 107.

2. *Resolution of the Issue in the Federal Circuits*

The majority of United States circuit courts has held that a PRP is not entitled to bring an action for response costs under § 107 of CERCLA, but, instead, would be limited to a contribution action under § 113. n47 The circuits that have ruled according to the majority view include the First, n48 the Third, n49 the Fourth, n50 the Sixth, n51 the Seventh, n52 the Ninth, n53 the Tenth, n54 and the Eleventh. n55 The outcome remains unclear in the Fifth Circuit, despite two cases that address the issue. n56 And the **Eighth** Circuit, along with the Second Circuit, has still not directly faced this issue.

3. A Specific Example: The Ninth Circuit's Pinal Creek Decision

The *Pinal Creek* case, which arose in the District Court of Arizona and was then reversed by the Ninth Circuit, is an excellent example of how this issue has typically been resolved in the federal courts. The dispute in *Pinal Creek* initially arose in 1989, when the Arizona Department of Environmental Quality ("ADEQ") earmarked state funds for the [*131] investigation and remediation of the Pinal Creek drainage basin site ("the Site"), near two Arizona towns where hazardous substances contaminated the groundwater in the shallow aquifer below Pinal Creek. n57 On May 17, 1990, three parties (collectively, "the Pinal Creek Group" or "the Group") entered an agreement to begin the remediation efforts at the Site. n58 When efforts to recover expenditures proved unsuccessful, the Pinal Creek Group filed a lawsuit in the U.S. District Court of Arizona on November 5, 1991, seeking to recover costs from a group of defendants. n59

The plaintiffs sought to recover all, or at least part, of their response costs from other PRPs under CERCLA § 107(a)(4)(B) and Arizona state law, n60 and also sought contribution pursuant to CERCLA § 113(f). n61 The defendants collectively filed motions to dismiss the Group's claims as to joint and several liability under § 107. n62

The district court considered three main issues. First, the defendants insisted that the Pinal Creek Group lacked standing to bring a claim under § 107(a)(4)(B) because that section provided a provision for joint and several liability available only to the government and "innocent" parties. n63 As a PRP, the defendants argued, the Group should not be afforded the advantages provided for innocent parties, because the plaintiff's claim is the "quintessential" contribution claim. n64 The Pinal Creek Group argued that § 107 did not require innocence on the part of a party bringing a claim for response costs. n65 The court agreed with the plaintiffs, ruling that, since the language did not read "any innocent person," § 107 "conferred standing upon any party who [] incurred response costs--regardless of culpability." n66 Therefore, the court held that "the plain language of the statute did not distinguish between innocent and non-innocent plaintiffs, or between public and private plaintiffs; the only distinction drawn was between parties who incurred response costs and those who did not." n67

Second, the Group, seeking to avoid paying an unfair share of orphan costs, contended that it should be entitled to recover all of its remediation costs by imposing joint and several liability on the identified parties for the total amount. n68 The defendants, according to the Pinal Creek Group, could then bring a contribution claim against the Group to recover the portion of the cleanup costs for which the plaintiffs themselves were responsible. n69 The defendants contended that this approach was simply unworkable under the statutes and that if plaintiffs were allowed to proceed under § 107 it would "frustrate contribution protection." n70 The district court agreed with the plaintiff's argument as to the fair allocation of orphan shares. The court reasoned that Pinal Creek's two-step approach to cost recovery--which allowed PRPs who initiated cleanup to recover response costs under § 107 from the other identified and solvent PRPs, and then allowed PRPs to seek contribution from the parties involved in the cleanup for their share of the damage--would satisfy CERCLA's policy goals. n71 If the plaintiffs in this case were denied the opportunity to take advantage of the § 107 incentives, the court reasoned that the CERCLA "incentive scheme would be turned on its head." n72

[*132] Third, the Group argued that it should be rewarded monetarily for initiating cleanup proceedings with reimbursement for response costs. n73 The defendants contended that this was essentially just such a claim for **contribution**. n74 If a third party brought a claim for **cost recovery**, the plaintiff-PRP and the defendants could be co-defendants seeking **contribution** from one another. n75 The district court explained that the defendant's argument that all the PRPs could be seen as joint tortfeasors relied upon the faulty assumption that the plaintiffs and the defendants in the present action stood on an "equal legal footing." n76 This holding hinged upon the fact that it would only be fair that the party involved in the cleanup should have some legal, and therefore financial and practical, advantages over the PRP who made no attempt to assist in the remediation efforts.

After consideration of the briefs and oral arguments of the parties, the district court denied the defendants' motions to dismiss. n77 The court did, however, certify the order for an immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). n78 The Ninth Circuit Court of Appeals granted the petition for interlocutory review, and consequently reversed the ruling of the lower court. n79

The Ninth Circuit ignored the "innocence" argument under § 107, holding that "even if the Pinal Group [had been] free to assert a claim under § 107, [the defendant's] liability to the Pinal Group would be for contribution under the combined effects of §§ 107 and 113." n80 The court therefore held: "because all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution." n81

The Ninth Circuit also disagreed with the district court on the issue of orphan costs. The Ninth Circuit reasoned that it was more fair to require the contribution claim and distribute the orphan shares "equitably among all PRPs" under § 113. n82 The "joint and several" approach would be contrary to the statutory scheme created by CERCLA. n83 If a group of defendant-PRPs is held jointly and severally liable for the total response costs incurred by a claimant-PRP, reduced by the amount of claimant-PRP's own share, those defendant-PRPs would have to absorb all the cost attributable to "orphan shares" which are shares of other PRPs who either are insolvent or cannot be located or identified. n84 There is no statutory support for such a rule, which would immunize the claimant-PRP from the risk of orphan-share liability. n85 This evaluation of the allocation of orphan costs by the Ninth Circuit proved fatal to the argument of the Pinal Creek Group.

The Ninth Circuit also briefly addressed but quickly rejected the plaintiffs' fairness argument about having taken the initiative to cleanup the Site. The court offered a clear response to the contention that an adverse holding would "hamper CERCLA's policy of promoting rapid and voluntary environmental responses by private parties." Thus, the court said that it rejected the argument because it was based on policy considerations that it could not consider in light of the controlling text, structure, and logic of CERCLA. n86 The court also insisted that the holding would not substantially affect the policy. n87 As a result, the decision of the district court was reversed, and the case was remanded with instructions to grant the defendant's motion to dismiss the § 107 claims. n88

[*133] III. AN UNRESOLVED ISSUE IN THE EIGHTH CIRCUIT

A. *Eighth Circuit Cases Do Not Directly Address the Issue*

The **Eighth** Circuit has not directly faced the issue of whether a PRP is limited to a contribution action under CERCLA. n89 The **Eighth** Circuit has, however, handed down several decisions in this area that could shed some light on how the court would lean in deciding the issue.

In its 1990 decision in *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, n90 the **Eighth** Circuit addressed an argument by the defendant that a § 107 plaintiff would be subject to an "unclean hands" defense. n91 The court rejected the idea that CERCLA § 107 contains any "unclean hands" defense. n92 The court held that questioning the plaintiff's motives would frustrate the statute's purpose of encouraging the "timely cleanup of hazardous waste sites." n93 This decision only reflects the fact that a PRP should be entitled to recover costs; it does not distinguish between response costs and contribution costs.

Two cases decided in 1995 also dealt with CERCLA §§ 107 and 113, but neither expressly distinguished between the two sections. In *Control Data Corp. v. S.C.S.C. Corp.*, the **Eighth** Circuit held that liability must first be established under § 107; then the "focus [must be] shifted to allocation," which would be a contribution claim under § 113. n94 In *United States v. Union Electric Co.*, the court again recognized that a § 113 interest would arise "at any time during or following litigation pursuant to § 106 or § 107 between parties who are or are potentially liable." n95

B. *The District Court Split within the Eighth Circuit*

There is a split of authority among the district courts within the **Eighth** Circuit. n96 In *Reynolds Metals Co. v. AP&L Co.*, the Eastern District of Arkansas ruled that, reading §§ 107 and 113 together, a PRP must be limited to a contribution claim under § 113 of CERCLA. n97 The court first recognized that "by its express terms, § 107(a) did not limit the ability of RPs and/or PRPs to bring an action thereunder against other PRPs." n98 However, the court then reasoned that § 107 must not "be read in a vacuum." n99 Recognizing that neither the Supreme Court nor the **Eighth** Circuit had directly passed on the issue, the district court relied on the decisions of other circuits in holding that the joint operation of the two sections required PRPs bring actions only under § 113. n100 The court clearly disagreed with the Supreme Court's "passing comment" in *Key Tronic*--made, the court in Arkansas believed, "somewhat offhandedly"--regarding the overlap of remedies in §§ 107 and 113. n101

The Eastern District of Missouri reached the opposite outcome in *Laidlaw Waste Systems, Inc. v. Mallinckrodt, Inc.* n102 The court analyzed prior **Eighth** Circuit decisions and determined that they were not persuasive on the issue. Thus, the court addressed the "plain language" of §§ 107 and 113, which "[did] not indicate that PRPs [would be] prohibited from bringing claims pursuant to Section 107." n103 According to its reasoning, "there [was] no indication

that the private [*134] right of action [in § 107] [was] limited to 'innocent' private parties." n104 The Eastern District of Missouri ultimately held that PRP-plaintiffs should be able to maintain § 107 cost-recovery actions. n105

IV. ARGUMENTS FAVORING ALLOWING A PRP TO BRING A CERCLA § 107 ACTION

A. The Straightforward Reading of the Statute--No "Innocence" Required

One of the most important issues raised by the reading of the CERCLA statute is whether § 107(a)(4)(B), which provides for joint and several liability of PRPs, is available only to the government and "innocent" private parties. n106 CERCLA provides liability for "any other necessary costs incurred by any other person consistent with the national contingency plan." n107 According to this language in the statute, response costs are available to "any other party," and not "any other innocent party." n108

Nevertheless, most courts, and all defendants, n109 refer to a PRP-plaintiff's claim as the "quintessential" contribution claim. n110 Such reasoning is sometimes cited to the Restatement (2d) of Torts (1979), which states that "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." n111 According to this argument, if an innocent third party brought a claim for cost recovery, the PRP-plaintiff and the party from which it seeks response costs could be co-defendants seeking contribution from one another. n112 This argument mischaracterizes the PRP who has undertaken remediation and the inactive defendant as parties in an equal legal position. Additionally, although this argument does question the relationship between §§ 107 and 113, requiring innocence as a prerequisite to § 107 recovery seems to directly conflict with the plain meaning of that section.

B. Achieving the Policy Goals of CERCLA

Despite the vast amount of legislative history in congressional reports on the passage of CERCLA and again at the time of the 1986 SARA amendments, Congress was virtually silent on this issue. Thus, court interpretations of this portion of CERCLA have gained added importance. Several courts have identified two major policy goals of CERCLA: (1) encouraging the prompt and voluntary cleanup of hazardous wastes and (2) imposing the costs of cleanup on responsible parties. n113 If those are the primary goals of CERCLA, then it would make sense to allow PRPs who have initiated cleanup to maintain § 107 claims. Otherwise, "if PRPs are not allowed to sue under § 107, then the viability of the CERCLA program itself will be jeopardized." n114

[*135] First, why would any private party start a cleanup of a hazardous waste site, absent an order from the EPA, if it knew that it would be lumped in with all the other PRPs who caused contamination of the site for the purposes of damages? n115 Obviously, this is a difficult question to answer. The only incentive a private party would have to initiate a cleanup must arise from the procedural advantages contained in § 107's liability scheme. n116 As one court explained, "to conclude otherwise would discourage voluntary clean-up by PRPs." n117

A common response to this argument offered by the courts is that allowing parties to choose between recovery under CERCLA's §§ 107 and 113 would essentially nullify the effect of § 113. n118 This indicates that these courts recognize the procedural preference of a § 107 action. n119 What it does not recognize is the proper application of this reasoning. Section 113 would not lose any of its present impact in the CERCLA framework. The distinction between a party entitled to recover under §§ 107 and 113 should, however, be based not on innocence but on whether the party took part in cleanup at the site. Each PRP who provided no assistance in the remediation of the Superfund site, other than monetary payments, should be entitled to assert a claim for contribution to recover excess payments under § 113(f). The PRP-plaintiff who incurred response costs for its efforts at the site, on the other hand, should be afforded standing to raise a § 107 recovery action. This framework would certainly work toward CERCLA's first goal of encouraging voluntary cleanup.

Second, there is no indication that this solution would reduce the likelihood of properly apportioning the costs of cleanup. One argument considered by some courts is that it is equally unfair to hold the PRPs who have not participated in cleanup responsible for all of the orphan costs of remediation. n120 This apportionment argument would be valid if that were the intent of allowing cleanup-initiating PRPs to recover response costs. It is not, however, the intent. The major [*136] impact of this approach is shifting the burden of proof. If one of many PRPs takes the initiative to begin the work of cleanup, that party should have the benefit of holding the other, inactive parties to joint and several liability. In this manner, that PRP would not be forced to determine precisely the amount of damage caused by each defendant. Instead, any defendant who felt that its share of the response costs was too high could institute a contribution action against the plaintiff-PRP and the other defendants. The only major effect would be to require the defendants, instead of the plaintiff, to carry the burden of proof as to the amount of damage each one caused individually. n121

A final assertion of some circuit courts is that this would be a highly inefficient method of liability for the courts. n122 According to the Sixth Circuit, this two-step approach--first allowing the active, plaintiff-PRP to bring a joint and several § 107 action and then requiring the inactive, defendant-PRPs to seek contribution from the plaintiff-PRP--would result in "unnecessary litigation, time and expense." n123 This conclusion seems faulty. Each defendant-PRP should already be a party to the lawsuit, so the defendants could easily assert their contribution claims as counterclaims against the plaintiff-PRP and crossclaims against any other identifiable PRPs. n124 The end result, however, would be to require the defendant-PRPs to prove the amount of damages each caused.

C. Fairness in Applying CERCLA Law

Fairness should be the most convincing argument for a plaintiff-PRP who has initiated cleanup at a site. As the district court in *Pinal Creek* explained, PRPs who initiate cleanup are not on equal footing with those who are not acting. n125 The assumption that the all PRPs were like "co-defendants" ignores the fact that CERCLA § 107 differentiates between responding and non-responding parties and confers significant legal advantages upon litigants in the former category. Here, plaintiffs were involved in cleaning up the Pinal Creek basin. Defendants were doing nothing. Consequently, plaintiffs and defendants should not have stood in an equal legal relationship with each other under the terms of the statute." n126

Some circuit courts have agreed with this argument, but only in limited situations where the plaintiff initiated a "voluntary" cleanup absent a government order, n127 or where the plaintiff was an "innocent landowner." n128 When a party [*137] comes forward to initiate cleanup, even after liability has been established by the EPA, fairness should still dictate that the party be given the procedural advantages of § 107.

Some district courts have decided that PRPs can maintain a cause of action under § 107 for response costs, regardless of their innocence, primarily based upon this fairness argument. n129 The U.S. District Court for the Western District of Michigan recently ruled that PRPs may bring claims for response costs under § 107. n130 The court recognized the Seventh Circuit's holding in *Akzo* that PRPs are limited to contribution actions, but it nonetheless decided that it was fairer to allow the § 107 recovery. n131 Although a PRP should not benefit from its own wrongdoing, the benefit of joint and several liability and the ability to control the cleanup at the site should go to PRPs who take part in the cleanup activities instead of having government entities perform the cleanup and then seek reimbursement from PRPs. n132 The court in Michigan agreed with the defendants in the case, who filed § 113(f) counterclaims for contribution, in holding that orphan shares should then be apportioned among all the solvent PRPs who had been identified. n133

The Middle District of Pennsylvania has also been very instructive on this issue. The court pointed out the unfairness of allowing PRPs who initiated cleanup to receive only contribution, n134 when it concluded that "with 'incentives' like these, no prudent party would leap into a voluntary cleanup effort." n135 The court goes on to note that it is more rational and fair for a court to provide parties who "voluntarily initiate cleanup or settlement" with the "two valuable procedural tools" of the six-year statute of limitations and shifting the burden of proof. n136 The District Court of Connecticut also addressed the notion of fairness, noting that PRPs are parties with "unclean hands." n137 The court allowed a PRP to bring a § 107 action to further the purposes and goals of CERCLA. n138

D. A Hypothetical Example

Fairness should dictate that joint and several liability is available to the PRP who initiates a voluntary cleanup of a CERCLA site. Consider the following example: The EPA labels "the Site" a Superfund site under CERCLA. There are five parties known to have contributed to contamination at the Site--A, B, C, D, and E. A enters an agreement with the EPA to begin remediation of the Site. A expends \$ 5 million in response costs. A knows that it probably caused about \$ 1 million of damage at the Site. B, C, and D are each thought to have caused \$ 750,000 of damage at the Site, but A can only actually prove \$ 650,000 from each. E is thought to have caused \$ 500,000, but is now insolvent and thus exempt from CERCLA liability. A also suspects that F and G caused damage to the Site of around \$ 1 million total, but A cannot readily prove this now. It would cost A another \$ 500,000 (in attorney fees, etc.) to determine the precise liability of F and [*138] G, and \$ 500,000 to identify other PRPs, such as H, who is as yet unknown to any of the parties, but caused the remaining \$ 250,000. n139

Solution 1: A can hold B, C, D, F, and G joint and severally liable under CERCLA § 107. If A is given standing to hold these parties joint and severally liable, it will recover the entire \$ 5 million it spent for cleanup. The defendants are then allowed to counterclaim for the \$ 1 million in damage that A caused. In addition, if the defendants can prove that the amounts given above were accurate, the court can reapportion their share according to § 113(f)(1),

all in a single action. There are \$ 750,000 in orphan shares, n140 which the court can also apportion between the parties as it sees fit. Because causation is not required, A does not have to spend the \$ 500,000 to determine the exact shares of damages caused by F and G. n141 A also does not have to spend additional money in an attempt to find other PRPs, such as party H.

Solution 2: A is limited to a contribution action under CERCLA § 113(f). In the contribution action, A must now prove that it has paid more than its share. Since it spent \$ 5 million to clean the site, this must be more than its share. So A can recover the amount it can actually prove was caused by B, C, and D. Since that amount proves to be \$ 300,000 less than the \$ 2,250,000 thought to be caused by those parties, that additional money is added to the \$ 750,000 in orphan shares present in Solution 1. In addition, A cannot plead F, G, or H into the action until it spends the \$ 500,000 to determine the share of damages contributed by F and G and the \$ 500,000 to identify additional PRPs such as H. The Supreme Court in *Key Tronic* said that this amount is recoverable, so it also goes into the pot as orphan shares. n142 Now, A recovers \$ 1,950,000 from B, C, and D, \$ 1 million from F and G, and \$ 250,000 from H, assuming H is actually located and solvent, or a total of \$ 3,200,000, even though it now spent \$ 6 million and caused \$ 1 million of the damage. The pot of orphan shares has now reached \$ 1,300,000. n143

In this example, if the court chose to divide orphan shares according to each identified and solvent PRP's (A, B, C, D, F, and G) n144 share of the actual damages, n145 party A would eventually pay a total of \$ 1,150,000 in Solution 1 for its \$ 1 million in damages. In Solution 2, A would pay \$ 6 million in costs, and then would recover contribution costs of approximately \$ 4,240,000 in Solution 2. This means that A is left with \$ 1,760,000 in costs. n146 Thus, one must consider the differences in the two solutions to determine which is fairer to the party who initiated the cleanup.

V. CONCLUSION

CERCLA attempts to act remedially to cleanup hazardous sites and impose the costs of cleanup on liable parties. In order to maintain its viability, CERCLA must rely on the assistance--both financial and remedial--of private parties. One way to encourage assistance is to allow the PRP who comes forward to hold the inactive PRPs joint and severally liable under CERCLA § 107. This article, therefore, relies upon one simple premise: If a PRP attempts to aid the EPA in implementing the cleanup of a site, that party should stand in a better legal position than the other parties who do not engage in cleanup. Voluntary cleanup should be encouraged, whether it occurs by an innocent party or not.

The rule that a PRP has no standing to maintain a § 107 response cost action has a solid foothold in the United States at the circuit court level. However, the Supreme Court has not directly addressed the issue. The *Key Tronic* decision does nothing to resolve the issue, but nor does it preclude a circuit court from reversing the current trend of [*139] CERCLA case law in this area. The **Eighth** Circuit has an opportunity to resolve the split among its district courts and force the Supreme Court's hand. There are legitimate policy and fairness reasons why the **Eighth** Circuit should rule that PRPs do have standing under § 107 where they have initiated remediation efforts, at the very least when the choice is voluntary. As long as the rulings remain as they are, parties will be reluctant to initiate cleanup if they must admit to causing some of the damage at the particular location. This creates an unfavorable position for the EPA in implementing CERCLA's remediation provisions.

FOOTNOTES:

n1 42 U.S.C. § 9601-9675 (1999).

n2 *See Pinal Creek v. Newmont Mining Corp.*, 524 U.S. 937 (1998).

n3 *See Pinal Creek v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) [hereinafter referred to as *Pinal Creek II*].

n4 *See Pinal Creek v. Newmont Mining Corp.*, 926 F. Supp. 1400, 1403 (D. Ariz. 1996) [hereinafter referred to as *Pinal Creek I*].

n5 *Id.*

n6 *See Lisa M. Glanvill, The Superfund's Superproblem: Will Congress Clean Up the Hazardous Wasteland of the Section 107/Section 113 Standing Controversy?*, 31 SUFFOLK U. L. REV. 153 (1997).

n7 *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1270 (3d Cir. 1993), *reh'g and reh'g en banc denied*.

n8 See William D. Auxer, *Orphan Shares: Should They Be Borne Solely by Settling PRP Conducting the Remedial Cleanup or Should They Be Allocated Among All Viable PRPs Relative to Their Equitable Share of CERCLA Liability?*, 16 TEMP. ENVTL. L. & TECH. J. 267, 267 (1998).

n9 *Rohm & Haas*, 2 F.3d at 1270.

n10 Auxer, *supra* note 8, at 267.

n11 See 42 U.S.C. § 9613(f) (1994).

n12 See, e.g., *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1236 (7th Cir. 1997) (reasoning that CERCLA's liability scheme is "wide indeed, reflecting the need both to clean up the nation's toxic waste sites and the practical imperative to find the necessary money for the job"); *United States v. Charter Int'l Oil Co.*, 83 F.3d 510, 522 (1st Cir. 1996) (noting that "the two major policy concerns underlying CERCLA are ensuring that prompt and effective clean-ups are put into place and making sure that the PRPs responsible for the hazards created bear their approximate share of the responsibility"); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667-68 (5th Cir. 1989) (describing the need for CERCLA and its early history; CERCLA "addressed this problem 'by establishing a means of controlling and financing both governmental and private responses to hazardous releases,'" (quoting *Bulk Distribution Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1441 (S.D. Fla. 1984))); and *Pinal Creek I*, 926 F. Supp. at 1407. See also *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995) (referring to the causation element of CERCLA damages; "CERCLA focuses on whether the defendant's release or threatened release caused harm. . . . If so, and if the other elements are established, the defendant is liable under CERCLA").

n13 See 42 U.S.C. § 9607, which reads in relevant part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--(1) the owner and operator of a vessel or a facility, . . . (4) from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan."

Id. PRP's in cases such as *Pinal Creek I* who seek recovery under the above section will rely on the proposition that § 107(a)(4)(B) simply reads "any other party," and not "any other *innocent* party."

n14 See *Pinal Creek I*, 926 F. Supp. at 1403.

n15 See, e.g., *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *Pinal Creek II*, 118 F.3d at 1300; *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997). *reh'g denied*, 116 F.3d 82 (1997); *United States v. Colorado & Eastern R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995); *Amoco Oil Co.*, 889 F.2d at 672; and *Pinal Creek I*, 926 F. Supp. at 1403.

n16 *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995).

n17 See *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993). "The Restatement (Second) of Torts § 433A (1965) has been relied upon in determining whether a party should be held jointly and severally liable, for the entire cost of remediating environmental harm at the site." *Id.*

n18 *Control Data Corp.*, 53 F.3d at 935. See also *Centerior Service Co.*, 153 F.3d at 348; *New Castle County*, 111 F.3d at 1120-21; *Colorado & Eastern*, 50 F.3d at 1535; and *Alcan Aluminum Corp.*, 990 F.2d at 721.

n19 *Control Data Corp.*, 53 F.3d at 936.

n20 See 42 U.S.C. § 9607(b) (1994).

n21 See 42 U.S.C. § 9613(g)(2) (1994).

n22 See 42 U.S.C. § 9613(f)(1) (1994), which sets forth the claim for contribution: "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."

n23 See *Pinal Creek I*, 926 F. Supp. at 1403.

n24 See *id.* at 1407.

n25 See *City of Merced v. R.A. Fields*, 997 F. Supp. 1326, 1332 (E.D. Cal. 1998), for an example to illustrate the difficulty of determining between response and contribution actions. Here, the court "provides examples to illustrate the point." *Id.* at 1333.

Example 1: The Government sues PRP X under CERCLA § 107, holding X jointly and severally liable for cleanup costs of Site. X sues Y and Z pursuant to CERCLA Section 113(f). Y and Z, as contribution defendants, are liable to X only for their fair-and-several share of the cleanup. Y and Z, being contribution defendants, thus cannot sue A, B, or C pursuant to Section 113(f). X can maintain such an action, because X is jointly and severally liable to the Government.

* * * *

Example 2: X, who is not a PRP, begins cleanup of Site. X sues Y and Z pursuant to CERCLA § 107, holding Y and Z jointly and severally liable. Y and Z then sue contribution defendants A, B, and C, who are liable to Y and Z for their fair-and-several share of cleanup costs. However, neither A, B, nor C could bring CERCLA contribution actions against D, E, or F. Y and Z could bring such actions, being jointly and severally liable to X.

* * * *

Example 3: To forestall a suit by the Government, PRP X voluntarily begins cleanup of Site and incurs costs greater than X's equitable share. X, being a PRP, brings a contribution action against Y and Z. Y and Z, being contribution defendants, are not liable to X for more than their fair-and-several share of the cleanup costs. Y and Z therefore cannot bring contribution actions against A, B, or C. However, because X is a contribution plaintiff, and not a contribution defendant, X can.

Id.

n26 Auxer, *supra* note 8, at 269.

n27 See 42 U.S.C. § 9613(f) (1994), which reads in relevant part: "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." In effect, this provision makes it advantageous for the PRP to seek a § 107 claim as opposed to a § 113(f) claim. The PRP would get all the response costs incurred under § 107, regardless of who caused any of the specific damages. Under a contribution claim, however, the PRP would likely pay at least some of the orphan costs. If any PRPs were insolvent or unable to be located, the court would allocate the remaining costs among the PRPs properly identified.

n28 *Key Tronic, Inc. v. United States*, 511 U.S. 809 (1994).

n29 See, e.g., *AM Int'l, Inc. v. Datacard Corp., Inc.*, 106 F.3d 1342, 1349 (7th Cir. 1997) (recognizing the limited exception carved out by *Key Tronic* for a private PRP to recover attorney fees under § 107 for expenses "not incurred in pursuing litigation"); *Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1239 (M.D. Pa. 1996); *Barnet Aluminum Corp. v. Doug Brantley & Sons, Inc.*, 914 F. Supp. 159, 162 (W.D. Ky. 1995); and *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221, 223 (E.D. Pa. 1995).

n30 See, e.g., *Pinal Creek II*, 118 F.3d at 1301; *Matter of Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *Clear Lake Properties v. Rockwell Int'l Corp.*, 959 F. Supp. 763, 766 (S.D. Tex. 1997); *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 799 (D.N.J. 1996); and *Reynolds Metals Co. v. Arkansas Power & Light Co.*, 920 F. Supp. 991, 995 (E.D. Ark. 1996). In the *Pinal Creek* district court case, the court directly addressed *Key Tronic*. *Pinal Creek I*, 926 F. Supp. at 1411.

The *Key Tronic* decision was based, in part, on the assumption that a liable party may prosecute a cost recovery action under Section 107. This assumption lends some support to plaintiffs' argument. However, because the Supreme Court did not squarely confront the issues underlying this assumption, *Key Tronic* is of limited value in deciding the issue before this Court.

Id. The Ninth Circuit points to a footnote in the *Key Tronic* decision to support its argument that an action between two PRPs must necessarily be one for contribution. *Pinal Creek II*, 118 F.3d at 1303.

Justice Scalia correctly notes that "to say that A shall be liable to B is the express creation of a right of action." Section 107, however, merely says that "A shall be liable" without revealing to whom A is liable. Sections 104 and 106

plainly indicate that the parties described in § 107 are liable to the Government. The statute thus expressly identifies the Government as a potential plaintiff and only impliedly identifies private parties as the hypothetical B in § 107 litigation. That § 107 imposes liability on A for costs incurred "by any other person" implies--but does not expressly command--that A may have a claim for contribution against those treated as joint tortfeasors.

Key Tronic, 511 U.S. at 818 n.11 (citations omitted).

n31 *Key Tronic*, 511 U.S. at 812.

n32 *Id.*

n33 *Id.* at 811.

n34 *Id.* at 811-12.

n35 *Id.*

n36 *Id.*

n37 *Id.*

n38 *Id.* at 813.

n39 *Id.*

n40 *Id.* at 810

n41 *Id.*

n42 *Id.*

n43 *Id.*

n44 *Id.* at 820 [citations omitted].

n45 *Id.*

n46 *Id.* at 816.

n47 *See United Technologies*, 33 F.3d at 103.

n48 *Id.*

n49 *See New Castle County*, 111 F.3d at 1119. The court framed the issue in *New Castle County* as follows:

We must decide whether a person who is potentially responsible for the clean-up of a hazardous waste site under [CERCLA] may bring a cost recovery claim against other potentially responsible persons under CERCLA section 107(a)(4)(B), *id.* § 9607(a)(4)(B), separate from a contribution claim under section 113(f). . . . We conclude that a potentially responsible person may not bring a section 107 cost recovery claim against another potentially responsible person.

Id. *See also Reading Co.*, 115 F.3d at 1120 (holding that civil actions for contribution under § 113 were distinct from those arising under § 107).

n50 *See Pneumo Abex Corp. v. High Point. Thomasville & Denton R. Co.*, 142 F.3d 769, 773 (4th Cir. 1998), *cert. denied*, 525 U.S. 963 (1998).

n51 *Centerior Service Co.*, 153 F.3d at 352. The Sixth Circuit here held:

Our reading of the statute limiting the PRP plaintiffs to contribution, gives meaning to the language in § 107(a) referring to any person, as well as the explicit contribution provisions found in § 113(f). Whether the plaintiffs themselves characterize their action as one for cost recovery or contribution, it is clear to us that they are seeking contribution, and are thus governed by § 113(f).

Id.

n52 See *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994), *reh'g denied*. See also *Rumpke of Indiana*, 107 F.3d at 1242 (holding that civil actions for contribution under § 113 were distinct from those arising under § 107).

n53 See *Pinal Creek II*, 118 F.3d 1298.

n54 See *Colorado & Eastern*, 50 F.3d at 1536.

n55 See *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996).

n56 See *Amoco Oil Co.*, 889 F.2d 664, and *OHM Remediation Services v. Evans Cooperage Co., Inc.*, 116 F.3d 1574 (5th Cir. 1997).

n57 *Pinal Creek I*, 926 F. Supp. at 1402.

n58 *Id.*

n59 *Id.* at 1402-03.

n60 See *Arizona Environmental Quality Act*, Ariz. Rev. Stat. § 49-285 (1998).

n61 *Pinal Creek I*, 926 F. Supp. at 1402.

n62 *Id.*

n63 *Id.* at 1405.

n64 *Id.*

n65 *Id.*

n66 *Id.* at 1406.

n67 *Id.*

n68 *Pinal Creek II*, 118 F.3d at 1300.

n69 *Id.*

n70 *Pinal Creek I*, 926 F. Supp. at 1406. Defendants here refer to the 1986 Amendment to CERCLA which adds a provision in 42 U.S.C. § 9613(f)(2) that provides protection from contribution claims for those parties who have already settled with the government: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims of contribution regarding matters addressed in the settlement."

n71 *Id.*

n72 *Id.* at 1408. The district court here explains that if plaintiffs are not allowed to recover response costs, they are left to a contribution action under which they would bear the burden of proving that they had in fact assumed more of the share of the costs at Pinal Creek than they should have. To then recover amounts in excess of this "fair share," the Group would seemingly have to track down and sue every potentially responsible party. They would still, however, be left to account for any orphan shares attributable to "absent or insolvent" parties. *Id.*

n73 *Pinal Creek I*, 926 F. Supp. at 1407.

n74 *Id.* at 1409.

n75 *Id.*

n76 *Id.*

n77 *Id.* at 1402.

n78 *Pinal Creek II*, 118 F.3d at 1300.

n79 *Id.*

n80 *Id.* at 1301.

n81 *Id.*

n82 *Id.* at 1303.

n83 *Id.*

n84 *Id.*

n85 *Id.*

n86 *Id.* at 1304.

n87 *Id.*

n88 *Id.* at 1306.

n89 *See, e.g., Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 630 (E.D. Mo. 1996); *Wolf, Inc. v. L&W Serv. Ctr.*, 1997 U.S. Dist. LEXIS 3758, *18 (D. Neb. 1997).

n90 *General Elec. Co. v. Litton Ind. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied sub. nom. Litton Ind. Automation Sys., Inc. v. General Elec. Co.*, 499 U.S. 937 (1991).

n91 *Id.* at 1418.

n92 *See id.*

n93 *Id.*

n94 *Control Data Corp.*, 53 F.3d at 935.

n95 *United States v. Union Elec. Co.*, 64 F.3d 1152, 1164 (8th Cir. 1995).

n96 *See Wolf, Inc.*, 1997 U.S. Dist. LEXIS 3758, at *17.

n97 *Reynolds Metals*, 920 F. Supp. at 995.

n98 *Id.* at 994.

n99 *Id.* at 995.

n100 *See id.*

n101 *Id.* at 997 n.10. The court went on to cast doubt on the importance of *Key Tronic* in providing guidance in this area: "With all due respect to the Supreme Court, this Court does not believe, in view of the SARA amendments (notably the addition of § 113(f)), that § 107(a) should continue to be viewed as providing some sort of implicit contribution remedy." *Id.*

n102 *See Laidlaw*, 925 F. Supp. 624.

n103 *Id.* at 630.

n104 *Id.*

n105 *See id.* at 631.

n106 *See Redwing Carriers*, 94 F.3d at 1496. The Eleventh Circuit clearly responds to this question, holding that if the plaintiff cannot claim "innocence" toward the contamination, then that party's claim is one for contribution as a matter of law.

n107 42 U.S.C. § 9607(a)(4)(B) (1994).

n108 *See, e.g., OHM Remediation*, 116 F.3d at 1579. In dicta, the Fifth Circuit reasoned that

The text of section 107 does not limit the class of plaintiffs who may recover response costs; the only descriptions of who may recover are "the United States Government or a State or an Indian tribe" in section 107(a)(4)(A) and "any other person" in section 107(a)(4)(B). Far from a limitation, the combination of these two clauses in section 107 evidences congressional intent that anyone is eligible to recover response costs.

n109 See *Pinal Creek I*, 926 F. Supp. at 1405, for the arguments raised by the defendants that a CERCLA plaintiff must be innocent to use § 107.

n110 See *Colorado & Eastern*, 50 F.3d at 1536.

In our case, [the plaintiffs] claim against the [defendant] parties must be classified as one for contribution. There is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution.

n111 RESTATEMENT (SECOND) OF TORTS (1979) § 886(A)(1), cited in *Pinal Creek I*. 926 F. Supp. at 1409.

n112 See *Pinal Creek I*, 926 F. Supp. at 1409.

n113 *Id.* at 1407.

n114 *Pinal Creek I*, 926 F. Supp. at 1408. The Amicus Curiae briefs submitted by the State of Arizona and the City of Phoenix in that case point out:

Absent PRP contribution, the federal Superfund would be wholly insufficient to pay for remediation of NPL [National Priority List] sites, much less other impacted areas. The situation is more dire in Arizona, where the limited WQARF resources frequently preclude ADEQ from even suing PRPs to initiate cleanup, much less do the work itself. . . . In short, unless liable parties continue to undertake prompt remediation themselves, the system will grind to a halt.

Id. The Amici Curiae note that Arizona currently has fifty-six Federal and State Superfund sites. While the situation may not be as serious in other states as it is in Arizona, the viability of the CERCLA program does rely on getting private parties to carry out the cleanup efforts.

n115 The Sixth Circuit has offered one answer. Clearly discounting the plaintiff's argument that allowing a PRP to utilize § 107 would encourage voluntary cleanup, the court held that the equitable factors in § 113(f) provide the same incentives to the PRP who conducts remediation at a site. *Centerior Service Co.*, 153 F.3d at 354. The court refers to the Gore Factors which determine how to allocate costs equitably among PRPs.

The so-called "Gore Factors" . . . are: (1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with the Federal, State or local officials to prevent any harm to the public health or environment.

Id.

n116 See *Centerior Service Co.*, 153 F.3d at 353-55 for a further discussion of these incentives including: (1) shifting the difficult burden of proof concerning the allocation of cleanup costs from plaintiffs to defendants; (2) relieving plaintiffs of the risk of being held liable for "orphan shares"--cleanup costs that would otherwise be charged to insolvent or absent parties; (3) minimizing plaintiffs' transaction costs involved in tracking down and suing every PRP; (4) limiting the range of available defenses to those enumerated in Section 107(b); and (5) giving parties who initiate cleanups the benefit of a longer statute of limitations.

n117 *Barnet Aluminum Corp.*, 914 F. Supp. at 164. Allowing recovery under § 107, on the other hand, "supports the underlying policy of encouraging prompt and complete response actions. . . ." *Id.* See also *Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579 (D. Conn. 1994). In that case, the court followed a previous case in reasoning that "a PRP who is otherwise amenable to cleanup may be discouraged from doing so if it knows that, where the harm is indivisible, its only recourse for reimbursement is contribution from the solvent PRPs." *Id.* (quoting *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1118 (N.D. Ill. 1988)).

n118 See, e.g., *New Castle County*, 111 F.3d at 1123 (holding that such a reading of the two sections would "render section 113 a nullity"), *United Technologies*, 33 F.3d at 101 (explaining that the court would "refuse to follow a course that ineluctably produces judicial nullification of an entire SARA subsection"), and *Reading Co.*, 115 F.3d at 1117 (holding that "in an action which presents a claim for apportionment of clean-up costs, § 113(f) trumps § 107(a)(4)(B)").

n119 *See New Castle County*, 111 F.3d at 1123 (explaining that "potentially responsible persons would quickly abandon section 113 in favor of the substantially more generous provisions of section 107").

n120 *See, e.g. Pinal Creek II*, 118 F.3d at 1303. The court here reasoned: "Moreover, even a modified rule, in which the joint and several liability of defendant-PRPs is reduced by that portion of the orphan shares which the claimant-PRP should equitably bear, could result 'in a chain reaction of multiple, and unnecessary lawsuits.'" *Id. See also New Castle County*, 111 F.3d at 1121-22 (containing an extensive argument as to the proper allocation and apportionment of orphan shares and remediation costs); *Charter Int'l*, 83 F.3d at 521 (holding that "substantive fairness introduces into the equation concepts of corrective justice and accountability" and that "a party should bear the cost of the harm for which it is legally responsible") (quoting *United States v. Cannons Engineering Corp.*, 89 F.2d 79, 87 (1st Cir. 1990)); and *Rohm & Haas*, 2 F.3d at 1280 (explaining that this was the reason why § 113 provides for the possibility of apportionment and contribution, i.e., to remedy the inherent unfairness).

n121 *See Bethlehem Iron Works*, 891 F. Supp. at 225: "Finally, permitting plaintiffs to raise their section 107(a) claims comports with CERCLA's goal of encouraging parties to initiate cleanup operations promptly and voluntarily. Any unfairness that might result in imposing joint and several liability on [the defendant] will be remedied through the resolution of [his] counterclaim for contribution."

n122 The Ninth Circuit in *Pinal Creek* fears that this would cause "a chain reaction of multiple, and unnecessary lawsuits." *Pinal Creek II*, 118 F.3d at 1303 (quoting *Ciba-Geigy Corp. v. Sandoz Ltd.*, 1993 WL 668325 at *7 (D.N.J. 1993)).

n123 *Centerior Service Co.*, 153 F.3d at 354. The court reasoned that the plaintiffs' argument, similar to the one advanced here, was unworkable:

Under such a framework [Section 113 recovery], plaintiffs need not worry about getting stuck with so called "orphan shares." Such equitable allocation would ultimately result from the plaintiffs' scenario. They tout a "two step framework" in which PRPs who initiate cleanup may seek joint and several recovery from other PRPs who then may turn around and file contribution claims against the original PRPs. Thus, even under the plaintiffs' framework, contribution ultimately becomes the necessary result. They seek, however, to prolong this result through unnecessary litigation, time and expense.

Id.

n124 *See Adhesives Research*, 931 F. Supp. at 1246. In this decision, the court addressed this issue of counterclaims:

Contrary to what some would argue, the court does not thereby provide plaintiff PRPs with a windfall. Defendant PRPs may crossclaim for contribution pursuant to § 113, thereby permitting the court to ultimately apportion liability equitably between the parties. Such an interpretation and application of CERCLA merely assists in accomplishing CERCLA's goals by providing all parties with a strong incentive to put the environment first.

Id.

n125 *Pinal Creek I*, 926 F.Supp. at 1409.

n126 *Id.*

n127 *See United Technologies*, 33 F.3d at 99. In that case, the First Circuit recognized that its holding--that a PRP is limited to a § 113 action--might have been different had the plaintiff voluntarily initiated a cleanup without a government order. The court reasoned that

it is possible that, although falling outside the statutory parameters established for an express cause of action for contribution, see 42 U.S.C. § 9613(f)(1), a PRP who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution under 42 U.S.C. § 9607(c).

Id. at 99, n.8.

n128 *See Reading Co.*, 115 F.3d at 1120. In that case, the Third Circuit relied on the dictum from *Key Tronic* to find an "innocent landowner" exception, whereby a landowner, regardless of fault, may bring a direct action under § 107 to recover his own cleanup costs.

n129 See, e.g., *Adhesives Research*, 931 F. Supp. 1231, 1238; *Pneumo Abex Corp. v. Bessemer & Lake Erie Railroad Co., Inc.*, 921 F. Supp. 336, 347 (E.D. Va. 1996) *rev'd* *Pneumo Abex Corp. v. High Point, Thomasville and Denton Railroad Co.*, 142 F.3d 769 (4th Cir. 1998); *Barnet Aluminum Corp.*, 914 F. Supp. at 164; *Charter Township of Oshtemo v. American Cyanamid Co.*, 898 F. Supp. 506 (W.D. Mich. 1995); *Town of Wallkill v. Tesa Tape Inc.*, 891 F. Supp. 955, 960 (S.D.N.Y. 1995) (explaining that, although the case dealt with a non-innocent government party, "even if the Town were not a governmental plaintiff, it would be entitled to maintain both § 107 and § 113 claims"); and *Companies for Fair Allocation*, 853 F. Supp. at 580.

n130 See *Charter Township of Oshtemo*, 898 F. Supp. at 509.

n131 *Id.* at 508-09.

n132 *Id.*

n133 *Id.* at 509.

n134 See *Adhesives Research*, 931 F. Supp. at 1244. Here, the court presented the following reasoning:

A party who took steps to settle with the EPA or a state agency and undertake cleanup efforts, or a party who promptly initiated cleanup on its own, would bear a number of additional burdens. Those plaintiffs who made an affirmative effort to clean the environment would be "rewarded" by being forced to carry the burden of proof in a contribution action to show that they incurred more than their fair share of the cleanup costs. To successfully prosecute such a contribution action, the plaintiff would necessarily incur large transaction costs in locating all other PRPs and proving that harm to the site was divisible. Moreover, the plaintiff would risk being unable to recover cleanup costs expended beyond its equitable share and attributable to absent or insolvent PRPs ("orphan shares").

Id. (citations omitted).

n135 *Id.*

n136 *Id.* at 1246.

n137 *Companies for Fair Allocation*, 853 F. Supp. at 580.

n138 *Id.*

n139 This simple example assumes that the cost of damage of the parties will equal the cost of remediation. In actuality, that may be far from true. In fact, it is often the case that cleanup runs far in excess of any monetary damage attributable to the parties, depending on the degree of remediation which is sought. If that is true, the party conducting the cleanup is stuck with even greater orphan shares.

n140 This figure indicates the \$ 500,000 attributable to insolvent party E and the \$ 250,000 attributable to party H, as yet unidentified.

n141 Those parties would be forced to assert their precise amount of damages in the counterclaim, which seems fair given that F and G are in a better position to do so than is A.

n142 See *Key Tronic*, 511 U.S. at 813. In *Key Tronic*, the plaintiff claimed \$ 1.2 million in attorney fees and other costs associated with locating other PRPs at the Superfund site, so the \$ 1 million in this hypothetical appears to be a fair estimate.

n143 Orphan shares now include only \$ 500,000 from Solution 1, as H has now been identified, the \$ 300,000 A could not precisely prove against B, C, and D, and the \$ 500,000 spent to identify F, G, and H.

n144 Or, this amount could be divided among seven parties in Solution 2, if H is located and solvent.

n145 This would mean that A would be liable for 1/5 of the orphan shares, because it caused \$ 1 million of the \$ 5 million in actual damages. Of course, the court could calculate this amount entirely differently.

n146 Note that parties B, C, and D, who were clearly liable but did not participate in the cleanup, each pays \$ 862,500 for \$ 750,000 in damages under Solution 1, and only \$ 845,000 in Solution 2. This means that, in effect, there is a financial incentive in refusing to take part in the remediation if contribution is the only remedy for the PRP-plaintiff.