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The Allowance of Disallowance of Private Party CERCLA Claims in Bankruptcy: A Judicially Forged Conflict Between the Code and CERCLA

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THE ALLOWANCE OR DISALLOWANCE OF PRIVATE PARTY CERCLA CLAIMS IN BANKRUPTCY: A JUDICIALLY FORGED CONFLICT BETWEEN THE CODE AND CERCLA

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Emerging upon the bankruptcy-environmental scene is yet another way for debtors in bankruptcy to avoid their environmental obligations. The Bankruptcy Code disallows contingent claims for reimbursement or contribution upon which a debtor is co-liable. The courts are split as to whether the CERCLA claims of private parties brought against debtors fit within the Code preclusion policy just described. If CERCLA reimbursement or contribution claims are disallowed, a private party with an uncollected and unadjudicated CERCLA claim against a debtor will never be able to require the debtor to shoulder its fair share of the cleanup costs. This unfortunate result is made more unacceptable by its lack of a legal basis: neither the plain meaning of the Bankruptcy Code or CERCLA nor their legislative histories support the judicial interpretation which disallows private party CERCLA claims. Moreover, there are better, fairer and more logical ways to resolve this conflict between the Code and CERCLA. This Article is addressed to both the courts that will interpret the relevant Bankruptcy Code and CERCLA provisions in the future and Congress which unartfully drafted the Bankruptcy Code provision in the first place. The hope is that either audience will acknowledge the unwarranted misreadings and resulting tension and adopt a position that allows private party CERCLA claimants to participate in the bankruptcies of polluting debtors.

I. Introduction

In years past, a number of businesses engaged in less-than-sophisticated environmental practices.[1] This lackadaisical attitude towards environmental protection spawned a host of environmental laws to offset the increasing pollution associated with business operations.[2] The most infamous environmental law to arise from the massive disregard for the environment is the Comprehensive Environmental Response, Compensation, and Liability

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1. *See* H.R. REP. No. 1016, 96th Cong., 2d Sess. 17-21 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6121-23, for a general description of the early handling practices of hazardous waste by businesses. Love Canal, where thousands of barrels of hazardous chemicals were buried near neighborhoods and schools in Niagara Falls, New York, by Hooker Chemical Co., serves as a prime example of previous years' practices. *Id.*

2. *See id.; see also Developments in the Law--Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1466 (1986).

Act of 1980 (CERCLA).[3] CERCLA's notoriety comes from its incredibly expansive terms and the courts' endorsement of its broad reach.[4] The well known reason for CERCLA's broad reach, usually at the expense of businesses' pocketbooks, is to effectuate prompt cleanup of businesses' past incursions on the environment, in order to protect the public health and safety.[5] The draconian scheme of CERCLA can send otherwise solvent businesses running for shelter.[6] With liability so expansive, and the associated costs seemingly infinite, one would think that a business that is in someway connected to hazardous waste has little hope of obtaining shelter from CERCLA.

Nevertheless, there is hope for businesses in such a predicament. The Bankruptcy Reform Act of 1978 ("Code")[7] provides businesses with the shelter they seek from the

3. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1990)). CERCLA was reauthorized by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1990)).

4. CERCLA's broad reach is well illustrated by Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1343 (9th Cir. 1992), where an innocent construction contractor was held liable for the cleanup costs as an "operator" and a "transporter" just for moving dirt that was later found to be contaminated. *See infra* note 35. The moral of the story is that CERCLA's provisions and goals are so broad that CERCLA interests rarely lose, irrespective of the merits of their legal arguments. *See* 2 THE LAW OF HAZARDOUS WASTE § 12.03[6] (Susan M. Cooke ed., 1987). *See infra* Part II.B.1.

5. *See* B.F. Goodrich v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992) ("In CERCLA Congress enacted a broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threaten . . . the environment and human health."); Alloy Eng'g & Casting Co. v. Elgin, J. & E. Ry., 1992 WL 275587, at *1 (N.D. Ill. Oct. 1, 1992) (citing cases for the same point).

6. *See* Arlene E. Mirsky et al., *The Interface Between Bankruptcy and Environmental Laws*, 46 BUS. LAW. 623, 626 (1991); Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1199 (1984). An EPA study concluded that in the next 50 years, 25-30% of the firms owning disposal sites will seek bankruptcy protection. U.S. GENERAL ACCOUNTING OFFICE, *Hazardous Wastes, Environmental Safeguards Jeopardized When Facilities Cease Operating* 18 (1986).

7. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1988 & Supp. 1990)), is commonly referred to as the "Code." The prior bankruptcy statute, the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (codified at 11 U.S.C. §§ 1-1103 (1976) (repealed 1978)), is commonly referred to as the "Bankruptcy Act" or simply the "Act."

wrath of CERCLA.[8] The Code attempts to rehabilitate debtors, ensure that all creditors are treated equally and provide for the orderly disposition of debtor's assets.[9] At numerous stages within the bankruptcy process, a party holding a CERCLA claim against a debtor will be required to do battle with the debtor and the debtor's other creditors in order to survive the pro-debtor provisions of the Code and receive payment on its claim against the debtor.[10] Because of the nature and size of CERCLA claims, and the profound impact that CERCLA claims have on debtors and the environment, controversies often arise when a CERCLA

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8. *See* Mirsky, *supra* note 6, at 626 (Noting, however, that "bankruptcy is not . . . the haven from environmental problems that many once believed."). *Cf.* John Van Lieshout, *Bankruptcy Code Offers Little Protection to Polluters,* WIS. LAW., May 1991, at 11, (courts have indicated that environmental concerns take priority over bankruptcy law). As this Article implicitly demonstrates, the Code is a safe haven for debtors. Note that it is not just that the provisions, as written, are overwhelmingly pro-debtor, but the courts have interpreted some provisions to be far more pro-debtor than they appear to be or were ever intended to be.

Three Code provisions in particular, and an emerging fourth provision, enable debtors to reduce or eliminate their environmental liability in bankruptcy: (1) 11 U.S.C. § 362(a) (1988), the automatic stay, bars most litigation and other enforcement actions concerning the debtor's pre-petition environmental obligations; (2) 11 U.S.C. § 554(a) (1988) permits the debtor to abandon environmentally burdened property from the debtor's estate; (3) 11 U.S.C. § 727 (1988), 11 U.S.C. § 1141 (1988), 11 U.S.C. § 1228 (1988), and 11 U.S.C. § 1328 (1988 & Supp. 1990) grant the debtor an extremely broad discharge of environmental obligations; and (4) 11 U.S.C. § 502(e)(1)(B) (1988) disallows contingent claims against the debtor upon which the debtor is co-liable. These last two Code provisions are the cutting edge of bankruptcy-environmental clashes. Code § 502(e)(1)(B) is the focus of this Article so it will not be elaborated upon in this footnote. Because the subject of this Article has only recently been discovered by the courts, there is very little commentary on the subject. Nevertheless, one article has been published regarding the subject. *See* Lori Jonas, Note, *Dividing the Toxic Pie: Why Superfund Contingent Contribution Claims Should Not be Barred by the Bankruptcy Code*, 66 N.Y.U. L. REV. 850 (1991).

The current trend among cases considering the discharge of CERCLA liability in bankruptcy is to discharge all CERCLA liability, including that which is undiscovered at the time of bankruptcy. *See In re* Chateaugay Corp., 944 F.2d 997 (1991); *In re* Jensen, 127 B.R. 27 (Bankr. 9th Cir. 1991); Shawn F. Sullivan, Note, *Discharging CERCLA Liability in Bankruptcy: The Necessity for a Uniform Position,* 17 HARV. ENVTL. L. REV. 445 (1993). The automatic stay and abandonment issues are more settled areas of the law. In Penn Terra Ltd. v. Dept. of Envtl. Resources, 733 F.2d 267, 273 (3d Cir. 1984), the leading case on environmental-automatic stay issues, the third circuit held that when the issue is whether the automatic stay bars enforcement of state police power, the reach of Code § 362(a) should be interpreted narrowly. In *Penn Terra*, the Department of Environmental Resources' cleanup order was found not to be an attempt to enforce a money judgment. *Id.* Actions to enforce money judgments, even though considered police powers, are barred by the automatic stay. *See* Code § 362(b)(5), 11 U.S.C. § 362(b)(5) (1988).

Regarding abandonment under § 554(a) of the Code, the Supreme Court has held that abandonment is unavailable to a debtor or trustee if the abandonment would violate environmental laws reasonably designed to protect the public health and safety. Midlantic Nat. Bank v. New Jersey Dept. of Envt'l. Protection, 474 U.S. 494, 506-07, 106 S. Ct. 755, 762, 88 L.Ed.2d 859 (1986), *reh. denied,* 475 U.S. 1090, 106 S.Ct. 1482 (1986). But even though the Supreme Court has settled the issue, most lower courts have allowed the abandonment of contaminated property, even when the property is clearly in contravention of environmental laws. *See, e.g., In re* Shore Co., 134 B.R. 572 (Bankr. E.D. Tex. 1991); *In re* Oklahoma Refining Co., 63 B.R. 562 (Bankr. W.D. Okl. 1986).

9. *See In re* Charter Co., 862 F.2d 1500, 1502 (11th Cir. 1989); Ellen E. Sward, *Resolving Conflicts Between Bankruptcy Law and the State Police Power*, 1987 WIS. L. REV. 403, 404 (1987).

10. *See supra* note 8 for some of the stages at which bankruptcy and environmental clashes take place. There are others as well. *See infra* note 111 and accompanying text. This Article will refer to claims against a debtor that are based on CERCLA as "CERCLA claims." The holder of a CERCLA claim will be referred to as a "claimant." For purposes of this Article, CERCLA claims will almost always be held by private parties. Although, since they can be held by the government, this Article will use the term "private party CERCLA claim."

claim confronts one of the pro-debtor Code provisions.[11] These environmental-bankruptcy clashes, more specifically CERCLA-Code clashes, are becoming increasingly popular.[12]

The most recent example of a Code-CERCLA clash is what courts have done in the past two years with a particular Code provision, § 502(e)(1)(B).[13] Surprisingly, the Code and CERCLA have both been in existence for over ten years, yet this particular controversy has only recently emerged.[14] The controversy surrounding § 502(e)(1)(B) and CERCLA arises when a holder of a CERCLA claim attempts to have its claim against a debtor validated and valued so that the claimant can participate in the debtor's bankruptcy. This is broadly referred to as the claim allowance stage of bankruptcy proceedings.[15] A creditor's claim must be allowed before a creditor can receive some sort of payment on its claim. Courts deciding whether to allow or disallow private party CERCLA claims have split, with some courts interpreting § 502(e)(1)(B) to allow the claims, and others interpreting § 502(e)(1)(B) to disallow them.

Once a holder of a disallowed claim is barred from participating in a debtor's bankruptcy, its claim will be permanently discharged when a debtor's case is closed.[16] Obviously, then, by excluding CERCLA claims for reimbursement or contribution from participating in the bankruptcies of polluting debtors, a substantial component of Congress' cleanup program is being alleviated by the bankruptcy courts. Private parties play a crucial role in the enforcement of CERCLA.[17] CERCLA's efforts to clean up the environment will be seriously hampered if bankruptcy courts continue to disallow private party CERCLA claims.

The focus of this Article is on the new controversy emerging from the bankruptcy courts which sometimes enables business debtors to alleviate private party CERCLA claims

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11. Many courts and commentators have recognized the significant conflicts between the Code and CERCLA. *See, e.g., In re* Combustion Equipment Assocs., 838 F.2d 35, 37 (2d Cir. 1988); Richard L. Epling, *The Impact of Environmental Law on Bankruptcy Cases, 26* WAKE FOREST L. REV. 69 (1991); Ellen E. Sward, *Resolving Conflicts Between Bankruptcy Law and the State Police Power,* 1987 WIS L. REV. 403 (1987).

12. *See* Nancy Firestone, *Government Perspectives on Bankruptcy and Environmental Law Interaction,* 18 Envtl. L. Rep. (Envtl. Law Inst.) 10358 (Aug. 1988) (Ten percent of U.S. Dept. of Justice's environmental cases involve bankruptcy issues).

13. *See* 11 U.S.C. § 502(e)(1)(B); *see infra* text accompanying note 155 (text of § 502(e)(1)(B)).

14. The Code was enacted in 1978, *see supra* note 7, while CERCLA was enacted in 1980, *see supra* note 3. The first case to discuss the relevance of Code § 502(e)(1)(B) to private party CERCLA claims was decided in 1989. The remainder of cases resolving the intersection of Code § 502(e)(1)(B) and CERCLA, which are all included in this Article, were decided in 1991 and 1992.

15. Claim allowance proceedings are governed by Chapter 5 of the Code, specifically Code §§ 501-510 (1988).

16. *See* supra note 8; *infra* notes 116-19 and accompanying text.

17. *See* Nurad, Inc. v. Hooper & Sons Co., 966 F.2d 837, 841 (4th Cir.), *cert. denied,* ---U.S.---, 113 S. Ct. 377 (1992); 3550 Stevens Creek Assocs. v. Barclays Bank of California, 915 F.2d 1355, 1357 (9th Cir. 1989) (to promote objectives of CERCLA, Congress created a private cause of action), *cert. denied,* ---U.S.---, 111 S. Ct. 2014, 114 L.Ed.2d 101; *see infra* notes 81-85 and accompanying text.

pursuant to § 502(e)(1)(B).[18] This Article takes the position that the controversy surrounding § 502(e)(1)(B) and the CERCLA claims of private parties is unjustified and insupportable. In manufacturing yet another clash between the Code and CERCLA, some courts have ignored the plain meaning and purposes of both statutes. Hopefully the analysis in this Article will encourage the courts to realize their insupportable forging of a conflict between the Code and CERCLA and persuade them to resolve the unnecessary conflict. Included among the courts that this Article is attempting to influence is the Supreme Court, which has yet to address any aspect of the § 502(e)(1)(B)-CERCLA conflict. If the courts are unpersuaded, this Article also attempts to persuade Congress to either repeal § 502(e)(1)(B) in its entirety or enact an explicit exception for private party CERCLA claims.

To set the stage for the legal and policy analysis that follows, Part II contains an explanation of the relevant background law and the typical scenarios that drive the issues concerning the disallowance of CERCLA claims. Part III surveys the case law concerning § 502(e)(1)(B) and private party CERCLA claims by centering the discussion around the opposing positions taken by the courts. The case law on these issues is still so new and sparse that it is possible to explore all of the decisions directly dealing with the allowance or disallowance of private party CERCLA claims. Since every case to be decided thus far involves a business debtor reorganizing under Chapter 11, this Article naturally will discuss the relevant issues in that context. Nevertheless, there is absolutely no reason why any material in this Article cannot be equally applied to the other types of debtors and bankruptcies.[19] Part IV follows with an analysis of the case law and relevant background law, evaluating the opposing positions taken by the courts and squaring them with the provisions and purposes of the Code and CERCLA. Included in part IV are proposals for law reform and for a more justifiable and equitable interpretation of existing law.

II. Typical Scenarios and Relevant Background Law

A. Typical Scenarios in 502(e)(1)(B) Disputes

The litigants of Code § 502(e)(1)(B) disputes for purposes of this article are comprised of a debtor on one side and a private party on the other. The debtor in these scenarios is normally a business that is in someway connected to hazardous substances contained at a site. The private party is usually a business or person that purchased contaminated real property from a debtor. The private party can also be a nonpurchaser that is already a

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18. *See* Nurad, Inc. v. Hooper & Sons Co., 966 F.2d 837, 841 (4th Cir.), *cert. denied*, ---U.S.---, 113 S. Ct. 377 (1992); 3550 Stevens Creek Assocs. v. Barclays Bank of California, 915 F.2d 1355, 1357 (9th Cir. 1989) (to promote objectives of CERCLA, Congress created a private cause of action), *cert. denied*, ---U.S.---, 111 S. Ct. 2014, 114 L.Ed.2d 101; *see infra* notes 81-85 and accompanying text.

19. In fact, Chapter 5, containing § 502(e)(1)(B), applies equally to all of the other Chapters in the Code. *See* Code § 103, 11 U.S.C. 103 (1988). Thus, the reader should not hesitate to apply the law and analysis provided herein when dealing with businesses under Chapter 7 and individuals under Chapters 7, 11 and 13. Furthermore, family farmers under Chapter 12 may find the issues herein especially relevant due to family farmers' use of pesticides and other chemicals and practices with environmental implications. Finally, because the material discussed in this Article applies to all bankruptcies, there will rarely be a distinction made between the use of the terms "bankruptcy," "reorganization" or "Chapter 11."

defendant in a CERCLA cost recovery action. In either scenario, the private party will be a potentially responsible party ("PRP")[20] under CERCLA that believes that the debtor is also potentially liable for the contamination of a particular site.[21] Private parties become involved in a debtor's affairs when they attempt to recover cleanup costs from a debtor based on a debtor's link to the subject contamination. At the point in the scenario, when a private party seeks cleanup costs from a debtor, a debtor will seek, is already seeking or has already sought protection under Chapter 11 of the Bankruptcy Code. Environmental agencies, under these scenarios, have yet to bring an action against a debtor for mandating clean up or for recovery of cleanup costs.

When the private party asserts its CERCLA claim for reimbursement or contribution, the debtor will respond with a motion in bankruptcy court to disallow the claim pursuant to Code § 502(e)(1)(B).[22] The private party claimant of course will retaliate by arguing that its claim should be allowed because Code § 502(e)(1)(B) was not meant to apply to CERCLA claims. Resolving the legal issues framed by both sides requires familiarity with the underlying bodies of law with a focus on private party CERCLA actions and the claims process in bankruptcy.[23]

B. Relevant Background Law

1. CERCLA

a. Goals

CERCLA was enacted with the purpose of providing funding and authority for the cleanup of existing contamination and the prevention of future contamination which threatens the public health and environment.[24] A major component of this goal is to provide

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20. It is very common to refer to potentially liable parties under CERCLA as "PRPs," even though the liability section of CERCLA, section 107, 42 U.S.C. § 9607 (1988), does not explicitly designate them as such. Other sections do recognize this label. *See, e.g.*, CERCLA §§ 104, 122, 42 U.S.C. §§ 9604, 9622 (1988). Put simply, a PRP is anybody or any entity that arguably fits within the broad CERCLA categories of responsible parties. *See infra* notes 35, 44, 45, and 53 and accompanying text. Purchasers of contaminated property are always PRPs due to their ownership of the contaminated site. *See infra* notes 35, 44, 45 and 53 and accompanying text.

21. Only in a citizen suit, *see* CERCLA § 310, 42 U.S.C. § 9659 (1988), or when a neighbor or the like brings a CERCLA cost recovery action against a debtor will a plaintiff not be a PRP.

22. *See* 11 U.S.C. § 502(e)(1)(B) (1988). For text of provision, see *infra* note 154 and accompanying text. A somewhat awkward situation arises when a CERCLA claimant brings a claim against a debtor after a debtor has emerged from bankruptcy. In this situation, a debtor would have to argue that the private party's CERCLA claim would have been disallowed at the time of bankruptcy. *See, e.g.*, Cottonwood Canyon Land Co., 146 B.R. 992 (Bankr. D. Colo. 1992). A debtor is more likely to offer the § 502(e)(1)(B) argument in the alternative and argue first that any CERCLA claims were discharged in its bankruptcy. *See id.; supra* note 8; *infra* notes 116-19 and accompanying text.

23. Appropriately, this Article will refer to the issues surrounding the allowance or disallowance of private party CERCLA claims as the "allowance issue."

rapid response to actual and potential releases of hazardous wastes.[25] A second purpose is to attach the costs of cleanup to those who contributed to the contamination in the first place.[26] *B.R. MacKay & Sons, Inc. v. United States*,[27] best sums up these goals: "It appears that with the dangers or potential dangers caused by hazardous substances, shooting first and asking questions later was the intent of Congress, making it clear that under CERCLA the EPA should have and has full reign to conduct or mandate uninterrupted cleanups for the benefit of the environment and the populous." [28] But most important, for purposes of this Article, are the new subsidiary goals to the cleanup scheme, such as equitable apportionment of cleanup costs and the further involvement of private parties in the cleanup scheme, brought about by Amendments to CERCLA in 1986.[29]

b. Reimbursement under CERCLA

To effectuate the above goals, CERCLA enables government bodies, meaning the EPA and state environmental agencies,[30] and private parties to bring various causes of action

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24. *See* CERCLA §§ 104(a)(1), 104(c)(4), and 106(a), 42 U.S.C. §§ 9604(a)(1), 9604(c)(4) and 9606(a) (1988); Hercules Inc. v. United States, 938 F.2d 276, 278 (D.C. Cir. 1988). Congress meant to take a preventive approach and clean sites up before they became a greater risk. *See* H.R. REP. No. 1016, 96th Cong., 2d Sess. 26-28 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6129-31.

25. *See* Exxon Corp. v. Hunt, 475 U.S. 355, 359-60, 106 S.Ct. 1103, 1107-08, 89 L.Ed.2d 364 (1986); Dickerson v. EPA, 834 F.2d 974, 978 (11th Cir. 1987); S. REP. No. 848, 96th Cong., 2d Sess. 62 (1980); 126 CONG. REC. H9440 (daily ed. Nov. 24, 1980) (statements of Sen. Bradley).

26. *See* Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); 126 CONG. REC.. S14964 (daily ed. Nov. 24, 1980).

27. 633 F.Supp. 1290 (D. Utah 1986).

28. *Id.* at 1294.

29. *See* H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 59 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841; *see, e.g.*, CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1988). *See supra* note 3 for SARA cite.

30. When it comes to government enforcement of CERCLA, the EPA is the primary enforcer of CERCLA, but there are many times when a state agency will undertake action pursuant to CERCLA. *See* CERCLA § 104(d), 42 U.S.C. § 9604(d) (1988); 40 C.F.R. §§ 300.500-.525 (1990); 2 THE LAW OF HAZARDOUS WASTE § 12.03[4][g] (Susan M. Cooke ed., 1987). Plus, at a minimum, states are consulted before an EPA cleanup occurs, and they play a part in the remedial efforts. CERCLA § 104(c)(2)-(3), 42 U.S.C. § 9604(c)(2)-(3) (1988). Moreover, states additionally bring their own state cleanup actions against debtors. This Article will at times refer to the government as plaintiff or as simply the "government," while at other times this Article may specifically refer to a government plaintiff of a CERCLA action as the EPA or state environmental agency. Usually, when the Article refers to an "environmental agency," it includes both the EPA and any relevant state environmental agencies. There is no major difference between the uses for purposes of this Article. It is largely just a matter of style. So, whether the term is "the government" or "environmental agencies," they connote the same meaning.

against PRPs when a "release or threatened release" [31] of hazardous substances[32] occurs.[33] After this preliminary requirement is fulfilled, the "Superfund" serves as a backdrop to cleanups if there are no PRPs to be found or when no time can be wasted to search for the culprits.[34] With these being the basic precepts of various CERCLA actions brought by any party, the material below explains the specific CERCLA causes of action, focusing

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31. *See* CERCLA § 101(22), 42 U.S.C. § 9601(22) (1988). As with most of CERCLA's provisions, the definition of a release is extremely broad: "The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)...." *Id.* Case law has followed the obvious intent of Congress and found most everything that is remotely relevant to constitute a release or threatened release. *See, e.g., In re* Acushnet River & New Bedford Harbor, 722 F. Supp. 893, 896-97 n.6 (D. Mass. 1989) (abandoned containers, even if perfectly contained, constitute threatened release); Vermont v. Staco, Inc., 684 F. Supp. 822, 833 (D. Vt. 1988) (finding that a hazardous substance was carried out of a manufacturing plant on the clothes and bodies of workers and was then "released" into the plumbing and sewer systems).

There is even support for the position that a "release or threatened release" under CERCLA continues until it is entirely cleaned up since it will probably continue to leach. *See, e.g., In re* CMC Heartland Partners, 966 F.2d 1143, 1147-48 (7th Cir. 1992); Nurad, Inc. v. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir.), *cert. denied*, ---U.S.---, 113 S. Ct. 377 (1992). The relevance of this point is that if a claimant has its CERCLA claim disallowed and later discharged in a debtor's bankruptcy, the claimant might still be able to bring a CERCLA action against a debtor after a debtor emerges from bankruptcy. The rationale is that the continuing migration of hazardous substances after a debtor emerges from bankruptcy constitutes a release which creates a new CERCLA cause of action.

32. *See* CERCLA §§ 101(14), 42 U.S.C. § 9601(14) (1988). Hazardous substances under CERCLA include substances that are expressed pursuant to other federal laws and designated as such by the EPA. *See* CERCLA § 102(a), 42 U.S.C. § 9602(a) (1988). As one would expect from the broad reach of CERCLA, there is no quantitative requirement for a hazardous substance. *See* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668-69 (5th Cir. 1989).

33. *See* CERCLA §§ 104(a), 107(a)(4), 42 U.S.C. §§ 9604(a), 9607(a)(4) (1988). CERCLA grants environmental agencies extensive investigatory powers to investigate releases and their causes. *See, e.g.*, CERCLA §§ 104(b), (e), 42 U.S.C. §§ 4604 (b), (e) (1988). In fact, one of the goals of SARA, *see supra* note 3, was to increase the investigatory powers of environmental agencies in order to increase the number and speed of cleanups. *See* 2 THE LAW OF HAZARDOUS WASTE § 12.04[1][a] (Susan M. Cooke ed., 1987) ("The 1986 Amendments are calculated to make hazardous waste site investigation and cleanup an even more pervasive and expensive fact of life for American industry.").

34. *See* CERCLA §§ 111, 112, 42 U.S.C. §§ 9611, 9612 (1988); Timothy B. Atkeson et al., *An Annotated Legislative History of The Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10363, 10413 (Dec. 1986) (explaining changes to fund). The Superfund is made up of taxes and appropriations. *See* CERCLA § 111(p), 42 U.S.C. § 9611(p) (1988); 2 THE LAW OF HAZARDOUS WASTE §§ 12.03[4][d], [f], 12.05[3][a], 12.05[3][a] (1992 Supp. at 46) (Susan M. Cooke ed., 1987). Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) (1988), authorizes environmental agencies and private parties to recover monies expended from the Superfund for cleanup.

particularly on the cost recovery actions under CERCLA § 107.[35] The importance of the government causes of action, for purposes of this Article, is that a government's cause of action against a private party normally motivates the private party being sued by the government to bring a contribution action against other PRPs, (i.e., debtors).[36]

The government has two methods which it can utilize to effectuate cleanup of hazardous wastes: (1) environmental agencies can begin cleanup when they discover a release and thereafter seek indemnification from the responsible parties under CERCLA § 107(a)(4)(A),[37] and (2) environmental agencies can order parties to clean up a site via administrative order or court injunction under CERCLA § 106(a).[38] But CERCLA requires that environmental agencies first determine whether PRPs will themselves undertake cleanup.[39] So even if an environmental agency decides to enforce cleanup via administrative order, the agency will first send out "PRP letters" to those parties that might be liable for cleanup costs at a site.[40] A PRP letter from the government does not mean that a party is automatically liable for cleanup and it alone poses no liability.[41]

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35. The reason for focusing on CERCLA's cost recovery actions is that claims based on them directly invoke § 502(e)(1)(B) or they trigger a contribution action which will invoke § 502(e)(1)(B). The cost recovery actions are governed by CERCLA § 107(a), 42 U.S.C. § 9607 (1988). Section 107(a) reads as follows:

> Notwithstanding any other provision or rule of law . . .
>
> (1) the owner or operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
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> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response cost, 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 . . . .

CERLCA § 107(a) 42 U.S.C. § 9607 (1988).

Supplementing the CERCLA causes of action that are discussed in this part of the Article, CERCLA authorizes private parties to bring citizen suits against any person or entity that is in violation of CERCLA or its related orders, regulations or standards. *See* CERCLA § 310(a), 42 U.S.C. § 9659(a) (1988).

36. *See infra* Part II.B.1.c for description of contribution action.

37. *See* 42 U.S.C. § 9607(a)(4)(A) (1988)(*supra* note 35); *see also* CERCLA § 104(a), 42 U.S.C. § 9604(a) (1988). The EPA can also allow a responsible party to clean up the contamination under CERCLA § 104(a) if they determine that the responsible party is qualified to do so. *Id.*

38. *See* 42 U.S.C. § 9606(a) (1988). It is not entirely clear that state governments have the same power to administer orders as the EPA under CERCLA § 106(a). *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1049-50 (2d Cir. 1985); United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1052 (D. Mass. 1989), aff'd, 899 F.2d 79 (1st Cir. 1990).

39. *See* CERCLA §§ 104(a)(1), 112(a), 42 U.S.C. §§ 9604(a)(1), 9612(a) (1988). *cf. supra* note 37.

40. *See* Borough of Rockaway v. Klockner & Klockner, 811 F. Supp.1039, 1043-44 (D.N.J. 1993); *In re* Combustion Equip. Assocs., 838 F.2d 35, 38-40 (2d Cir. 1988).

41. *See* 838 F.2d 35, 38-40. There are over 10,000 outstanding PRP letters that have not lead to any action on the recipients of the letters. *Id. at 40.*

Private parties do without the corresponding CERCLA remedy afforded to the government.[42] Nevertheless, private parties can obtain reimbursement of cleanup costs pursuant to CERCLA § 107(a)(4)(B) which holds PRPs liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." [43] As indicated by "any other person," there is no limitation as to who or what can bring a cost recovery action under CERCLA § 107(a)(4)(B) action.[44] The private parties that bring CERCLA § 107 actions are most often purchasers of contaminated property,[45] but may also be states or municipalities,[46] neighbors,[47] water companies,[48] and the like. Note that these parties are PRPs themselves, although this does not preclude them from bringing a cost recovery action under CERCLA § 107(a)(4)(B).[49] If a private party is already a PRP in a CERCLA § 107 action, it is given the choice of bringing a CERCLA § 107(a) or § 113(f) action for contribution against another PRP.[50] Still, even if a PRP brings an action under CERCLA § 107(a)(4)(B), a substantial portion of the proceeding will also involve equitable apportionment of liability.[51]

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42. *See* Cadillac Fairview/Ca., Inc. v. Dow Chem. Co., 840 F.2d 691, 697 (9th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1048 (2d Cir. 1985).

43. 42 U.S.C. § 9607(a)(4)(B) (1988); *see supra* note 35.

44. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988), permits any "person" to recover cleanup costs. "Person" is defined by CERCLA as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.* at § 101(21), § 9601(21).

45. Because property owners are the "current owners" under CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988), they are usually PRPs themselves.

46. *See, e.g.*, Borough of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1043-44 (D.N.J. 1993); Vermont v. Staco, Inc., 684 F. Supp. 822, 831 (D. Vt. 1988) (action by state and village).

47. *See, e.g.*, Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985).

48. *See, e.g.*, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986).

49. *See* Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co., Inc., 814 F. Supp. 1269, 1277 (E.D. Va. 1992) (nothing in statute indicates that only innocent persons fall within the definition of "any other person"); FMC Corp. v. United States Dept. of Commerce, 786 F. Supp. 471, 486 (E.D. Pa. 1992); Alloy Eng'g & Casting Co. v. Elgin, J. & E. Ry., 1992 WL 275587, at *3 (N.D. Ill. Oct. 1, 1992).

50. *See generally infra* Part II.B.1.c for CERCLA § 113(f)(text *infra* note 82).

51. *See* Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co., Inc., 814 F. Supp. 1269, 1277 (4th Cir. 1992) (no need to recast proceeding as one for contribution). A private action for reimbursement is much like a contribution action, *see infra* Part II.B.1.c, when all the parties involved are PRPs. *See* Stephen B. Russo, *Contribution Under CERCLA: Judicial Treatment After SARA*, 14 COLUM J. ENVTL. L. 267, 273, 284 (1989).

From the foregoing, it is obvious that a crucial determination in CERCLA actions is who or what is a PRP. Basically, any person or entity that *could be* liable under CERCLA may satisfy the PRP requirements. There are four broad categories of responsible persons under CERCLA § 107(a). CERCLA § 107(a) holds (1) the current owner or operator of a "facility"; [52] (2) any person who at the time of disposal of a hazardous substance owned or operated a facility; (3) hazardous waste generators; and (4) hazardous waste transporters potentially liable for the costs incurred as a result of a release or threatened release of hazardous substances at a facility.[53]

For the government or a private party to establish a prima facie case of liability against a PRP in a CERCLA § 107(a) cost recovery action, the plaintiff must show that (1) the site in question is a facility; (2) a release or threatened release of hazardous substances occurred at the facility; (3) the accused fits into at least one of the four categories of responsible persons above; (4) the plaintiff has already incurred some cleanup costs responding to the release or threatened release; and (5) the costs of response were incurred in accordance with the national contingency plan's ("NCP")[54] required procedures.[55] The only defense to liability, which must be proven by a preponderance of the evidence, is that the release or threatened release was caused *solely* by an act of God, war or third party.[56]

A showing of all five elements by a plaintiff, with no demonstration of a defense by a defendant, entitles a plaintiff to summary judgment as far as liability is concerned.[57] The

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52. CERCLA refers to a contaminated site as a "facility." *See* CERCLA § 101(9), 42 U.S.C. § 9601(9) (1988). "Facility," like most of the terms under the statute, is broadly defined as "any building, structure, installation, equipment, pipe or pipeline, . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, . . . aircraft, . . . area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ." *Id.* In order to show that an area is a facility, the plaintiff need only show that hazardous substances are located there. California v. Blech, 976 F.2d 525, 527 n.1 (9th Cir. 1992).

53. *See* CERCLA § 107(a)(1)-(4), 42 U.S.C. 9607(a)(1)-(4) (1988). *See supra* note 35.

54. *See generally* CERCLA § 105, 42 U.S.C. § 9605 (1988). These procedures, for the most part, govern how the EPA, state environmental agencies and private parties are to respond to a release or threatened release. *Id.*; see 40 C.F.R. pt. 300 (1991) (for the codification of the NCP). CERCLA refers to costs related to cleanup as "response costs." *See* CERCLA § 101(25), 42 U.S.C. § 9601(25) (1988). The definition itself refers to other words that need further defining themselves. To keep the technical jargon at a minimum, this Article will refer to any remedial action as either "response costs" or "cleanup costs."

55. *See* Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1278-79 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3rd Cir. 1988); Reading v. Philadelphia, 1992 WL 392595, at *3 (E.D. Pa. Dec. 17, 1992); Ohio Edison Co. v. Marsteller, 806 F. Supp. 676, 677 (N.D. Ohio 1992); Eng'g & Casting Co. v. Elgin, J. & E. Ry., 1992 WL 275587, at *4 (N.D. Ill. Oct. 1, 1992).

56. *See* CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988) (emphasis added). Contamination caused solely by third parties has developed its own line of cases, notably the development of an "innocent purchaser's defense." The development of the "innocent purchaser or landowner defense" is largely based on a definitional provision added in 1986, CERCLA § 101(35)(A)-(B), 42 U.S.C. § 101(35)(A)-(B) (1988). For a recent case elaborating on this defense see Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., 964 F.2d 85 (2d Cir. 1992).

57. *See* County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1513 (10th Cir. 1991); Ohio Edison Co. v. Marsteller, 806 F. Supp. 676, 677-79 (N.D. Ohio 1992).

same is true even if there is a genuine issue as to damages.[58] Put another way, as long as a plaintiff can satisfy the fourth element, liability will be established, and, satisfaction of the fifth element will not be a concern until the plaintiff seeks to be reimbursed for the remainder of the cleanup costs actually incurred. Correspondingly, courts bifurcate the difficult damages issues from the liability determinations to foster quicker cleanups.[59] When dealing with damages issues, a court must then ascertain each responsible party's equitable share of cleanup costs.[60] Hence, any challenges to a plaintiff's satisfaction of the fifth element by a PRP (i.e., a debtor) can occur at a later stage, the damages phase of the case.[61]

The fifth element of a cost recovery action, requiring that a cleanup pursuant to CERCLA § 107(a) be in accordance with certain prescribed procedures contained in the NCP, deserves extra attention.[62] This is so primarily because the fifth element applies varyingly depending on whether the party seeking to recover cleanup costs is an environmental agency or a private party. An environmental agency needs only to incur cleanup costs that are not inconsistent with the NCP.[63] Moreover, government cleanups are presumed to be consistent with the NCP unless a defendant of a CERCLA action can show otherwise.[64]

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58. *See* Envtl. Transp. Sys. v. Ensco, Inc., 969 F.2d 503, 506-07 (7th Cir. 1992); United States v. Mottolo, 695 F. Supp. 615, 620-21 (D. N.H. 1988). An allegation that the plaintiff has incurred and will continue to incur response costs satisfies the fifth element. *See* N.Y. v. General Electric Co., 592 F. Supp. 291, 298 (N.D. N.Y. 1984). Plaintiff has no requirement of particularizing response costs at the liability phase of the case. *See* Alloy Briquetting Corp. v. Niagara Vest, Inc., 756 F. Supp. 713, 717 (W.D. N.Y. 1991). Still, the fifth element is part of a cost recovery prima facie case and it must be shown that plaintiff will be able to satisfy the fifth element or defendant will be granted summary judgment. *See* Milbut v. Hi-Score Plant Food Co., 1992 WL 396774, at *4 (E.D. Pa. Dec. 24, 1992).

59. *See*, e.g., Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989); United States v. Wade, 653 F. Supp. 11, 14-15 (E.D. Pa. 1984).

60. *See*, e.g., Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989); Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co., Inc.,814 F. Supp.1269, 1277 (E.D. Va. 1992). For the factors involved in formulating contribution shares by PRPs see text immediately below in this part and *infra* Part II.B.1.c.

61. *See* United States v. Hardage, 982 F.2d 1436, 1441-42 (10th Cir. 1992); Cadillac Fairview/Ca., Inc. v. Dow Chem. Co., 840 F.2d 691, 695 (9th Cir. 1988) (damage issues are to be determined in a separate stage); La. Pacific Corp. v. Beazer Materials & Servs., Inc., ---F. Supp.---, 1993 WL 25386, at *2, *4 (E.D. Cal. Jan. 27, 1993). It is within a courts discretion to bifurcate the first four elements from the fifth element consisting of damages considerations. *See* Nurad, Inc. v. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir.), *cert. denied*, ---U.S.---, 113 S. Ct. 377 (1992); County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1513 (10th Cir. 1991).

62. Some courts view the fifth element not as an element, but solely as an issue of damages. *See* La. Pacific Corp. v. Beazer Materials & Servs., Inc., 811 F. Supp. 1421, 1424 (E.D. Cal. 1993). The distinction is irrelevant.

63. *See* CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (1988). Nonetheless, the government must act *consistent with* the NCP when it is acting under CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1988).

64. *See* United States v. Hardage, 811 F.2d 1421, 1425-26 (E.D. Cal 1992); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 747 (8th Cir. 1986), *cert. denied*, 484 U.S. 848, 108 S. Ct. 146, 98 L.Ed.2d 102 (1987).

The private party's fifth element is a bit more involved. According to CERCLA § 107(a)(4)(B), a private party's cleanup costs can be broken down to three cost requirements: (1) "necessary costs of response," (2) costs already "incurred" and (3) costs that are "consistent" with the NCP.[65] Necessary costs are only those that are incurred in responding to a release or threatened release.[66] Since the only response costs that are recoverable are those already incurred, parties must bring a declaratory action for future cleanup costs.[67] As for the NCP, the private party plaintiff bears the burden of proving necessity and consistency with the NCP.[68] There is no requirement in the NCP that a private party seek governmental approval before initiating cleanup or suing a PRP if such private party does not intend to avail itself of Superfund monies.[69] In fact, environmental agencies play no role in private cost recovery actions, although they can become involved in private party cleanups if they choose to do so.

The standards of liability under CERCLA are unique. "In enacting CERCLA, Congress specifically refused to adopt traditional elements of tort culpability."[70] Consequently, it is no surprise that a remedial statute like CERCLA imposes strict liability as the standard of

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65. *See* 42 U.S.C. § 9607(a)(4)(B) (1988); *see supra* note 35.

66. *See* Daigle v. Shell Oil Co., 972 F.2d 1527, 1535-37 (10th Cir. 1992). Plaintiffs cannot recover traditional damages, e.g., damage to wells, personal injury, loss of consortium, medical testing, etc. *See* Milbut v. Hi- Score Plant Food Co., 1992 WL 396774, at *3 (E.D. Pa. Dec. 24, 1992); Ambrogi v. Gould, Inc., 750 F. Supp. 1233 (M.D. Pa. 1990). A much litigated issue is whether attorney fees fall under the ambit of necessary response costs in private cost recovery actions. Some courts hold that they are recoverable by private plaintiffs. *See* General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1421-22 (8th Cir. 1990), *cert. denied*, ---U.S.---, 111 S. Ct. 1390, 113 L.Ed.2d 446 (1991), and others hold that they are not, *see* Key Tronic Corp. v. United States, ---F.2d---, 1993 WL 15234, at *1 (9th Cir. Jan. 28, 1993); Alloy Briquetting Corp. v. Niagara Vest, Inc. 802 F. Supp. 943, 946 (W.D. N.Y. 1992). Attorney fees are expressly granted to the prevailing party in a citizen suit, *see* CERCLA § 310(f), 42 U.S.C. § 9659(f) (1988), and actions by whistle-blowing employees of polluting companies. *See* CERCLA § 110(c), 42 U.S.C. § 9610(c) (1988).

CERCLA refers to costs related to cleanup as "response costs." *See* CERCLA § 101(25), 42 U.S.C. § 9601(25) (1988). The definition itself refers to other words that need further defining themselves. To keep the technical jargon at a minimum, this article will refer to any remedial action as either "response costs" or "cleanup costs".

67. *See* La. Pacific Corp. v. Beazer Materials & Servs., Inc., ---F. Supp.---, 1993 WL 25386, at *3 (E.D. Cal. Jan. 27, 1993); *In re* Dant & Russel v. Burlington N. R.R. Co., 951 F.2d 246, 250 (9th Cir. 1991). CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2) (1988), expressly provides for a declaratory judgment to establish future cleanup costs. This scheme requires that a party come back into court each time it wants to be reimbursed for response costs incurred. In an attempt to avoid this prospect, courts are not permitted to award damages for the entire cleanup and have them put in a fund to be used exclusively for cleanup. *See* Stanton Road Assocs. v. Lohrey, ---F.2d---, 1993 WL 15233, at *7 (9th Cir. Jan. 28, 1993).

68. *See* La. Pacific Corp. v. Beazer Materials & Servs., Inc., ---F. Supp.---, 1993 WL 25386, at *3 (E.D. Cal. Jan. 27, 1993); United States v. Hardage, ---F.2d---, 1992 WL 372569, at *4 (10th Cir. Dec. 21, 1992).

69. Cadillac Fairview/Ca., Inc. v. Dow Chem. Co., 840 F.2d 691, 697 (9th Cir. 1988); Richland-Lexington Airport Dist. v. Atlas Properties, Inc., 901 F.2d 1206, 1208 (4th Cir. 1990); New York v. Shore Realty Corp., 759 F.2d 1032, 1048 (2d Cir. 1985).

70. La. Pacific Corp. v. Beazer Materials & Servs., Inc., ---F. Supp.---, 1993 WL 25386, at *8 (E.D. Cal. Jan. 27, 1993); *see* Nurad, Inc. v. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir.), *cert. denied*, ---U.S.---, 113 S. Ct. 377 (1992). It is suffice to say that CERCLA was enacted to deal with an especially acute and individualized problem. CERCLA is not based on any predecessor type of common law rule, contract scheme or statute. It fits into no general category.

liability applied to PRPs.[71] Relatedly, there is virtually no causation test.[72] CERCLA also has joint and several liability implications, though, that issue is so important to this Article that it receives a separate explanation immediately below.

Generally speaking, CERCLA does not mandate the imposition of joint and several liability, permitting it in cases where the liability is indivisible.[73] More specifically, when determining the basis for joint and several liability in cases where all the parties are PRPs, the defendant(s) will rarely be jointly and severally liable with the plaintiff.[74] As in apportioning liability in a contribution action, courts use a host of factors to determine whether joint and several liability should be imposed.[75] Even before Congress enacted a statutory right of contribution in 1986, courts simply apportioned liability when deciding whether to impose joint and several liability.[76]

Now that an express right of contribution exists in the statute, courts rationalize that since both the contribution and joint and several liability determinations are so similar, they ought to be done all at once.[77] More precisely, the first apportionment determination in a private cost recovery case will be at the same time that the liabilities of the plaintiff and

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71. See United States v. Mexico Feed and Seed Co., 980 F.2d 478, 484 (8th Cir. 1992); La. Pacific Corp. v. Beazer Materials & Servs., Inc., 811 F. Supp. 1421, 1429 (E.D. Cal. 1993). Section 101 of CERCLA, 42 U.S.C. § 9601(32) (1988), states that liability under CERCLA is to be the same as that under the § 311 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321 (1988). Liability under § 311 is strict liability. *See* Stephen Q. Giblin & Dennis M. Kelly, *Judicial Development of Standard of Liability in Government Enforcement Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act*, 33 CLEV. ST. L. REV. 1, 11-13 (1984-85).

72. *See* Nurad, Inc. v. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir.) (nexus requirement, meaning proof that defendants wastes were deposited at site), *cert. denied*, ---U.S.---, 113 S. Ct. 377 (1992); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (CERCLA imposes strict liability "without regard to causation"); Arizona v. Motorola, Inc., 805 F. Supp. 742, 746 (D. Ariz. 1992); United States v.Wade, 577 F. Supp. 1326, 1332-34 (E.D. Pa. 1983).

73. *See* United States v. Alcan Aluminum Corp., 964 F.2d 252, 268-69 (3d Cir. 1992) (using RESTATMENT (SECOND) OF TORTS § 433A (1965)); United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106, 109 S. Ct. 3156, 104 L.Ed.2d 1019 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1037 (2d Cir. 1985); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 806, 810-11 (S.D. Ohio 1983).

74. *See, e.g.*, Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co., Inc., 814 F. Supp. 1269, 1277-78 (E.D. Va. 1992) (to allow joint and several liability when a plaintiff itself is a wrongdoer under the statute would improperly enhance a plaintiff's position). *Cf.* United States v. Kramer, 757 F. Supp. 397 (D. N.J. 1991) (plaintiff PRP can recover all of its costs from defendant PRPs and force defendants to sue for contribution).

75. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988) (citing RESTATMENT (SECOND) OF TORTS § 433A (1965)), *cert. denied*, 490 U.S. 1106, 109 S. Ct. 3156, 104 L.Ed.2d 1019 (1989); Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co., Inc., 814 F. Supp. 1278-79 (E.D. Va. 1992) (same); United States v. Marisol, Inc., 725 F. Supp. 833, 843 (M.D. Pa. 1989) (the question of the relative contribution by each defendant to a waste site impacts joint and several liability). What the courts are trying to determine is whether the harm, i.e., the contamination, is divisible. *See Monsanto*, 858 F.2d at 171 & n.22.

76. *See* United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984); United States v. Conservation Chemical, 628 F. Supp. 391 (W.D. Mo. 1985); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 806, 810-11 (S.D. Ohio 1983). See *infra* Part II.B.1.c for discussion of contribution action.

77. *See*, e.g. United States v. Alcan Aluminum Corp., 964 F.2d 252, 270 (3d Cir. 1992) ("Thus, if the defendant can show the harm is divisible and that it only caused some portion of the injury, it should only be held liable for that amount."); *see supra* note 51.

defendant(s) are determined.[78] All this has the effect not only of trivializing the imposition of joint and several liability, but also negating the need to file a separate contribution. On a similar vein, note also that courts uphold contractual releases and the like when determining liability among PRPs.[79] These liability and apportionment determinations are to be done on a case by case basis and are to be intensely factual.[80]

c. Contribution under CERCLA

The originally enacted version of CERCLA did not lead to the quick cleanups that Congress hoped and expected to achieve with CERCLA's draconian provisions.[81] Congress thus added a statutory right of contribution, CERCLA § 113(f), along with many other new provisions to speed up the cleanup process.[82] Section 113(f), in relevant part, says that "[a]ny person may seek contribution from any other person who is liable or potentially liable under CERCLA § 9607(a) of this title, during or following any civil action under § 9606 of this title or § 9607(a) of this title." [83] It was designed to motivate private PRPs to clean up a site themselves or settle with the relevant environmental agency or private party and seek

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78. *See* Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co., Inc., 814 F. Supp. 1269, 1277-78 (E.D. Va. 1992).

79. *See* AM Int'l, Inc. v. Int'l Forging Equip. Corp., 982 F.2d 989, 995 (6th Cir. 1993) (interpreting CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1) (1988)); Thaddeus Beredy, Note, *Contractual Transfers of Liability under CERCLA Section 107(e)(1): For enforcement of Private Risk Allocations in Real Property Transactions*, 43 CASE W. RES. L. REV. 161, 201-212 (1992).

80. *See* United States v. Alcan Aluminum Corp., 964 F.2d 252, 269 (3d Cir. 1992); Envtl. Transp. Sys. v. Ensco, Inc., 969 F.2d 503, 509 (7th Cir. 1992); United States v. Chem-Dyne, 572 F. Supp. 802, 808 (S.D. Ohio 1983).

81. *See* H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 59 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841; 131 CONG. REC. H11,093-94 (daily ed. Dec. 5, 1985) (statement of Rep. Studds); 131 CONG. REC. S12,008 (daily ed. Sept. 24, 1985) (statement of Sen. Domenici); *see generally* Timothy B. Atkeson et al., *An Annotated Legislative History of The Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10363 (Dec. 1986) (describing changes SARA made and reasons for them).

82. 42 U.S.C. § 9613(f) (1988) provides the following:

(1) Contribution

> Any person may seek contribution from any other person who is liable or potentially liable under CERCLA section 9607(a) of this title, during or following any civil action under section 9606 of this title or section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of others by the amount of the settlement.

See CERCLA § 122, 42 U.S.C. § 9622 (1988), for the added settlement provisions.

83. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1988); *see supra* note 82.

contribution from other PRPs.[84] The contribution action instills confidence in private parties because of the statutes promise to apportion costs among PRP's. CERCLA § 113(f) is another tool which supplements CERCLA § 107(a)(4)(B)'s cost recovery action in order to get more private parties involved in CERCLA enforcement.[85]

Much like a CERCLA § 107 action, "[a]ny party may seek contribution." [86] A party can seek contribution from any person or entity it believes to be a PRP.[87] Parties can even settle their own case with an environmental agency and still seek contribution from other PRPs.[88] Actions for contribution can be brought at any time after an action against the PRP has been filed.[89] This technically means that a CERCLA § 106 or § 107(a) action must be filed first, although as alluded to above, plaintiffs can bring both actions at once.[90] There is even support for the position that a CERCLA § 113 contribution action can be initiated before a cost recovery action is brought against the plaintiff of the contribution action.[91] The rationale for this is simple: if parties receive a declaration of their respective liabilities, they

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84. See H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862. The amendments were intended to promote faster cleanup by drawing more heavily upon the vast finances and expertise of private parties. H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 100 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2882.

85. *See supra* notes 81-84 and accompanying text, and Part II.B.1.b. If the different actions are beginning to get confusing, the following is a simplified illustration of when a party would bring a CERCLA § 113(f) contribution action. When the government sues less than all PRPs, those that are the unfortunate chosen by the government will turn around and implead other PRPs. The same thing might happen when a private party brings a cost recovery action against some PRPs, but not all. Lastly, if there is small number of PRPs, a private party may bring a CERCLA § 107(a) action and a CERCLA § 113(f) action at the same time since it makes sense to apportion the liability initially. This last scenario normally occurs in the context of a disgruntled purchaser of property suing the former owner.

86. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1988); *supra* notes 43-51 and accompanying text.

87. *See* CERCLA § 113(f)(1), 42 U.S.C. § 113(f)(1) (1988). CERCLA §§ 113(f)(2) and 122(g)(5), 42 U.S.C. §§ 9613(f)(1), 9622(g)(5) (1988), protects defendants of a government cost recovery action from contribution actions by other PRPs if the particular defendants settle with the government. But, these sections only protect settling PRPs from contribution actions on matters included in the settlement with the government. *See* United States v. U.T. Alexander, 981 F.2d 250, 252-53 (5th Cir. 1993).

88. *See* CERCLA § 113(f)(3)(a), 42 U.S.C. § 113(f)(3)(a) (1988).

89. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1988); *see supra* note 82.

90. *See, e.g.*, Ohio Edison Co. v. Marsteller, 806 F. Supp. 676, 677 (N.D. Ohio 1992) (plaintiff pleaded cost recovery action and contribution action in the alternative); Alloy Briquetting Corp. v. Niagara Vest, Inc. 802 F. Supp. 943, 944 (W.D. N.Y. 1992) (same). Technically, that is, under the common law, there can be no contribution action if there is not joint and several liability. *See* Envtl. Transp. Sys. v. Ensco, Inc., 969 F.2d 503, 508 (7th Cir. 1992). *But see supra* notes 73-78 (contribution basically takes place of joint and several liability). *See also, infra* note 98 and accompanying text. However, the CERCLA right of contribution is a statutory right of contribution, not a common law right of contribution, and CERCLA actions, being part of a remedial statute, in general do not fit into traditional common law notions.

91. *See* Alloy Briquetting Corp. v. Niagara Vest, Inc. 802 F. Supp. 943, 948-49 (W.D. N.Y. 1992); Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1390 (N.D. Ill. 1988); *See also* Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co., Inc., 814 F.Supp. 1269, 1277 (E.D. Va. 1992) (no need to recast proceeding as one for contribution).

will more quickly contribute their fair share to cleanup. Besides, if a CERCLA § 107(a) case is simply a matter of private party PRPs, with no government involvement, the case will *de facto* constitute a contribution action.[92]

A court is to apportion liability for cleanup costs using whatever "equitable factors . . . the court determines are appropriate."[93] At this point in time, there is no recognized set of factors that all the courts are following. Moreover, the courts are not limited in the slightest way in making contribution determinations.[94] What many courts have done is apply a modified comparative fault approach based on the section 886A of the *Restatement (Second) of Torts*.[95] The approaches often incorporate equitable defenses and the factors of the Gore Amendment.[96] Equitable defenses such as unclean hands and caveat emptor may be used as factors to apportion liability, although, as already mentioned, they do not preclude a party from seeking contribution from other PRPs because this would impair Congress' intent to encourage cleanup by responsible parties.[97] By its very nature, then, there is no joint and several liability in a contribution action.[98] Quite simply, if a party is

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92. *See* Stephen B. Russo, *Contribution Under CERCLA: Judicial Treatment After SARA*, 14 COLUM. J. ENVTL. L. 267, 276, 284 (1989). To demonstrate further the similarity between the contribution action and the initial private cost recovery action, note the following: In its legislative history of CERCLA § 113(f), Congress cited United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984), which apportioned the harm at the liability stage, not the contribution stage. *See* H.R. REP. No. 253, 98th Cong., 2d Sess., pt. 3, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835; CONG. REC. H11069-70 and H11073 (Dec. 5, 1985); CONG. REC. H9563 (daily ed. Oct. 8, 1986).

93. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1988).

94. *See* Envtl. Transp. Sys. v. Ensco, Inc., 969 F.2d 503, 507-10 (7th Cir. 1992) (a court can use whatever factors it wants and focus on only one factor if it chooses to do so); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992). It is basically a balancing of the equities, totality of the circumstances, type of determination. *See* United States v. R.W. Meyer, Inc., 932 F.2d 568 (6th Cir. 1991).

95. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 172-73 (4th Cir. 1988) (factors include the evidence against the PRP (culpability), the mobility, toxicity and volume of the hazardous substance and the public interest involved in getting the site cleaned up), *cert. denied*, 490 U.S. 1106, 109 S. Ct. 3156, 104 L.Ed.2d 1019 (1989); Chemical Waste Management v. Armstrong World Indus., 669 F. Supp. 1285 (E.D. Pa. 1987) (factors include relative fault, the volume of waste deposited and the relative toxicity of the waste). A pro rata apportionment approach would negate Congress' intent to instill fairness in CERCLA. *See* Idaho v. Bunker Hill Co., 635 F. Supp. 665, 677 (D. Idaho 1986); United States v. Conservation Chemical, 628 F. Supp. 391, 401-02 (W.D. Mo. 1985) (CERCLA imposes on judiciary a duty to apportion liability in a fair and equitable manner). *Cf.* Envtl. Transp. Sys. v. Ensco, Inc., 969 F.2d 503, 508-09 (7th Cir. 1992) ("There may be cases in which pro rata apportionment in a contribution action is appropriate . . . .").

96. The Gore Amendment to the original enactment of CERCLA, which provided a way for apportioning liability instead of imposing joint and several liability, was initially passed by the House of Representatives on September 23, 1980, as part of H.R. 7020, although it was subsequently dropped. *See* 126 CONG. REC. 26,781 (1980); *see also* United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984).

97. *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 88-89 (3d Cir. 1988); Chem. Waste Management v. Armstrong World Indus., 669 F. Supp. 1285 (E.D. Pa. 1987); *supra* note 86 note and accompanying text.

98. According to the *Restatement of Torts*, a PRP cannot be liable for more than its fair share of the damage. *See* RESTATMENT (SECOND) OF TORTS, § 886A(2) (1979).

shown to be responsible for all the contamination at a site, that party will be liable for all of the costs and will be unable to rely on joint and several liability as a way to get other parties involved in the cleanup.[99]

2. *The Code*

a. *Goals*

A commonly emphasized goal of the Code is to provide "honest but unfortunate" debtors a fresh start.[100] Many Code provisions are geared towards effectuating this goal, but the most important are the discharge provisions.[101] Another important goal of the Code is to treat all creditors of similar rank equally and treat all creditors fairly.[102] Again, a number of Code provisions contribute to achieving this goal.[103] A less recognized goal, but an extremely important one, is the efficient resolution of the debtor's bankruptcy case, which

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99. *See* Gopher Oil Co. v. Union Oil Co., 955 F.2d 519, 526 (8th Cir. 1992).

100. The phrase comes from Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 78 L.Ed.2d 1230 (1934). For examples of the fresh start policy see Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 659, 112 L.Ed.2d 755 (1991) (noting in Chapter 11 dispute that the fresh start policy is a central purpose of the Code); *In re* Chicago, M., St. P. & P. R.R., 974 F.2d 775, 779 (7th Cir. 1992); *In re* Chateaugay Corp., 944 F.2d 997, 1002 (2d Cir. 1991). Some commentators have stated that the fresh start policy only applies to individuals. *See, e.g.*, Ellen E. Sward, *Resolving Conflicts Between Bankruptcy Law and the State Police Power*, 1987 WIS. L. REV. 403, 409 n.27 (1987). Admittedly, a business that liquidates cannot use a fresh start because it dissolves under the law of the state that incorporated it. However, the fresh start policy applies to businesses that are reorganizing as businesses can emerge from bankruptcy without any of their pre-petition debt. This enables them start anew without the pre-petition burdening debt.

101. *See* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV L. REV. 1393, 1393 (1985) ("discharge is viewed as granting the debtor a financial fresh start."); *see supra* note 8. A business or individual debtor liquidating under Chapter 7 of the Code is governed by the discharge provided in Code § 727(b), 11 U.S.C. § 727(b) (1988). Code § 1141(d), 11 U.S.C. § 1141(d) (1988), governs the discharge of businesses and individuals which seek to reorganize under Chapter 11. A "family farmer" reorganizing under Chapter 12 receives a discharge pursuant to Code § 1228(a), 11 U.S.C. § 1228(a) (1988). A debtor reorganizing under Chapter 13, which is available only to individuals with a limited amount of debt, is provided with the discharge in granted Code § 1328(a), 11 U.S.C. § 1328(a) (1988 & Supp. 1990). The discharge provisions under all four chapters of the Code are essentially identical: § 727(b) "discharges the debtor from all debts" that arose before the date of the filing of the petition for bankruptcy; § 1141(d) upon confirmation of the debtor's plan of reorganization, "discharges the debtor from any debt that arose before the date of . . . confirmation"; § 1228(a) provides the family farmer the ability to "discharge of all debts provided for by the plan"; and § 1328(a) grants "the debtor a discharge of all debts provided for by the plan . . . ."

102. *See, e.g.*, Simonson v. Granquist, 369 U.S. 38, 40, 82 S. Ct. 537, 539, 7 L.Ed.2d 557, 559 (1962) (equitable distribution of the debtor's estate to its creditors is of primary importance in bankruptcy policy); *In re* Security Gas & Oil, Inc., 70 B.R. 786, 795 (Bankr. N.D. Cal. 1987).

103. Equitable distribution is enforced by Code § 726, 11 U.S.C. § 726 (1988) (creditors of the same class receive the debtor's assets or payments pro rata). Creditors of the same rank that are involved in reorganizations must be treated equally, and no class of creditors can be unfairly discriminated against. *See, e.g.*, Code §§ 1123(a)(4), 1129(b), 1322(b)(1), 11 U.S.C. §§ 1123(a)(4), 1129(b), 1322(b)(1) (1988). Moreover, certain provisions like the avoiding powers given to either the debtor in possession or the trustee ensure that no creditor gets a benefit beyond what the body of creditors at the same rank receive. *See, e.g.*, Code §§ 544, 548, 11 U.S.C. §§ 544, 548 (1988).

benefits the debtor and creditors alike.[104] In sum, "the debtor should be expeditiously rehabilitated and reorganized, thereby providing the bankrupt a fresh start, while simultaneously according fair treatment to creditors by paying ascertainable claims as quickly as possible." [105]

b. General Requirements

Debtors have the choice of liquidating[106] or reorganizing.[107] A polluting business debtor is not required to be insolvent or even to be experiencing present financial difficulties to file a petition for Chapter 11 relief.[108] In addition, a debtor can be involuntarily pushed into Chapter 11 by its creditors filing a petition.[109] The filing of the petition is a significant date because it triggers the automatic stay,[110] and it marks the point at which the debtor's pre-

104. *See* Katchen v. Landy, 382 U.S. 323, 328 , 86 S.Ct. 467, 472, 5 L.Ed.2d 391, 396 (1966). The longer it takes to resolve the debtor's estate, the more it costs the parties involved in the bankruptcy, including the court.

105. In re Charter Co., 862 F.2d 1500, 1502 (11th Cir. 1989) (citing NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527, 104 S. Ct. 1188, 1196, 79 L.Ed.2d 482 (1984)).

106. Chapter 7, Code §§ 701-766, 11 U.S.C. §§ 701-706 (1988), governs the liquidation of all debtors. In Chapter 7, the assets of a debtor are distributed to its creditors according to the priority they hold under the Code. *See* Code §§ 704, 726, 11 U.S.C. §§ 704, 726 (1988).

107. Generally speaking, business reorganizations are governed by Chapter 11, Code §§ 1101-1174, 11 U.S.C. §§ 1101-1174 (1988). The purpose of the business reorganization chapter is to prevent a business debtor from liquidating, which means a loss of jobs and efficient use of economic resources. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528, 104 S. Ct. 1188, 1196, 79 L.Ed.2d 482 (1984). Individual reorganizations are covered by Chapter 13, Code §§ 1301-1330, 11 U.S.C. §§ 1301-1330 (1988). And reorganizations of the family farmer are governed by Chapter 12, Code §§ 1201-1231, 11 U.S.C. §§ 1201-1231 (1988). As said in Part I, even though Code § 502(e)(1)(B) applies to all the bankruptcy chapters, this Article will only discuss the provision in relation to Chapter 11. *See supra* note 19 and accompanying text.

108. *See* Code §§ 301, 109(d), 11 U.S.C. §§ 301, 109(d) (1988). An example of a debtor with no present financial strain, but with potential future unmanageable strain arose in Grady v. A.H. Robins Co., 839 F.2d 198, 199 (4th Cir. 1988) ("Because of the overwhelming number of claims filed against it because of the Dalkon Shield, Robins filed a petition for reorganization under Chapter 11."), *cert. dismissed*, 487 U.S. 1260, 109 S. Ct. 201, 101 L.Ed.2d 972 (1988). *See* Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV L. REV. 1121, 1126 (1983).

109. *See* Code § 303, 11 U.S.C. § 303 (1988). Nonetheless, under the scenarios involved in this Article, a debtor has all the motivation it needs to file for Chapter 11 relief. As a matter of fact, based on the recent interpretations of the Code and CERCLA, including Code § 502(e)(1)(B), debtors are likely to be ready to file for bankruptcy protection long before a debtor's creditors would like.

110. The automatic stay stays all proceedings and collection efforts by creditors. *See* Code § 362, 11 U.S.C. § 362 (1988); *supra* note 8.

bankruptcy affairs come to an end, and a new regime begins.[111] Many administrative matters occur from the filing of a petition until a debtor emerges from bankruptcy. An aspect of that administration involves the allowance and disallowance of creditors' claims for purposes of determining which creditors will participate in a debtor's reorganization. Since § 502(e)(1)(B) is the focus of this Article and deserves detailed attention, discussion of the claim process will be discussed in detail below in Part II.B.2.c.

While all the above issues regarding the claim process are being resolved, the debtor normally continues to run the business as the "debtor in possession."[112] Plus, a debtor retains the ability to file the plan for an extended period which, along with the authority to continue to run the business, gives a debtor a significant amount of control over the bankruptcy proceedings.[113] The plan of reorganization, no matter which party drafts it, must meet a host of requirements before being confirmable.[114] Moreover, a debtor must receive favorable

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111. Which claims arise pre-petition and which arise post-petition are important determinations. CERCLA claims which arise in between the filing for bankruptcy and confirmation of the plan of reorganization might be designated as "administrative expenses." If a CERCLA claim arises post-petition, yet pre-confirmation, the claim might be paid in priority to pre-petition claims; claims that arise pre-confirmation, but after the filing of the petition, are paid in priority to other claims are referred to as "administrative claims." *See* Code §§ 503, 507(a)(1), 11 U.S.C. §§ 503, 507(a)(1) (1988). Administrative claims are discharged like other claims, yet they are usually paid in full because of their priority status. To meet the requirement of an administrative expense, the costs must be "the actual, necessary costs and expenses of preserving the estate ... after commencement of the case." Code § 503(b)(1), 11 U.S.C. § 503(b)(1). Some courts have held "preserving the estate" to cover expenses related to cleanup of hazardous materials that pose an "imminent and identifiable danger" to the public. *See, e.g., In re* Chateaugay Corp., 944 F.2d 997, 1009-10 (2d Cir. 1991); *In re* Wall Tube & Metal Products Co., 831 F.2d 118, 123-24 (6th Cir. 1987); *In re* Pierce Coal and Const., Inc., 65 B.R. 521, 531 (Bankr. N.D. W.Va. 1986), *aff'd*, 1990 U.S. Dist. Lexis 6413 (N.D. W.Va. 1990). If the CERCLA liability arose post-petition, but pre-confirmation, cleanup costs might be an administrative expense, even though the cleanup expenses do not benefit or preserve the estate. *See In re* Hemingway Transp., Inc., 126 B.R. 656, 661 (D. Mass. 1991), *aff'd*, 954 F.2d 1 (1st Cir. 1992); *In re* N.P. Mining Co, 963 F.2d 1449 (11th Cir. 1992) (environmental penalties as administrative expenses). The counter argument is that cleanup expenses are only administrative expenses when they benefit and preserve the estate. *See, e.g., In re* Dant & Russell, Inc., 853 F.2d 700 (9th Cir. 1988).

112. *See* Code § 1107, 11 U.S.C. § 1107 (1988); *see also* Code §§ 1101(1), 1108, 11 U.S.C. §§ 1101(1), 1108 (1988). A trustee or examiner can be appointed under certain circumstances. Code § 1104, 11 U.S.C. § 1104 (1988).

113. *See* Code § 1121, 11 U.S.C. § 1121 (1988). Being able to draft the plan means, among other things, having the authority to classify the creditors according to Code § 1122, 11 U.S.C. § 1122 (1988). For illustration, a debtor is able to group the creditors, within the parameters of the Code provisions, in order to secure assenting votes for the plan of reorganization when it is voted upon. In general, creditors can be put in different classes if the claims are of a different nature, such as contingent. Still, a debtor probably cannot separately classify a single CERCLA creditor for no other reason than to manipulate the votes received in favor of confirming the plan. This may be an illegal classification under Code § 1122, 11 U.S.C. § 1122 (1988). *See In re* Greystone III Joint Venture, 948 F.2d 134, 140 (5th Cir. 1991). *See* Code § 1126, 11 U.S.C. § 1126 (1988)(containing *inter alia* the required amount of affirmative votes to confirm a plan), for the mechanics of voting on a plan of reorganization).

114. *See, e.g.*, Code §§ 1123, 1129, 11 U.S.C. §§ 1123, 1129 (1988). There are quite a few specific requirements that the plan must satisfy -- too many to discuss in any detail. For starters there is the requirement that every creditor receive as much in payments under the plan as that creditor would receive if a debtor was liquidated pursuant to Chapter 7, Code § 1129(a)(7), 11 U.S.C. § 1129(a)(7) (1988); the requirement that a debtor's plan of reorganization be feasible, Code § 1129(a)(11), 11 U.S.C. § 1129(a)(11) (1988); the requirement that all confirmation votes be secured in good faith and that all votes be given in good faith, Code §§ 1126(e), 1125(e), 11 U.S.C. §§ 1125(e), 1126(e) (1988); the requirement that all creditors of the same class be treated equally, Code §§ 1123(a)(4), 1125(c), 1129(b), 11 U.S.C. §§ 1123(a)(4), 1125(c), 1129(b) (1988); the requirement that almost all facets of the plan be disclosed to creditors, Code § 1125, 11 U.S.C. § 1125 (1988); and the general requirement that all actions of a debtor in bankruptcy be done in good faith, Code § 1129(a)(3), 11 U.S.C. § 1129(a)(3) (1988).

votes from every class of creditors or use the "cram down" provisions in order to get a plan confirmed.[115]

If a debtor's plan is confirmed, a debtor will receive a discharge of its debts. Section 1141(d) is the Code provision which provides a Chapter 11 debtor with a discharge upon the confirmation of a Chapter 11 plan: "the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation . . . ." [116] Section 101(12) of the Code defines debt as "liability on a claim." [117] Hence, Code § 1141(d)(1) purports to discharge any prepetition debt of a debtor no matter if the claim is allowed or disallowed, notwithstanding that a claim of a creditor was not filed or that a creditor with a valid claim objected to the plan.[118] The bottom line is that if its a "claim," it is discharged.[119] A private party, who wishes to recover anything on its CERCLA claim, must have a valid CERCLA claim allowed and included in a debtor's reorganization.

c. The Claims Process and § 502(e)(1)(B) in Detail

Some basic history is essential to understanding the current bankruptcy law and in particular the new claims process. The Code greatly revamped the concepts and provisions that were a part of bankruptcy law prior to 1978. The Bankruptcy Act, repealed in its entirety in 1978, was seriously outmoded by its reliance on "provable" claims,[120] basically only contract claims.[121] A claim was allowed and discharged under the Act only if it was provable.[122] Tort claims, then, unless adjudicated, were neither allowed nor

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115. *See* Code § 1129(a)(8), (10), 11 U.S.C. § 1129(a)(8), (10) (1988). "Cram down" is the process by which a debtor is able to get a plan of reorganization confirmed despite the dissenting vote of a class of creditors. *See* Code § 1129(b), 11 U.S.C.§ 1129(b) (1988).

116. Code § 1141(d)(1)(A), 11 U.S.C. § 1141(d)(1)(A) (1988).

117. Code § 101(12), 11 U.S.C. § 101(12) (1988 & Supp. 1990). "[T]he terms debt and claim are coextensive: a creditor has a claim against the debtor; the debtor owes a debt to the creditor." H.R. REP. No. 595, 95th Cong., 1st Sess. 310 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6267.

118. Section 1141(d)(1) plainly intends to discharge *all* claims by emphasizing that claims are discharged whether filed, deemed filed, allowed or disallowed, and regardless of whether the particular creditor holding the claim accepted the plan. *See id.*

119. *See In re* Chicago, M., St. P. & P. R.R., 974 F.2d 775 (7th Cir. 1992); *see supra* note 8.

120. *See* Bankruptcy Act of 1898, ch. 541, § 63a, 30 stat. 544, 562-63 (codified as amended at 11 U.S.C. § 103(a) (1976) (repealed 1978); Schall v. Camors, 251 U.S. 239, 250 (1920). A contingent or unliquidated claim incapable of either reasonable or expeditious estimation was disallowed in its entirety as unprovable. *See* Bankruptcy Act § 57d, 11 U.S.C. § 93(d) (1976) (repealed 1978); *In re* Esgro, Inc., 645 F.2d 794, 798 (9th Cir. 1981).

121. *See* In re Baldwin-United Corp., 55 B.R. 885, 891 (Bankr. S.D. Ohio 1985).

122. *See* Bankruptcy Act of 1898, ch. 541, § 57, 30 stat. 544, 562-63 (codified as amended at 11 U.S.C. § 93 (1976) (repealed 1978). Bankruptcy Act § 17a discharged a debtor from all provable debts. Bankruptcy Act of 1898, ch. 541, § 17a, 30 stat. 544, 550 (codified as amended at 11 U.S.C. § 35(a) (1976)) (repealed 1978). In other words, if a claim was not "provable" it was not dischargeable. *See In re* Baldwin-United Corp., 55 B.R. 885, 897 (Bankr. S.D. Ohio 1985); Note, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153, 155 (1982). In sum, for a claim to be discharged under the Act, it had to be allowed; to be allowed it had to be provable.

discharged.[123] Consequently, they survived a debtor's bankruptcy, though there was rarely anything to collect from since debtors usually liquidated.[124] Not only did this scheme of the Act leave tort claimants in the cold, but it precluded the debtor from receiving a fresh start and left the debtor with little choice but to dissolve after seeking liquidation.[125]

Congress' new scheme embodied in the Code was to provide a debtor with the broadest possible discharge and permit all creditors to participate in the bankruptcy.[126] The new bankruptcy scheme significantly altered prior bankruptcy law so that all potential claims against a debtor would be required to be brought into a debtor's bankruptcy and formulated into the debtor's bankruptcy. The new scheme, then, comes much closer to the attainment of the goal of equal treatment of creditors. Moreover, it permits bankruptcy judges to determine realistically whether a debtor's plan of reorganization is feasible, fair and equitable.

The Code achieves this new scheme mainly through its immensely broad definition of "claim," as all claims are discharged upon confirmation. Section 101(5) defines "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ." [127] The legislative history sheds some light on just how broad the definition of claim is to be interpreted: "By this broadest definition . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." [128] The courts have endorsed Congress' broad definition of claim.[129]

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123. *See* In re Baldwin-United Corp., 55 B.R. 885, 897 (Bankr. S.D. Ohio 1985).

124. *See,* e.g., In re Cartridge Television, Inc., 535 F.2d 1388 (2d Cir. 1976).

125. *See In re* Hemingway Transp., Inc., 954 F.2d 1, 8 (1st Cir. 1992) (The provability requirement "ill-served the two principal legislative policies federal bankruptcy law was meant to foster."); *In re* Johns-Manville Corp., 57 B.R. 680, 686-87 (Bankr. S.D. N.Y. 1986) (same); *In re* Baldwin-United Corp., 55 B.R. 885, 897 (Bankr. S.D. Ohio 1985) (same).

126. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6266; S. REP. No. 989, 95th Cong., 2d Sess. 21-22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5807-08. *See supra* notes 100-105. The new scheme does not legally limit the claims that could participate to provable ones nor does it practically limit the claims to contract claims.

127. Code § 101(5)(A), 11 U.S.C. § 101(5)(A) (1988 & Supp. 1990).

128. *Supra* note 126.

129. *See, e.g.,* Johnson v. Home State Bank, 501 U.S.——, 111 S. Ct. 2150, 2154, 115 L.Ed.2d 66 (1991) (Congress intended the broadest possible definition). "Cases interpreting § 101(5) almost without exception state that the term claim must be expansively defined." *See also In re* Waterman Steamship Corp., 141 B.R. 552, 555 (Bankr. S.D. N.Y. 1992) (listing numerous cases and their language concerning the broad definition of "claim").

According to the Code definition of claim, claims that do not yet exist, and are "contingent" upon future occurrences, are still claims for purposes of bankruptcy.[130] What constitutes a contingent claim, or any claim for that matter, generally depends on the nature of the claim and the posture of the case.[131] Although, the Code does not define what a contingent claim is, case law has attempted to create a suitable definition.[132] In the context of mass *tort* claims, the Fourth Circuit considered the definition of a contingent claim in *Grady v. A.H. Robins Co.*[133] The court used Black's Law Dictionary to define contingent:

> Possible, but not assured; doubtful or uncertain; conditioned upon the occurrence of some future event which is itself uncertain, or questionable. Synonymous with provisional. This term, when applied to a . . . legal right or interest, implies that no present interest exists, and that whether such interest or right ever will exist depends upon a future uncertain event.[134]

No matter what definition the court is using, if the court finds that the subject liability or debt is a contingent claim, which arose pre-petition, the claim might be a dischargeable claim under Code § 1141(d)(1).[135]

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130. *See, e.g.*, Johnson v. Home State Bank, 501 U.S.——, 111 S. Ct. 2150, 2154, 115 L.Ed.2d 66 (1991) (Congress intended the broadest possible definition). "Cases interpreting § 101(5) almost without exception state that the term claim must be expansively defined." *See also In re* Waterman Steamship Corp., 141 B.R. 552, 555 (Bankr. S.D. N.Y. 1992) (listing numerous cases and their language concerning the broad definition of "claim").

131. *See In re* Chicago, M., St. P. & P. R.R., 974 F.2d 775, 781 (7th Cir. 1992). The nature of claims dealt with in this Article will be contingent CERCLA liability of a debtor to a private party. An example of the issues that can arise in determining whether an alleged claim is a claim for purposes of bankruptcy can be seen in the line of cases where it is unclear whether cleanup orders or injunctions mandating cleanup are claims. *See, e.g.*, Ohio v. Kovacs, 469 U.S. 274, 283, 105 S. Ct. 705, 710, 83 L.Ed.2d 649 (1985) (state injunction requiring cleanup constituted dischargeable claim when only means of complying with order was expending funds); United States v. Whizco, Inc., 841 F.2d 147, 150-51 (6th Cir. 1988) (injunction requiring reclamation of abandoned mines constituted a "claim" where debtor had to spend funds to comply); *In re* Kaiser Steel Corp., 87 B.R. 662 (Bankr. D. Colo. 1988).

132. "Unmatured" and "disputed" are likewise undefined by the Code, but do not arise in case law nearly as much as "contingent" does. By the ordinary meaning of the terms, they would seem to be more fixed and certain than "contingent" because contingent claims may never come into existence, and "unmatured" and "unliquidated" claims exist but are not yet finalized.

133. 839 F.2d 198, 201 (4th Cir. 1988) (definition for contingent *tort* claims), *cert. dismissed*, 487 U.S. 1260, 109 S.Ct. 201, 101 L.Ed.2d 972 (1988).

134. *Id.* Another popular definition of "contingent claim," though seemingly for contingent *contract* claims, is exhibited in *In re* All Media Properties, Inc., 5 B.R. 126 (Bankr. S.D. Tex. 1980), *aff'd mem.*, 646 F.2d 193 (5th Cir. 1981). The court was considering whether a contract claim was contingent: "A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created." *Id.* at 133.

135. *See* In re Baldwin-United Corp., 55 B.R. 885, 891 (Bankr. S.D. Ohio 1985); *see supra* notes 116-19 (provisions of section 1141) and note 8 and accompanying text.

Regarding the mechanics of the claims process, at the time of filing the petition for relief, a debtor is required to file a list of creditors and a schedule of liabilities.[136] These known creditors of a debtor receive notice of the debtor's bankruptcy and are told by what time they are required to file a claim if they choose to challenge a debtor's listing of the debt.[137] All creditors whose claims are scheduled as disputed, contingent or unliquidated by the debtor must file a proof of claim before the bar date to avoid having their claim forever barred.[138] Creditors that are not listed on a debtor's schedules must also file a proof of claim before the bar date.[139] Yet a debtor must always list known creditors or else their claims might not be discharged.[140] Extensions of the bar date to allow for late filings is sometimes, but not often, granted.[141]

A debtor's schedule of liabilities constitutes prima facie evidence of the validity and the amount of a claim unless the claim is listed as contingent, disputed or unliquidated.[142] On the other hand, a filed proof of claim by any creditor against a debtor's estate is deemed allowed, and it then constitutes prima facie evidence of the validity and amount of the claim.[143] The debtor has the burden of proof if the debtor chooses to challenge the validity or amount of a creditor's filed claim, and the bankruptcy court shall determine the validity and amount of the claim when an objection to a claim is made.[144]

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136. *See* Code § 521(1), 11 U.S.C. § 521(1) (1988); *see also* FED. R. BANKR. P. 1007(b)(1). Pursuant to Bankruptcy Official Form No. 6, a debtor is required to list all claims against the estate indicating which are disputed, unliquidated or contingent.

137. *See* Code § 342(a), 11 U.S.C. § 342(a) (1988); FED. R. BANKR. P. 2002 (bankruptcy court sends notice of a debtor's bankruptcy to those creditors listed and notices other creditors as necessary). The Bankruptcy Rules only require that notice be *sent* 20 days prior to the bar date for filing proofs of claims pursuant to FED. R. BANKR. P. 3003(c). *See* FED. R. BANKR. P. 2002(a)(8) (not less than 20 days notice by mail). FED. R. BANKR. P. 9006(e) provides that notice is complete upon mailing. *In re* Torwico Electronics, Inc., 131 B.R. 561, 563 (Bankr. D. N.J. 1991).

138. *See* Code § 1111(a), 11 U.S.C. § 1111(a) (1988) (claims listed as disputed, unliquidated or contingent are not deemed to be filed); FED. R. BANKR. P. 3003(c)(2); *see also Torwico*, 131 B.R. at 563 (such a filing is necessary to preserve creditor's right to receive payment under plan).

139. *See* FED. R. BANKR. P. 3003(c)(2).

140. *See* Code § 523(a)(3), 11 U.S.C. § 523(a)(3) (1988). However, this particular provision does not apply to companies and partnerships in Chapter 11. *See* Code § 1141(d)(2), 11 U.S.C. § 1141(d)(2) (1988).

141. The time in which to file may be extended by the court if cause is shown. FED. R. BANKR. P. 3003(c)(3). The bar date can also be extended by FED. R. BANKR. P. 9006(b)(1) for particular creditors if cause is shown. If a creditor fails to file before the bar date, the court may grant a late filing based on "excusable neglect." FED. R. BANKR. P. 9006(b)(1). *See e.g., In re* Vertientes, Ltd., 845 F.2d 57 (3d Cir. 1988); *In re* Hudson Oil Co., 100 B.R. 72 (Bankr. D. Kan. 1989). In *In re* Sharon Steel Corp., 110 B.R. 205, 207 (Bankr. W.D. Pa. 1990) the court emphasized a three-factor test for excusable neglect: (1) the adequacy of the notice provided, (2) the source of the delay and sophistication of the creditor and (3) the prejudice to the debtor.

142. *See* FED. R. BANKR. P. 3003(b)(1).

143. *See* Code § 502(a), 11 U.S.C. § 502(a) (1988); FED. R. BANKR. P. 3001(f).

144. *See* Code § 502(a)-(b), 11 U.S.C. § 502(a)-(b) (1988); FED. R. BANKR. P. 3001(f). If a demand for relief is made with an objection, the hearing to be held becomes an adversary proceeding. *See* FED. R. BANKR. P. 3007.

No matter what the objection, all claims that would "unduly delay the administration of the case" *must* be estimated pursuant to Code § 502(c).[145] More precisely, "the bankruptcy court is required, for purposes of allowance, to estimate the amount of every timely contingent or unliquidated prepetition claim, even if a nominal estimate alone is practicable."[146] Special problems arise in valuing contingent claims because they are not even certain to occur. Nevertheless, no longer is the apparent impossibility of estimation an excuse for not determining the value of a contingent claim.[147] Hence, bankruptcy courts possess wide latitude in estimating claims.[148] For instance if a claim is so contingent as to preclude immediate payment to the holder of the contingent claim, "[c]reation of a trust to be expended on contingent claims is a frequently used mechanism for insuring that such funds are properly disbursed."[149] In estimating a claim, "the court is bound by the legal rules which may govern the ultimate value of the claim."[150] A claim that has arguably been incorrectly estimated, may be reconsidered for cause.[151]

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145. *See* Code § 502(c)(1), 11 U.S.C. § 502(c)(1) (1988). The section reads as follows:

(c) There shall be estimated for purpose of allowance under this section-

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

"[C]ontingent or unmatured claims are to be liquidated by the bankruptcy court in order to afford the debtor complete bankruptcy relief; these claims are generally not provable under present law." H.R. REP. No. 595, 95th Cong., 1st Sess. 352 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6308; *see* S. REP. No. 989, 95th Cong., 2d Sess. 65 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5851 (all contingent claims must be converted to dollar amounts). One commentator notes that contingent claims must be estimated even if estimation would delay administration of a case. Benjamin Weintraub & Alan N. Resnik, *Treatment of Contingent and Unliquidated Claims Under the Bankruptcy Code*, 15 UCC L.J. 373, 374 (1983). The requirement is consistent with the Code's general policy of providing all encompassing relief. *Id.* This mandatory estimation process epitomizes bankruptcy in general and especially the fresh start policy. *See generally* Mitchell R. Julis, *Classifying Rights and Interests Under the Bankruptcy Code*, 55 AM. BANKR. L.J. 223, 237-40 (1981). For more information on the estimation process see David Kauffman, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN L. REV. 153 (1982).

146. *See In re* Hemingway Transp., Inc., 954 F.2d 1, 8 (1st Cir. 1992) (citing legislative history).

147. *See Id.*

148. *See In re* Corey, 892 F.2d 829 (9th Cir. 1989), *cert. denied*, 495 U.S. 917, 111 S.Ct. 56, 112 L.Ed.2d 31 (1990).

149. In re Allegheny, 126 B.R. 919 (W.D. Pa.) (citing *In re* Johns-Manville Corp., 68 B.R. 618, 625-26 (Bankr. S.D. N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D. N.Y. 1987), *aff'd*, 843 F.2d 636 (2d Cir. 1988); *In re* A.H. Robbins Co., 88 B.R. 742 (E.D. Va. 1988), *aff'd* 88 B.R. 742 (E.D. Va. 1988), *aff'd* 880 F.2d 694 (4th Cir. 1989)), *aff'd mem.*, 950 F.2d 721 (3d Cir. 1991).

150. Bittner v. Borne Chem. Co., 691 F.2d 134, 135 (3d Cir. 1982); *see In re* Baldwin-United Corp., 55 B.R. 885, 898 (Bankr. S.D. Ohio 1985) (the court need only arrive at a reasonable estimate of the probable value of the claim).

151. *See* Code § 502(j), 11 U.S.C. § 502(j) (1988); FED. R. BANKR. P. 3008.

i. Code § 502(e)(1)(B)

The focus of this Article is on a certain type of contingent claim: § 502(e)(1)(B) covers contingent claims for contribution[152] or reimbursement[153] of an entity that is co-liable with a debtor on the claim at the time of its allowance or disallowance.[154] The text of § 502(e)(1)(B) reads as follows:

> the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that . . . such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution . . . .[155]

Objections based on § 502(e)(1)(B) are brought pursuant to Bankruptcy Rule 3007. Both a debtor and its other creditors are likely to raise the objections under this section when it is possible to do so.[156] If the challenged claim is not disallowed, or not fully disallowed, an evidentiary hearing is held to determine the validity and value of the allowed portion of the claim.[157] And though a claim may be disallowed under § 502(e)(1)(B), these claims are of course subject to discharge just like any other claim.[158] Case law concerning § 502(e)(1)(B) agrees that the following elements must be satisfied before § 502(e)(1)(B) applies: (1) the claim is for reimbursement or contribution; (2) the party asserting the claim is liable with the debtor on the claim of a creditor; and (3) the claim is contingent at the time of allowance

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152. Under the principle of 'contribution' a tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff. The share of a loss payable by an insurer when contracts with two or more insurers cover the same loss.
> . . . The sharing of loss or payment among several. The act of any one of several of a number of co-debtors, co-sureties, etc., in reimbursing one of their number who has paid the whole debt or suffered the whole liability, each to the extent of his proportionate share. Right of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear.

BLACK'S LAW DICTIONARY 174 (5th abr. ed. 1989).

153. "Reimburse" is defined as "[t]o pay back, to make restoration, to repay that expended; to indemnify, or make whole." BLACK'S LAW DICTIONARY 669 (5th abr. ed. 1989).

154. *See* Code § 502(e)(1)(B), 11 U.S.C. § 502(e)(1)(B) (1988).

155. *Id.*

156. *See, e.g,* In re Wedtech Corp., 85 B.R. 285, 287 (Bankr. S.D. N.Y. 1988).

157. In re Wedtech Corp., 85 B.R. 285, 287 (Bankr. S.D. N.Y. 1988).

158. *See* supra note 119 and accompanying text; *In re* Baldwin-United Corp., 55 B.R. 885, 891 (Bankr. S.D. Ohio). In *Baldwin*, the claimant sold securities for the debtor and was later sued by the purchasers of the securities. *Id.* at 887-89. Thus, the claimant sought indemnification and contribution from the debtor for the claimant's potential liability under securities laws. *Id.* at 889. The debtor objected on Code § 502(e)(1)(B) grounds. *Id.* at 890. The claimants argued that § 502(e)(1)(B) does not apply to their claim since it was not based on a suretyship or guaranty. *Id.* The court disagreed holding that § 502(e)(1)(B) applies to all types of liability including tort liability. *Id.*

or disallowance.[159] Even if a claim meets all of the elements of Code § 502(e)(1)(B), there is some support for the proposition that the equities of the situation may require that the claim be disallowed.[160] Though the courts agree on what the elements are, in interpreting these elements, the courts have endorsed very different readings of § 502(e)(1)(B), especially in the area of CERCLA claims. The courts' opposing results are the subject of the next part, Part III, so for now the generally accepted rules in this area of the law will be highlighted.

First of all, it is well settled that the "time of allowance or disallowance" for purposes of the statute is at the time of a court's ruling on the issue.[161] Establishing the "reimbursement or contribution" element of § 502(e)(1)(B) has not produced much controversy, seemingly because this requirement is so easy to satisfy. The contingency and co-liability requirements, unfortunately, cannot be explained as well in general terms because the holdings of courts concerning these two elements have been rather varied. It is fairly well settled that a claim is contingent if liability is yet to be established.[162] And it is safe to say that a contingent claim stays contingent for purposes of § 502(e)(1)(B) until a court, including the bankruptcy court, establishes liability.[163]

The co-liability element is determined by looking to the underlying third party action.[164] The element of co-liability requires "a finding that the causes of action in the underlying lawsuit assert claims upon which, if proven, the debtor could be liable but for the automatic stay." [165] Note that the application of § 502(e)(1)(B), and the co-liability requirement in particular, to tort claims, as compared with contract claims like guaranties and sureties, has been endorsed by the bankruptcy courts.[166] Additionally, "[b]y its nature a claim for

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159. The case to state the three elements based on the words of the statute was *In re* Provincetown-Boston Airlines, Inc., 72 B.R. 307, 309 (Bankr. M.D. Fla. 1987). These three elements or requirements have been cited in every Code § 502(e)(1)(B) case ever since. *See In re* Drexel Burnham Lambert Group, 146 B.R. 92, 95 (S.D. N.Y. 1992) ("*Drexel I*").

160. *See* In re Drexel Burnham Lambert Group, 1992 Bankr. LEXIS 2023, at *2-*3 (Bankr. Dec. 18, 1992) ("*Drexel III*").

161. *Id.* at *11-*12; *In re* Drexel Burnham Lambert Group, 146 B.R. 98, 101 (Bankr. S.D. N.Y. 1992) ("*Drexel II*"); *In re* Baldwin-United Corp., 55 B.R. 885, 891 (Bankr. S.D. Ohio 1985).

162. *In re* Wedtech Corp., 85 B.R. 285, 289 (Bankr. S.D. N.Y. 1988).

163. *Drexel II*, 146 B.R. at 102-04.

164. *Id.* at 102.

165. *In re* Wedtech Corp., 85 B.R. 285 (Bankr. S.D. N.Y. 1988); *see Drexel I*, 146 B.R. at 95 (S.D. N.Y. 1992); *Drexel III*, 1992 Bankr. LEXIS 2023, at *11-12.

166. *See In re* Am. Continental Corp., 119 B.R. 216, 217-18 (D. Ariz. 1990) (listing other cases making the same finding, the court could find no reason itself for limiting Code § 502(e)(1)(B) to contract claims). An example is supplied by the following case: In *In re* Provincetown-Boston Airlines, Inc., 72 B.R. 307 (Bankr. M.D. Fla. 1987). In *Provincetown*, the claimant and the debtor were being sued for securities violations. *Id.* at 308-09. The laws that the claimant and the debtor were being sued under held codefendants jointly and severally liable. *Id.* at 309-10. The claimant filed proofs of claim for indemnification pursuant to its contract with the debtor. *Id.* at 308. The debtor objected on § 502(e)(1)(B) grounds. *Id.* The claimant responded that there was no basis for objection since the claimant never agreed to guaranty the debts of the debtor and § 502(e)(1)(B) does not apply to joint tort-feasors. *Id.* at 309. The court disagreed holding that the debtor and claimant were joint tort-feasors under the securities laws and § 502(e)(1)(B) applied. *Id.* at 309-10.

contribution presupposes a having of liability and thus a codebtor relationship." [167] But even after a bankruptcy case has begun, a claimant can change its co-liability status. If a claimant that is co-liable with a debtor fixes the contingent liability, i.e., pays the principal creditor, at some point after commencement of the bankruptcy case, but before the debtor is discharged, the claimant's claim is allowed and valued against the debtor as a pre-petition claim.[168] As a corollary provision, Code § 509(a) allows a claimant's claim to be subrogated to that of the principal creditor to the extent that the claimant has paid the creditor.[169] Still, this is tempered by § 509(c) that requires that a principal creditor be paid in full, before a claimant recovers on its claim against a debtor.[170] In addition to the fact that no payment can be recovered from a debtor before a claimant pays off the underlying creditor, no payment can even be made to a principal creditor by one secondarily liable until liability has been determined.[171] If a claimant and a principal creditor (plaintiff) of an underlying action settle their claims, a hearing is required to determine if a debtor is still liable to the plaintiff.[172]

ii. Legislative History and Background of § 502(e)(1)(B) and its Judicially Formulated Purpose

Since the first place to look when courts reach opposing results after interpreting the same statutory provision is the legislative history and the historical background of the provision, turning now to that material should shed some light on the issues presented in this Article.

Oddly enough, even though the Code was revamped to reflect a scheme that was all inclusive in regards to creditor participation and a debtor's fresh start, § 502(e)(1)(B) is based squarely on a predecessor provision contained in the Bankruptcy Act, which usually

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167. *Drexel II*, 146 B.R. at 101 (quoting *In re* Baldwin-United Corp., 55 B.R. 885, 891 (Bankr. S.D. Ohio 1985)).

168. *See* Code § 502(e)(2), 11 U.S.C. § 502(e)(2) (1988).

169. *See* 11 U.S.C § 509(a) (1988). Part of the legislative history says "section 509 deals with codebtors generally, and is in addition to the disallowance provision in section 502(e). Section 509 is based on the notion that the only rights available to a surety, guarantor, or comaker are contribution, reimbursement, and subrogation." S. REP. No. 989, 95th Cong., 2d Sess. 65, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5851. Code § 501(b), 11 U.S.C. § 501(b) (1988), gives a claimant that is co-liable with a debtor the ability to file a claim on behalf of a creditor if the creditor does not file its own claim.

170. 11 U.S.C. § 509(c) (1988).

171. *In re* Pacor, Inc., 110 B.R. 686, 689 (E.D. Pa. 1990).

172. *Drexel II*, 146 B.R. at 102.

only dealt with fixed *contract* claims.[173] Congress was not shy in admitting that § 502(e)(1)(B) was based on predecessor provisions in the Act:

> [D]erived from present law, [§ 502(e)(1)(B)] requires disallowance of the claim for reimbursement or contribution of a codebtor, surety or guarantor of an obligation of the debtor, unless the claim of the creditor on such obligation has been paid in full. The provision prevents competition between a creditor and his guarantor for the limited proceeds in the estate.[174]

In *In re Wedtech Corp.*, the court explained Congress' intent: "To be sure, the legislative history concerning § 502(e) indicates that a principal purpose of the entire subsection is to prevent a double payment if the plaintiff fails to file a claim." [175] To reinforce the point, the language and intent of the Act's allowance/disallowance provision, evinces the same language and concerns as § 502(e)(1)(B).[176]

Recall from the discussion above at the beginning of Part II.B.2.c that although the predecessor allowance/disallowance provision demonstrates the concerns of bankruptcy law as they existed before the Code, the Code embraces a wholly different scheme. Claims disallowed under the predecessor provision were not allowed to participate in a debtor's bankruptcy and were not subject to discharge, meaning the claimants could sue a debtor after

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173. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 354 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6310; S. REP. No. 989, 95th Cong., 2d Sess. 65, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5851. Contractual claims were basically the only type of claims brought against debtors in bankruptcy during the reign of the Bankruptcy Act of 1898. *See supra* notes 120-25 and accompanying text. Tort claims were simply not as popular or common at the time the Act was in force. Additionally, the Act was used mainly to liquidate, and tort claimants might not recognize that they had a claim in time enough to file a claim, and even if they did, contingent tort claims were disallowed. *Id.* All this had the effect of disallowing any type of non-fixed, non-contractual claim. For extended discussion on the historical issues see Donald R. Korobkin, *"Killing the Husband": Disallowing Contingent Claims for Contribution or Indemnity in Bankruptcy*, 11 CARDOZO L. REV. 735, 742-46 (1990).

174. H.R. REP. No. 595, 95th Cong., 1st Sess. 354 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6310; S. REP. No. 989, 95th Cong., 2d Sess. 65, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5851. *In re* Amatex Corp., 110 B.R. 168, 171 (Bankr. E.D. Pa. 1990), recognized the concern over multiple claims as the main purpose of § 502(e)(1)(B).

175. *In re* Wedtech Corp., 85 B.R. 285, 289 (Bankr. S.D. N.Y.). An example of how the allowance/disallowance provision works is illustrated by *In re* Pettibone Corp., 110 B.R. 837, 838 (Bankr. N.D. Ill. 1990). In *Pettibone*, the claimants were codefendants of the debtor in a products liability case that was awaiting trial. Since the tort victim had already filed a claim in the debtor's bankruptcy, the court disallowed the codefendants' claims pursuant to § 502(e)(1)(B). *Id.*

176. *See* Bankruptcy Act of 1898, ch. 541, § 57i, 30 stat. 544, 560 (codified as amended at 11 U.S.C. § 93(i) (1976)) (repealed 1978). The section, which resembles a combination of Code §§ 501(b), 502(e)(1)(B) and 509, read as follows: Whenever a creditor whose claim against a bankrupt estate is secured, in whole or in part, by the individual undertaking of a person, fails to prove and file that claim, that person may do so in the creditor's name, and shall be subrogated to the rights of the creditor, whether the claim has been filed by the creditor or by him in the creditor's name, to the extent that he discharges the undertaking except that in the absence of an agreement to the contrary, he shall not be entitled to any dividend until the amount paid to the creditor on the undertaking plus the dividends paid to the creditor from the bankrupt estate on the claim equal to the amount of the entire claim of the creditor. Any excess received by the creditor shall be held by him in trust for such person.

emerging from bankruptcy.[177] As also explained above in Part II.B.2.c, under current law, all claims are discharged, including claims that are disallowed.

Probably the most amazing aspect of § 502(e)(1)(B)'s development has originated in the courts. Despite the legislative intent of § 502(e)(1)(B) consisting only of a "double payment concern," and the seeming ease in which it would be to regulate such a concern, courts have disallowed contingent claims under § 502(e)(1)(B), even when the claimant, and not the creditor, is the only one to file a claim.[178] To justify this interesting phenomenon that some courts have engaged in, these courts have created another purpose for § 502(e)(1)(B). The purpose for § 502(e)(1)(B) that the courts have formulated over and above Congress' own express purposes is to shield a debtor from "estimated claims contingent in nature." [179] That is, contingent claims for contribution or reimbursement are disallowed "precisely because they are so contingent."[180] The basis of this court-proclaimed purpose allegedly comes from § 502(e)(2), which permits a claimant to have an allowed claim if the claimant pays off its liability to the creditor.[181] The Courts' rationale is that if eliminating the contingency renders the claim allowable, § 502(e)(1)(B) must primarily exist to regulate excessively contingent claims.

III. Section 502(e)(1)(B) Caselaw

As strange as it may be, caselaw concerning the allowance or disallowance of private party CERCLA claims has only begun to appear in the books. All but one of the cases in this part dealing with the allowance issue were decided in 1991-1992, with the one case being decided in 1989. Because § 502(e)(1)(B) and CERCLA have themselves been in the books for over ten years, this lack of cases dealing with the allowance issue is difficult to explain. Perhaps the most logical reason for this phenomenon is that the private party CERCLA claims and § 502(e)(1)(B) do not inherently conflict. The conflict has arisen only recently because debtors and bankruptcy courts are so overwhelmed by the number and size of CERCLA claims that they are turning to new, and less justifiable, ways to eliminate them. There are surely other explanations, but the one above is likely to be the soundest and is elaborated upon further in Part IV.

Still, not all courts have succumbed to this pro-debtor phenomenon. Below are the opposing positions that courts have taken on the allowance issue, i.e., the position allowing private CERCLA claims and the position disallowing them. Each position is represented by significant and influential courts, but of course not yet the Supreme Court. Overall, the

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177. *See* supra note 120-25.

178. *See* infra Part III.A. "Double payment concern" will refer to the threat of a creditor and a claimant both receiving payments from a debtor on the same claim.

179. *In re* Charter Co., 862 F.2d 1500, 1502 (11th Cir. 1989); *Drexel I*, 146 B.R. at 97; *In re* Am. Continental Corp., 119 B.R. 216, 217 (D. Ariz. 1990); *Drexel II*, 146 B.R. at 106.

180. *Drexel III*, 1992 Bankr. LEXIS 2023, at *16, *18; *In re* Wedtech Corp., 85 B.R. 285, 290 (Bankr. S.D. N.Y. 1988).

181. *Id.*

positions are close to being evenly supported. The decisions within each position are fairly uniform, but have some variation among them. For that reason, the law below which constitutes a position will be set out in general rules unless a particular case has said something unique and noteworthy. Finally, the reader will note that the law espoused by both positions focuses mostly on the co-liability requirement of § 502(e)(1)(B) since it is the most difficult element of § 502(e)(1)(B) to satisfy, in general, and even more difficult to satisfy in the CERCLA context.[182]

A. The Position Disallowing Private Party CERCLA Claims

The position disallowing CERCLA claims for reimbursement or contribution, the "disallowance position," is represented by *In re Charter Co.*,[183] *In re Bicoastal*,[184] *In re Hemingway Transp., Inc.*,[185] *In re Cottonwood Canyon Land Co.*,[186] *In re Eagle-Picher*

182. *See, e.g.*, In re Allegheny Int'l, Inc., 126 B.R. 919, 921 (W.D. Pa.), *aff'd mem.*, 950 F.2d 721 (3d Cir. 1991). In fact, it is not uncommon for claimant's to concede the reimbursement requirement and the contingency requirement, and only challenge the co-liability requirement. If a claimant challenges either of the other two elements it will be the contingency requirement. *See, e.g., In re* Dant & Russell, 951 F.2d 246, 247-48 (9th Cir. 1991); *In re* Eagle-Picher Indus., 144 B.R. 765, 766-67 (Bankr. S.D. Ohio 1992).

183. 862 F.2d 1500 (11th Cir. 1989). PRPs of a CERCLA action sought contribution from the debtor via CERCLA § 113(f) for potential CERCLA cleanup costs. *Id.* at 1502-03. The court refused to decide whether the result would be different if the claims of the PRPs were instead brought under CERCLA § 107(a)(4)(B). *Id.* at 1503. Affirming the bankruptcy and district court, the court of appeals found the PRPs' claims to satisfy the elements of Code § 502(e)(1)(B) and thus were disallowed. *Id.* at 1504.

184. 141 B.R. 231 (Bankr. M.D. Fla. 1992). The purchaser of the debtor's property prepetition filed a claim for cleanup costs after the state environmental agency's claim was disallowed. *Id.* at 232-34. Although the state environmental agency was pursuing the purchaser as well, it had not obtained a judgment against it. *Id.* at 232-33. The court disallowed the purchaser's claim because its claim was contingent, it was one for reimbursement or contribution and the government's claim was previously disallowed by the court. *Id.* at 234. The court was also overly concerned about the claim for cleanup costs thwarting the debtor's reorganization efforts. *See id.* at 234.

185. 126 B.R. 656 (D. Mass. 1991), *aff'd*, 954 F.2d 1 (1st Cir. 1992). A purchaser was attempting to secure future cleanup costs from the reorganizing debtor who sold the property to the PRP. *Id.* at 661-62. The EPA had issued an administrative order against the claimant. *Id.* Since the PRP had not paid the EPA for its own liability, i.e., incurred all the response costs, and the EPA had warned the debtor of its PRP status,the claim was disallowed. *Id.* at 662.

186. 146 B.R. 992 (Bankr. D. Colo. 1992). A party that purchased property from the debtor prepetition sought reimbursement for future cleanup costs. *Id.* at 993. The court held that any unincurred costs of the purchaser are contingent and that the debtor and the claimant were coliable on the claim, despite the fact that the government was not involved. *Id.* at 997.

Indus.,[187] and *In re Kent Holland Die Casting & Plating.*[188] As indicated above, much of the controversial opining surrounding this position arises out of the courts' arguments to satisfy the co-liability requirement. Although, there is also a substantial amount of controversy invoked by the courts' self-proclaimed policy justifications for their attenuated interpretation of § 502(e)(1)(B) and the relevant CERCLA provisions. Therefore, the discussion below focuses mostly on the areas of reimbursement or contribution.

When confronted with the argument that no government agency has filed a claim against a debtor to satisfy the co-liability requirement, the courts of the disallowance position respond that the effects of § 502(e)(1)(B) are not premised on the actual filing of two claims, but merely the abstract existence of multiple claims.[189] Put another way, potential enforcement by the government against a debtor or a claimant in the CERCLA context is co-liability for purposes of § 502(e)(1)(B).[190] The most clear example is when a claimant is named a PRP by the government, and a PRP letter is also delivered to the debtor. This is sufficient to satisfy the co-liability requirement.[191]

But, no contact between the government entity and the claimant or debtor needs to occur to satisfy the co-liability requirement.[192] Thus, neither the EPA nor state environmental agencies need actually be involved in any way with a debtor or the claimant for there to be co-liability. Supplementally, it is clearly not necessary under the disallowance position that the EPA or a state environmental agency file a claim in the debtor's bankruptcy along with a private party claimant.[193] Interestingly, some courts of the disallowance position have looked to the decisions of two courts of the allowance position for evidence that a claimant and a debtor are co-liable. These disallowance courts, to buttress their position, offer the decisions by the Allegheny and Harvard Courts endorsing the creation of a trust to hold funds for the exclusive use of cleanup.[194]

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187. 144 B.R. 765 (Bankr. S.D. Ohio 1992). PRPs, obligated via consent orders to the EPA for cleanup costs at a dump site, sued the debtor for contribution under CERCLA § 113(f). *Id.* at 766-67. Prior to seeking bankruptcy (and perhaps because of it) the debtor had been warned by a PRP letter that it was potentially liable for the cleanup costs at the site. *Id.* The court held that the PRP letter established co-liability, and thus the PRPs' claims were disallowed under Code § 502(e)(1)(B). *Id.* at 767-68.

188. 125 B.R. 493 (Bankr. W.D. Mich. 1991). A PRP, being sued by the EPA and a state environmental agency, sought contribution from the debtor for cleanup costs incurred and to be incurred. *Id.* at 495. The court held that the PRP's CERCLA claim fit all three elements of Code § 502(e)(1)(B) and thus was disallowed. *Id.*

189. *Cottonwood Canyon*, 146 B.R. at 997.

190. *See Hemingway*, 126 B.R. at 662.

191. *See* Hemingway, 126 B.R. at 662; *Eagle-Picher*, 144 B.R. at 767-68.

192. *See* Cottonwood Canyon, 146 B.R. at 997.

193. *See* Hemingway, 126 B.R. at 661-62; *Eagle-Picher*, 144 B.R. at 767-68.

194. *See, e.g.*, *Cottonwood Canyon*, 146 B.R. at 996; *Eagle-Picher*, 144 B.R. at 769. The *Allegheny*, *see infra* note 214, and *Harvard*, *see infra* note 215, courts are discussed in detail *infra* Part III.B.

It is apparent under this position, especially in light of the material last espoused, that CERCLA § 113(f) contribution actions are virtually *per se* disallowed.[195] It is simply assumed that if the claimant is bringing a contribution action, it is admitting joint liability. But not only are CERCLA actions for contribution disallowed under this position, the courts of the disallowance position often went a step further and additionally disallowed CERCLA § 107(a)(4)(B) private cost recovery actions.[196] Nonetheless, the *Charter* and *Hemingway* courts implied that a voluntary cleanup and subsequent CERCLA § 107(a)(4)(B) action would not be covered by § 502(e)(1)(B).[197] So, it is hard to concretely state what the disallowance position's rule is as to the applicability of § 502(e)(1)(B) to CERCLA § 107(a)(4)(B).

Under the disallowance position, if a claimant pays off the underlying creditor, e.g., the EPA or state environmental agency, or incurs all of the cleanup costs itself that it is seeking from a debtor, then the claimant's CERCLA claim for reimbursement or contribution will be allowed.[198] Yet, if a claimant settles with the government as to its liability only, the courts have still found the co-liability requirement to be satisfied because, even though the claimant has no further liability to the government, in theory, a debtor can still be sued by both parties.[199] Consequently, even though a claimant has no liability to the government, the claimant is still found to be co-liable under § 502(e)(1)(B). Likewise, a settlement does not alleviate the contingency or co-liability.[200] And lastly, although it makes no difference concerning whether a claim is allowed or disallowed, a claimant can file a claim on behalf of a government agency that it and a debtor are allegedly liable to.[201]

In adding an alternative element to the § 502(e)(1)(B) prima facie case, the *Bicoastal* holding exposed how far courts will stretch § 502(e)(1)(B) in order to disallow private party CERCLA claims. The *Bicoastal* court set forth the following principle: When an underlying principal creditor's claim has been disallowed, a claimant's claim is also to be disallowed under § 502(e)(1)(B).[202] More precisely, when the CERCLA claim of either the EPA or state

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195. *See Eagle-Picher*, 144 B.R. at 767-68; *Kent Holland*, 125 B.R. at 501.

196. *See, e.g., Cottonwood Canyon*, 146 B.R. at 995-96.

197. *See* Charter, 862 F.2d at 1503. The *Hemingway* court affirmed the district court which affirmed the bankruptcy court which stated that Code § 502(e)(1)(B) did not apply to direct cost recovery actions by a claimant, as opposed to contribution actions. *In re* Hemingway Transp., Inc., 105 B.R. 171, 175 (Bankr. D. Mass. 1989), *aff'd*, 126 B.R. 656 (D. Mass. 1991), *aff'd*, 954 F.2d 1 (1st Cir. 1992). On the other hand, a decision representing the position that allows private party CERCLA claims, *In re* Allegheny Int'l, Inc., 126 B.R. 919, 923 (W.D. Pa.), *aff'd mem.*, 950 F.2d 721 (3d Cir. 1991) (*infra* note 222 and accompanying text), assumed that a contribution action by a PRP with the government incurring the cleanup costs was within the reach of Code § 502(e)(1)(B).

198. *See Hemingway*, 126 B.R. at 662; *Cottonwood Canyon*, 146 B.R. at 996; *Eagle-Picher*, 144 B.R. at 768.

199. *See Eagle-Picher*, 144 B.R. at 768.

200. *Id.*

201. *See Cottonwood Canyon*, 146 B.R. at 997 (citing Code § 501, 11 U.S.C. § 501 (1988)).

202. *See Bicoastal*, 141 B.R. at 234.

environmental agency is disallowed, a private party's claim based upon the same contamination is also disallowed.[203]

Expectedly, all of the disallowance position decisions reiterated the Code requirement of estimating contingent claims.[204] Nonetheless, when it came time to justify the disallowance of a contingent CERCLA claim, the courts reasoned that a debtor's estate should not be burdened by estimated claims, contingent in nature.[205] According to this position, § 502(e)(1)(B) was meant to exclude claims that are "excessively contingent," so that distribution could be made to the unsecured creditors without holding back reserves for the contingent claims.[206] The "excessively contingent" theory to disallowance under § 502(e)(1)(B) is another purpose of § 502(e)(1)(B) along side the double payment concern. Some courts of the disallowance position claim to be taking this fabrication of a new purpose behind § 502(e)(1)(B) from the plain meaning of the statute.[207] Astoundingly, some cases did not even mention Congress' express intent behind the enactment of § 502(e)(1)(B) -- the double payment concern.[208]

Some courts of the disallowance position attempted to justify their decision of disallowance on policy grounds as well. The *Charter* and *Eagle-Picher* courts reasoned that its finding of disallowance would encourage expeditious waste cleanup and prompt liquidation of claims by parties that sought to obtain an allowable claim in a debtor's bankruptcy.[209] The *Bicoastal* court was especially open about its underlying policy agenda. It admitted that its underlying worry was due to the extent that large private party CERCLA claims can impair a debtor's reorganization efforts: after extensive litigation with the government, it now appears that almost all of the debtor's major problems have been resolved, and the debtor will be able to propose, possibly by the end of this month, a consensual Plan of Reorganization. With the cooperation of the Official Creditors' Committee, the debtor may shortly be able to obtain confirmation of its Plan. To entertain this claim at such a late stage of the game *would certainly not only present a very substantial and detrimental delay to the creditors who timely filed their claims, but it would also possibly destroy the Debtor's ability to successfully attain a meaningful reorganization.*[210]

Along the same lines, the *Cottonwood Canyon* court almost seemed to be encouraging

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203. It is unclear whether *Bicoastal* involved CERCLA liability or a state hazardous waste statute. The court does not explicitly say which statute the claimant's claim is based on, though as said above, it really makes no difference for purposes of the allowance issue.

204. *See e.g.*, Charter, 862 F.2d at 1503; *Bicoastal*, 141 B.R. at 233.

205. Charter, 862 F.2d 1502; *Hemingway*, 126 B.R. at 61-662; *Bicoastal*, 141 B.R. at 233; *Eagle-Picher*, 144 B.R. at 767-68; *Kent Holland*, 125 B.R. at 501.

206. *See Hemingway*, 126 B.R. at 661-62.

207. *Id.*

208. *See Charter*, 862 F.2d 1500. *But see Eagle-Picher*, 144 B.R. at 767-68.

209. *Charter*, 862 F.2d at 1504; *Eagle-Picher*, 144 B.R. at 769.

210. *Bicoastal*, 141 B.R. at 234 (emphasis added).

debtors to file for bankruptcy relief in order to alleviate their environmental liability. The court disallowed the private party's claims after noting in its opinion that even the debtor had thought at the beginning of its bankruptcy that it would not be able to use the bankruptcy laws to escape its environmental obligations.[211] And in conclusion, the *Eagle-Picher* court quipped that if the harsh results on CERCLA and private party CERCLA claimants are dissatisfying, take it up with Congress, not the "innocent" and "neutral" courts.[212]

B. The Position Allowing Private Party CERCLA Claims

The decisions representing the "allowance position," that private party CERCLA claims for reimbursement or contribution should be allowed, are *In re Dant & Russell*,[213] *In re Allegheny Int'l., Inc.*[214] and *In re Harvard Indus.*[215] These decisions, since fewer in number and jurisdictions covered, though being endorsed by two Circuits, will get more individual attention than the decisions of the disallowance position above. Besides, according to this Article, assuming § 502(e)(1)(B) is to remain in force, the cases of the allowance position, to a certain extent, represent the way § 502(e)(1)(B) should be interpreted. Consequently, by detailing these decisions slightly more, the approach promoted by this Article will be better understood.

Similar to the disallowance position, little law exists under this position regarding the contingency requirement or the reimbursement/contribution requirement. Yet there is some support for the argument that once a claimant incurs some cleanup costs at a site, the remaining future cleanup costs do not constitute a contingent claim. The bankruptcy court in *Dant & Russell* held just that, although the court of appeals failed to address the bankruptcy court's argument.[216] Since outside of bankruptcy a private party CERCLA claimant must incur some cleanup costs before it has a valid CERCLA claim, such a rule would do much to keep private party CERCLA claims out of the reach of § 502(e)(1)(B). It remains to be seen whether this argument will be endorsed by the allowance position.

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211. *Cottonwood Canyon*, 146 B.R. at 997.

212. *Eagle-Picher*, 144 B.R. at 770.

213. 951 F.2d 246 (9th Cir. 1991). A purchaser sought reimbursement for future cleanup costs under CERCLA § 107(a)(4)(B) after being ordered by the EPA to cleanup its property. *Id.* at 247. The court held that the claimant's CERCLA claim did not meet the co-liability requirement and therefore did not fall within the reach of Code § 502(e)(1)(B). *Id.* at 248. The bankruptcy court came to the same result, although it found the claim not to be contingent. *Id.*

214. 126 B.R. 919 (W.D. Pa.), *aff'd mem.*, 950 F.2d 721 (3d Cir. 1991). A purchaser sought reimbursement under CERCLA § 107(a)(4)(B) from debtor for cleanup costs it had incurred and would continue to incur. *Id.* at 920-22. The court held that the CERCLA claim was a direct contingent claim and therefore could not be disallowed by Code § 502(e)(1)(B). *Id.* at 923-24.

215. 138 B.R. 10 (Bankr. D. Del. 1992). Although neither the state environmental agency nor the EPA had been involved with the site in question, the owner was cleaning up the site and sought reimbursement under CERCLA § 107(a)(4)(B) from the debtor. *Id.* at 11. The court held that since no government entity was involved, the cost recovery action was a direct action which is not covered by Code § 502(e)(1)(B). *Id.* at 13-14.

216. See *Dant & Russel*, 951 F.2d at 248.

As are most cases which deal with § 502(e)(1)(B), the courts representing the allowance position were more absorbed by the co-liability requirement. In regards to the co-liability requirement, the position held, with some variation, is that as long as an environmental suit against a claimant is not in existence at the time the claimant seeks reimbursement or contribution from a debtor, there is no co-liability. For example, in *Dant & Russell*, the EPA had ordered the claimant to clean up its property prompting the claimant to seek reimbursement from the debtor.[217] Notwithstanding EPA involvement, the *Dant & Russell* court's allowance of the claimant's private party CERCLA claim seems to support the proposition that the only way in which co-liability concerns are triggered in the CERCLA context is if the government is actually competing for the funds of the debtor alongside the claimant.[218] Otherwise, a claimant is not competing with any third party for the funds of the estate, but is attempting to recover expenses it personally has incurred and will incur in the future.[219]

Nonetheless, there is varied support under this position for the proposition that claims involving joint or secondary liability pursuant to a contribution action are disallowed.[220] All the courts representing this proposition did focus on the fact that CERCLA § 107(a)(4)(B) creates a direct cause of action for recovery of response costs incurred by private parties.[221] Such a proposition restricts the allowance position to only allowing CERCLA § 107(a)(4)(B) claims and not CERCLA § 113(f) contribution actions. Thus, if the government was suing a claimant for cleanup costs, and the claimant was seeking contribution under CERCLA § 113(f) from a debtor, the cases of the allowance position might have held that the claimant's CERCLA claim falls within the reach of Code § 502(e)(1)(B).[222]

Closely related to the co-liability requirement is the double payment concern. The concern over multiple claims, according to the allowance position, is the central purpose behind § 502(e)(1)(B).[223] "Section 502(e)(1)(B) is not a means of immunizing debtors from contingent liability, but instead protects debtors from multiple liability on contingent debts." [224] The self-proclaimed contingency purpose of Code § 502(e)(1)(B), e.g., to disallow excessively contingent claims, does not explain § 502(e)(1)(B) at all.[225] According to the allowance position, Code § 502(c), requiring estimation of contingent claims, is the

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217. *Id.* at 247.

218. *Id.* at 248.

219. *See Allegheny*, 126 B.R. at 923.

220. *See Id.* at 921-922; *Harvard*, 138 B.R. at 13.

221. *See Allegheny*, 126 B.R. at 922-23; *Harvard*, 138 B.R. at 13.

222. *See Dant & Russell*, 951 F.2d at 248-49; *Allegheny*, 126 B.R. at 923. Even the *Charter* court, a decision that falls within the disallowance position, implied that a CERCLA § 107(a)(4)(B) action might not fall within the reach of Code § 502(e)(1)(B). *See supra* 197 and accompanying text.

223. *See Dant & Russell*, 951 F.2d at 248.

224. *Allegheny*, 126 B.R A. at 923.

225. *Dant & Russell*, 951 F.2d at 248.

section that deals with *all* contingent claims, no matter how contingent.[226] Specifically, the *Allegheny* and *Harvard* courts noted, in discussing how to deal with the concern over double payment, that either a claim could be estimated lower to reflect the amount of unincurred cleanup costs or a trust could be created to fund future cleanup costs.[227]

In formulating a solution to the allowance issue, the courts representing this position have paid much more attention to the unique measures and nuances that make up CERCLA law and have made the CERCLA scheme workable in bankruptcy. For example, the *Dant & Russell* court, by its own accord, applied CERCLA § 113(f) to the claimant's CERCLA § 107(a)(4)(B) claim so the court could apportion liability between the debtor and the claimant.[228] The court upheld the bankruptcy court's quick and efficient way of apportioning liability: The bankruptcy court computed a percentage of liability based upon the number of years the debtor had operated the site compared to the time other tenants had operated the site.[229] The *Harvard* court serves as another example, as it stipulated to the claimant's percentage estimate of the debtor's portion of the total liability that could be refuted by the debtor in later proceedings.[230]

And lastly, as a policy matter, these courts have said that by holding private party CERCLA causes of action to be direct actions, they are furthering the goals of CERCLA that encourage private party cleanup.[231] More elaborately, since private party causes of action are a significant component of CERCLA's goal to clean up the environment, by not excluding them these courts obviously give CERCLA a chance to achieve its statutory mandate.

IV. Solutions to the Conflict Between Code § 502(e)(1)(B) and Private Party CERCLA Claims

Now that the necessary background law and the opposing sides to the allowance issue have been set forth, this Article will pull together where the law has been, where the law is now and where the law is going. The most important aspect of this analysis will elaborate upon what the law should be and why. More directly, the analysis in this part is covered in the following ways: by setting forth, in abstract form, how private party CERCLA claims should be treated and the implications of not allowing private party CERCLA claims, and in two more specific sections, one focusing on interpretive arguments and criticisms and another dealing with law reform. While at first the optimum world is described in this part,

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226. *See id.* at 247.

227. *See Allegheny,* 126 B.R. at 924; *Harvard,* 138 B.R. at 13.

228. *Id.* at 249.

229. *Dant & Russell,* 951 F.2d at 249-50. This computation resulted in the debtor being liable for 50 % of the cleanup costs. *Id.*

230. *See Harvard,* 138 B.R. at 12 (citing United States v. Marisol, Inc., 725 F. Supp. 833, 842 (M.D. Pa. 1989)).

231. *See Dant & Russell,* 951 F.2d at 248-253.

the latter sections attempt to convince the courts and Congress, respectively, of the necessary changes to resolve the Code-CERCLA clash.

This Article argues that, overall, there is little, if any, legal or policy support to justify the application of § 502(e)(1)(B) to private party CERCLA claims. As was hopefully looming CERCLA claim held by a private party. To a certain extent, this Article endorses the allowance position in Part III.B that allows private party CERCLA claims to participate in bankruptcy. Nonetheless, since not everything espoused by the courts of the allowance position was uniform, it is necessary to briefly set out a straight-forward supportable approach--what the law should be--that will be strengthened throughout the interpretation and law reform sections that follow in Part IV.B-C.

The Article is directed at persuading both the courts and Congress. First, it is obvious that § 502(e)(1)(B) does not have to be interpreted to disallow private party CERCLA claims. What follows in Part IV.B is a look at, and a great deal of criticism of, the various interpretations the courts have given to § 502(e)(1)(B). If future courts realize the flaws that are contained in some of the contemporary interpretations, hopefully, they will correct them. Most interpretative issues are still very unsettled in this area. If nothing else, possibly the courts will be motivated to reach a sound uniform position on the allowance issue. Since there is a direct conflict among the circuits regarding how to resolve the allowance issue, the Supreme Court might resolve the conflict itself. If such an event should occur, this Article seeks to convince the Court to establish a position that allows private party CERCLA claims. Ultimately, though, Congress needs to preclude these misinterpretations of Code § 502(e)(1)(B) and the unjustifiable disallowances by enacting an exception to § 502(e)(1)(B) or, better yet, repealing the section entirely. Support is given in Part IV.C for both types of law reform.

A. How the Law Should Be and What Happens When It Is Not

What follows in the next couple of paragraphs is a brief description of how the law should be no matter how it is achieved. The Article posits that the main tenet in resolving this particular conflict between the Code and CERCLA should be that the only time a private party's CERCLA claim is disallowed is when a government entity also files a claim in a debtor's bankruptcy to recover cleanup costs expended at the same site at which the claimant is linked to. The reason for this tenet is simple: This is the only situation in which there is a double payment concern based on the same underlying obligation. There is no other apparent, justifiable concern on which to base a different tenet.

The law in this area should reflect this main tenet because the soundest position under the Code's scheme is to estimate *all* claims, even if that estimation results in a value of zero, so that all claims can be resolved and discharged, fairly and legitimately. In other words, private party CERCLA claims would be able to participate in a debtor's bankruptcy the same as all other contingent claims, unless the government is also seeking payment from a debtor. In a case where multiple claims are filed, a court could set up a trust to be used exclusively for cleanup costs or else permit the government to recover as primary creditor.

Actually, in the CERCLA context, the double payment concern is especially irrelevant because a debtor can logically only be liable for the amount of liability that the bankruptcy court determines. After the amount is set and a debtor's plan is confirmed, there are no

concerns of further liability for a debtor associated with the same site. An analogous result should occur if the multiple claims come from more than one PRP. It is just a matter of distributing a debtor's pay outs on its liability to any number of creditors. As far as being able to participate in a polluting debtor's bankruptcy, a claimant would be able to have its claim for cleanup costs of the entire contaminated site estimated. This would of course include apportioning of liability by the bankruptcy court.

Since the foregoing would normally allow private party CERCLA claims to participate in a debtor's bankruptcy, and since the actual state of affairs disallows private party CERCLA claims in some jurisdictions, it is necessary to address the implications of either result. The first and major implication to address is the effect that the disallowance position has on the environment. Since a major component of CERCLA's cleanup scheme is private party involvement, to disallow private party claims in bankruptcy would seemingly preclude CERCLA from achieving a respectable level of cleanup.[232] But before accepting that the disallowance position is inhibiting CERCLA cleanup, there are a number of assumptions to explore. First, it must be true that there are a significant number of debtors that use bankruptcy to control their environmental liability. Unfortunately, there are, and the numbers are steadily rising.[233] Considering the current trends emerging from the bankruptcy courts, bankruptcy may become even more appealing to potential debtors.[234]

Second, disallowing contingent private party CERCLA claims only impairs cleanup efforts if private parties are unable to get their claims adjudicated in time to alleviate the contingentness of their claims. To require private parties to bring their claims on bankruptcy alone is a tremendous task because it is normally the debtor who chooses when to file for bankruptcy. Private parties must react to a debtor's whim and make sure they discover any potential CERCLA liability of a debtor or forever hold their peace. To require private parties to discover all potential CERCLA liability and have the claim adjudicated before a debtor enters bankruptcy is ludicrous.[235] On the other hand, bankruptcy courts themselves could easily estimate the claim as they were given the power to do. The disallowance courts, nonetheless have refused to estimate contingent CERCLA claims of private parties.

A contaminated site might not get cleaned up in the absence of funds from a debtor. Obviously, private parties have less funds to cleanup contaminated property when a debtor does not contribute to cleanup efforts. Not only would private parties be denied funds in order to complete cleanups under the scenario, but they would also have less incentive to begin cleanups knowing that there will be no contribution by debtors. A private party claimant might at least need a declaration by the bankruptcy court that the debtor will be held

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232. *See supra* text accompanying notes 17, 29, 81-85.

233. *See supra* notes 6 and 12 and accompanying text.

234. *See supra* notes 8 and 111 and accompanying text. The disallowance position itself, of course, contributes to the attractiveness of bankruptcy for those debtor's with potential or existing environmental debt.

235. Note that once a debtor files a petition for bankruptcy relief, the automatic stay stops most suits against a debtor. *See supra* note 8.

responsible for a certain amount of the cleanup costs. Likewise, if PRPs cannot obtain contribution from debtors then they will be less inclined to settle with an environmental agency regarding their own liability. Whether to initiate cleanup, then, would be a major concern, and private parties may simply wait until forced to involve itself in cleanup efforts.[236] This is directly contrary to what Congress was trying to achieve by getting private parties involved.[237]

The courts that have disallowed private party CERCLA claims would argue that their decisions have encouraged quicker cleanups.[238] However, there is little any party can do to get a piece of contaminated property cleaned up during the period that a debtor is in bankruptcy. It is well known that the time to clean up a site can be exceedingly long. It would be virtually impossible to liquidate all CERCLA claims before a debtor was discharged. Additionally, the faster a private party cleans up contaminated property in the hopes of getting reimbursed by a debtor, the more likely that party will not be incurring response costs consistent with the NCP.[239] Not only will this impair the quality of cleanup, but this means it will have no legal basis on which to recover cleanup costs.

Additionally, the chance of an environmental agency filing a claim in a debtor's bankruptcy once a private party's CERCLA claim is disallowed are *de minimis* if the government is not already involved. For the government to have to file a claim in a debtor's bankruptcy case of which it knows nothing about is unrealistic. But, once a debtor is discharged, there is no further liability to the government or any private party for liability at the relevant site.

Assuming that private parties continue to bring their CERCLA claims into bankruptcy court, notwithstanding that they be disallowed in jurisdictions following the disallowance position, the question remains as to whether the relevant site will be cleaned up. It will not if the private party whose claim was disallowed does not have the funds to clean it up itself. Furthermore, the private party can seek bankruptcy relief itself and avoid having to shoulder cleanup costs. So, even if the government demands the private party to undertake cleanup by itself, it is not at all clear that the private party will be required or able to. The remaining possibilities for the government are to locate other PRPs, if they exist, or use Superfund monies to clean up a site. The private party would then be required to undertake a substantial investigation to locate funds to clean up the site. This approach would stultify Congress' intended use of CERCLA. Practically speaking, it is optimistic indeed to assume that the EPA or state environmental agencies are willing and able to chase after all these parties.

There are fairness implications as well. To disallow private party CERCLA claims, without a sound reason, while allowing many other types of claims, is arbitrarily unfair to

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236. In cases where the government is involved at a site, and a number of PRPs being sued by the government file claims against a debtor, the contaminated property might still be cleaned up despite no help from a debtor. The other PRPs involved, though, must be solvent. These PRPs might also seek bankruptcy relief, however, and leave the government with no PRPs to go after. If the situation is severe enough, the EPA may step in and use Superfund monies. *See supra* note 34.

237. *See supra* text accompanying notes 17, 29, 81-85.

238. *See supra* Part III.A.

239. *See supra* notes 61-68 and accompanying text.

those private parties who have CERCLA claims against a debtor when the debtor decides to seek bankruptcy relief. Relying on CERCLA's private causes of action, a private party seeking reimbursement or contribution will be forced to shoulder the entire cleanup burden. And if a private party cannot clean up a site itself, it is not fair to society-at-large which then must pay for cleanup via Superfund or live with the site. Moreover, since all potential claims against a debtor, whether filed or undiscovered, and whether allowed or disallowed, are discharged when a debtor emerges from bankruptcy, debtors with potential CERCLA liability are encouraged by the disallowance position to seek bankruptcy relief.[240] This may encourage debtors to pollute and then seek bankruptcy. In conclusion, it is difficult to tell just how severe the harm might be from disallowing private party CERCLA claims, although it seems clear that the environment would be at least somewhat better off if private party CERCLA claims were allowed.

B. Critiquing and Reconciling Interpretations of the Section 502(e)(1)(B)-CERCLA Conflict

1. Section 502(e)(1)(B) Not Meant to Cover Private Party CERCLA Claims

The interpretation arguments that follow in this part vary in strength and hence are arranged from the least to the most convincing. Initially, then, a question that needs addressing is whether § 502(e)(1)(B) was meant to apply to claims like private party CERCLA claims. It is necessary to preempt this question with the fact that no court has thus far failed to apply § 502(e)(1)(B) to tort or CERCLA claims, which makes any argument to the contrary less convincing. But note that there is some evidence that supports applying § 502(e)(1)(B) only to contingent contract claims and not to contingent tort claims.[241] For instance, the legislative history speaks only in contract language, i.e., terms referring to contractual claims.[242] It is arguable that the relationships listed in the legislative history--suretyship and guaranty--presuppose a pre-existing contractual relationship. Also, the predecessor provision to § 502(e)(1)(B) for the most part only applied to fixed contract claims.[243]

Moreover, as Code § 509 requires, and the courts have often noted, in order to avoid disallowance under § 502(e)(1)(B), a claimant must pay off the underlying creditor in order to be subrogated to the rights of that creditor.[244] In the contract scenario, this makes perfect sense because there is always an obvious party (i.e., the principal) to pay off at an often fixed amount. The problem with using Code § 509 in the private party CERCLA context is that there is usually no underlying creditor to pay off. Only if a debtor is already liable to an

240. *See supra* notes 116-19 and accompanying text.

241. *See supra* note 166 for application of § 502(e)(1)(B) to tort claims.

242. *See supra* note 166 for application of § 502(e)(1)(B) to tort claims.

243. *See supra* notes 120-25 and 173 and accompanying text.

244. *See supra* note 168-72 and accompanying text.

environmental agency will a creditor exist. However, in many cases the government is not involved with the debtor in any way. Further, an environmental agency is not likely to get involved in any but the most egregious contamination sites if there is a private party taking measures to cleanup the contamination. There is no reason for an environmental agency to waste its own limited resources when a private party is acting on its own. Hence, to use Code § 509 and avoid the effects of § 502(e)(1)(B), a private party CERCLA claimant would be required to notify the government of its liability to it and send a check for payment in full for all cleanup costs to an environmental agency that is neither asking nor expecting payment. Only then would a private party CERCLA claimant be able to avail itself of Code § 509 and participate in a debtor's bankruptcy. No court could actually expect a claimant to do such an act.

Another related problem with being required to pay off an underlying claim to the principal is that in the CERCLA context, the amount of liability, if any, is unknown. Tort claimants cannot even pay off the principal creditor until liability is established.[245] Paying before one is found to be liable in this context would be absurd. Also, there is no contract available to determine the amount owing as there is when a surety or guaranty is involved. This makes it impossible for a private party CERCLA claimant to pay off the EPA or state environmental agency since there is no way of knowing what amount is sufficient for paying off. Again, the only answer is to estimate the costs of an entire cleanup at the outset of bankruptcy and have the private party pay the entire amount to the government. Not only is this burden unfair to the private party, and possibly financially prohibiting, but the government might not accept payment as payment in full.

Some courts have argued that the fact that § 502(e)(1)(B) uses the word "contribution" demonstrates that it was meant to apply in the tort context.[246] The flaw in this argument is that "contribution" does not *only* apply to tort relationships. For instance, *Black's Law Dictionary* defines contribution in contractual and tort terms.[247] The use of "contribution" in § 502(e)(1)(B) could have been to reach agreements for contribution and other situations that involved contractual liability but might have been referred to as contribution situations. Thus, far from "contribution" indicating that § 502(e)(1)(B) refers to tort claims as well, Congress might have only meant for § 502(e)(1)(B) to apply to particular contract claims since the rest of the language used in § 502(e)(1)(B) hints at contractual claims.

Assuming that § 502(e)(1)(B) applies to tort claims, another argument for not applying § 502(e)(1)(B) to private party CERCLA claims is found in the fact that CERCLA claims are not even considered to be normal tort claims.[248] CERCLA are specialized, statutory, remedial claims in a class all by themselves. They are not based on any prior type of liability because CERCLA was created by Congress to deal with a specific problem in a specific

245. *See supra* note 163 and accompanying text.

246. *See supra* 167 and accompanying text.

247. *See supra* note 152.

248. *See supra* note 70 and accompanying text.

fashion.[249] Additionally, the Code could not have specifically been meant to govern private party CERCLA claims because the Code was enacted two years prior to CERCLA.[250] Quite simply, if the nature of CERCLA claims for reimbursement or contribution is so different from that of a contract claim or a traditional tort claim, and Congress clearly could not have intended to cover them with a pre-dated bankruptcy provision, § 502(e)(1)(B) should not be applied to private party CERCLA claims.

Notwithstanding arguments similar to the foregoing, as noted above, pro-debtor bankruptcy courts have applied § 502(e)(1)(B) to tort claims, including private party CERCLA claims, since there is no express limitation in the words of the statute itself. Whether or not certain federal circuit courts are misinterpreting § 502(e)(1)(B) may not be judicially reconciled without a Supreme Court ruling.[251] Alternatively, Congress may have to be the actor to change how courts have applied the section to claims that are not contractually based. Still, it is not unimaginable that the courts could hold that § 502(e)(1)(B) does not apply to CERCLA claims because of their special nature and circumstances surrounding their existence.

2. *Unadjudicated CERCLA Claims are Barely Contingent*

Although interpreting the co-liability requirement residing in § 502(e)(1)(B) allows for many persuasive interpretation arguments, it is worthwhile to take a glance at another point of interpretation in § 502(e)(1)(B). The first element of § 502(e)(1)(B), a finding that the claim is one for reimbursement or contribution is rather easy to satisfy and usually only amounts to a semantic question. Whether a claim is one for reimbursement or contribution is especially easy to satisfy when courts take a "plain meaning" approach. There are surely arguments to make, but a court is unlikely to listen to them when they have the chance to make such a straightforward application of an element: CERCLA claims are normally referred to as claims for reimbursement under CERCLA § 107(a)(4)(B) and contribution under CERCLA § 113(f). The contingency element of § 502(e)(1)(B), which is the focus of this point, is also not that difficult to satisfy as the courts love to apply the simple test: Has liability been established? If the answer is no, the claim is contingent.[252]

Admittedly, unadjudicated CERCLA claims are contingent claims, but only technically and formally so. They are about as close as a claim can come to being non-contingent. The liability provisions under CERCLA are so liberal in favor of finding liability that the determination of liability might only be a short hearing away.[253] Although an over-simplification, defendants of CERCLA cases rarely escape all liability.[254] This is especially

249. *See supra* notes 70-80.

250. *See supra* notes 70-80.

251. *See supra* Part II.B.2.c.

252. *See supra* notes 162-63.

253. *See supra* Part II.B.1.

254. *See supra* note 4.

true when applying the expansive "contingent" definitions that the bankruptcy courts have created.[255] These definitions include claims that may never actually result in liability. With contingent CERCLA claims, not only is it rather easy to establish liability, but because of the minimal showings required for liability, liability can also be established quickly. It then is puzzling why courts are not required to determine liability by holding a short and painless hearing to establish liability and remove the contingency.[256]

Moreover, the fact that CERCLA claims are barely contingent adds support to two other arguments in this part: It supports the argument in Part IV.B.1, that CERCLA claims are different from the claims Congress intended to fall under § 502(e)(1)(B), and it supports the argument in Part IV.B.4, that the judge-made "excessively contingent" theory as applied to unadjudicated private party CERCLA claims is insupportable.

3. *The Controversial and Confusing Co-liability Requirement*

The co-liability requirement, the third element to determine disallowance under § 502(e)(1)(B), has been the subject of some rather glaring interpretations. In this regard, it is interesting to note that while the courts of the disallowance position might have liberally used mechanical jurisprudence on the first and second elements of § 502(e)(1)(B), they are extremely reluctant to apply mechanically the co-liability element. Recall that § 502(e)(1)(B) applies to an entity that "is liable with the debtor." [257] A plain meaning approach to § 502(e)(1)(B) would require that a debtor and a claimant actually be adjudged liable together on a claim before or at the time of disallowance. Furthermore, although a draft of the statute used "is or may be liable" language, that language was later changed to "is liable," which is the current language in the provision.[258]

Notwithstanding these seemingly compelling arguments, courts of both positions in Part III, have taken for granted that a claimant and a debtor can be co-liable under § 502(e)(1)(B) without *really* being co-liable yet. There has not been much of a challenge to the fact that the statute apparently requires that the finding of liability as to a claimant and a debtor to a third party should actually exist before § 502(e)(1)(B) is satisfied. The courts have basically shunned the argument that the statute actually says "is liable" and not "could be" liable. If the plain meaning of the statute was enforced, none of the cases in Part III would have been able to satisfy the co-liability requirement without further proceedings. Perhaps the plain meaning is not enforced because to do so would basically render § 502(e)(1)(B) useless. If co-liability could be established, the relevant claim would no

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255. *See supra* note 127, 133-34 and accompanying text.

256. *See supra* note 164 and accompanying text.

257. *See supra* text accompanying note 155.

258. The Report of the Commission on the Bankruptcy Laws of the U.S., PartI, H.R. Doc. No. 137, 93d Cong., 1st Sess. 1 (1973), set forth the first formulation of 502(e)(1)(B) in the following terms "[p]ayments shall not be made on a claim of a person who *is or may be* liable on a debt with a debtor, or has secured a creditor of the debtor, except on proof that the original debt will be diminished by the amount so paid." Commission Report, Part II, H.R. Doc. No. 137, 93d Cong., 1st Sess. 1, 111 (1973) (emphasis supplied). The "or may be" was later dropped in favor of just "is."

longer be contingent. That is, the co-liability or contingency elements could be satisfied, but not both at the same time.[259]

Any "ultimate" liability to the EPA or state environmental agency as sufficient for the co-liability requirement should be avoided since such a proposition runs the risk of sliding down the slippery slope. There are too many potential situations where a debtor and a claimant could, under the right circumstances, be "ultimately" liable to some third party even though that third party has not acted in any way upon the alleged ultimate liability. If co-liability is that easy to satisfy, it serves little purpose as an element in § 502(e)(1)(B). Such a result seems especially odd since § 502(e) was only enacted to deal with co-liability claims.

Similarly, the CERCLA claims being brought by private parties cannot meet the often cited test of co-liability espoused by the *Wedtech* court.[260] That test at least requires that a finding of co-liability between a debtor and a claimant would have been found, but for the automatic stay. In the CERCLA private party context, however, the government is usually not pursuing a debtor, at least not very forcefully. None of the cases in Part III involved a government agency that had filed a claim in a debtor's bankruptcy or filed an action against a debtor outside of bankruptcy. Besides, that is why the private party enforcement mechanisms are there in the first place. As stated above, environmental agencies have neither the resources nor the incentive to get involved when a private party is already doing so. The government is far from bringing actions against every PRP, even if it has sent out a PRP letter to a particular PRP.[261] In cases where many PRPs could be involved, the EPA usually chooses a few of the most financially solid PRPs and puts the onus on them to seek contribution. Thus, if a debtor is not one of the unlucky few chosen by the government, it is probably safe to say that the debtor will not be chosen as a defendant in the future as to the subject site.

Even if one can get past (i.e., by ignoring) the interpretation problems discussed thus far in regard to the co-liability requirement, there is still no basis for finding co-liability. Since the nature of claims in bankruptcy is governed by nonbankruptcy substantive law,[262] the courts of the disallowance position in Part III.A rest their fulfillment of the co-liability requirement on CERCLA's alleged imposition of joint and several liability. Nonetheless, this interpretation of CERCLA law fulfilling the co-liability requirement has several flaws. First, as argued in Part IV.B.1, the nature of private party CERCLA claims for reimbursement and contribution do not involve co-liability in the normal sense. CERCLA law is in a category all by itself as it is a remedial statute with a very distinguished purpose.[263] It was

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259. This incoherence in the section is simply one more reason why § 502(e)(1)(B) does not make any sense. It supports amending or repealing the section and for this reason also belongs in Part IV.C.

260. *See supra* note 165 and accompanying text.

261. See supra notes 40-41 and accompanying text. There are over 10,000 outstanding PRP letters that have not lead to any action on the recipients. *Id.*

262. *See supra* note 131 and accompanying text.

263. *See supra* note 70-71 and accompanying text.

deliberately not enacted with traditional tort concepts in mind.[264] It would not be rational to consider CERCLA claims in a category with typical joint tort-feasor claims simply because they can be distinguished from them.

Second, joint and several liability is not a mandatory imposition and is basically left to the courts to decide on a case by case basis.[265] Joint liability is not always imposed when it is the government suing PRPs for reimbursement.[266] Moreover, when the plaintiff of a cost recovery action is a private party, the action basically only consists of apportionment.[267] The actions by private CERCLA parties are more like direct actions by one party against another.[268]

Because Congress has sought to ensure equitable results under CERCLA, rarely are parties held liable today for more than their own share.[269] Now that there is a statutory right of contribution in CERCLA, parties will never have to foot the whole cleanup bill. This essentially makes joint and several liability meaningless. Apportionment of liability can be completed by a bankruptcy court quickly and challenged in later proceedings.[270]

Although it appears at this point as though the co-liability requirement cannot be satisfied in the private party CERCLA context, some courts become set on disallowing the relevant private party CERCLA claim that they are willing to squeeze new elements out of § 502(e)(1)(B) that totally circumvent the co-liability element. *Bicoastal* is an example.[271] There, the court said that if an environmental agency's claim was filed in a debtor's bankruptcy and disallowed, then any private party's CERCLA claim based on the same CERCLA site would also be disallowed.[272] What this essentially means is that since the government's claim is disallowed, there is no way a debtor and a claimant can be co-liable. Likewise, the double payment concern is an impossibility. If nothing else, this demonstrates the extent to which § 502(e)(1)(B) has become a tool in eliminating private party CERCLA claims. Interpretations like the one in *Bicoastal*, although not as extreme as the interpretations which constitute Part IV.B.4 below, stretch the parameters in § 502(e)(1)(B) so far that there is virtually nothing left of the provision's plain meaning.[273]

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264. *See supra* note 71 and accompanying text. CERCLA is in a category all by itself.

265. *See supra* note 73 and accompanying text.

266. *See supra* notes 63-99 and accompanying text.

267. *See* supra note 92 and accompanying text.

268. *See* supra note 51 and accompanying text.

269. *See* supra notes 81-85 and accompanying text.

270. *See supra* text accompanying notes 74-78, 93-99 and 227-29.

271. *See supra* notes 202-03 and accompanying text.

272. *See supra* notes 202-03.

273. Here is another argument that strongly supports scrapping section 502(e)(1)(B) altogether. Repealing or amending § 502(e)(1)(B) is discussed in detail in Part IV.C.

A collateral issue, when analyzing the co-liability requirement, concerns the distinction that some courts representing both positions have made regarding CERCLA § 107(a)(4)(B) and § 113(f). For example, some courts would disallow private party claims based on CERCLA § 113(f) actions without hesitation while implying that CERCLA actions under § 107(a)(4)(B) would not be disallowed.[274] In other words, there is support for the proposition that CERCLA § 113(f) actions are disallowed, whereas CERCLA § 107(a)(4)(B) actions are allowed. Lurking behind this distinction is the argument that § 107(a)(4)(B) actions are direct actions that do not involve the same co-liability repercussions that section 113(f) actions do. Section 113(f) action by their very nature--contribution--involve co-liability so the argument goes.[275]

Strangely enough, this distinction was drawn despite the fact that Congress enacted CERCLA § 113(f) to deal with the problems residing in CERCLA § 107(a)(4)(B).[276] In addition, it is possible that under current CERCLA doctrine, a contribution action can be brought separately without a prior cost recovery action.[277] This demonstrates, *inter alia*, their similarity and that the actions are functionally identical in the eyes of CERCLA.[278] If a claimant can bring either a CERCLA § 107(a)(4)(B) action or a CERCLA § 113(f) action at its discretion, and they are virtually identical anyway, then why distinguish between the two? To hold that contribution actions by their very nature involve co-liability[279] ignores what a contribution action under CERCLA entails: it essentially guarantees apportionment of liability and no co-liability.[280] It may as well be considered as the antitheses of co-liability. Therefore, basing a bankruptcy policy on such a distinction makes the law arbitrary and unjustifiable.

4. *The Judicially Formulated Purpose Behind Section 502(e)(1)(B): Eliminating Excessively Contingent Claims*

The most astounding interpretation to be espoused by the allowance courts is the fabrication of a new purpose, not expressed anywhere by Congress, that although *all* contingent claims are allowed under the Code, those that are "too" contingent are not.[281] In

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274. *See, e.g.*, Charter, 862 F.2d at 1503 (implying that a CERCLA § 107(a)(4)(B) action would not be disallowed); *Allegheny*, 126 B.R. at 923 (stating that a contribution action under CERCLA § 113(f) would clearly be disallowed).

275. *See supra* text accompanying notes 195-96.

276. *See supra* notes 81-85 and accompanying text.

277. *See supra* note 91.

278. *See supra* 73-81 and 87-92 and accompanying text.

279. *See supra* note 167 and accompanying text.

280. *See supra* note 98 and accompanying text.

281. *See supra* text accompanying notes 178-83 and 204-08.

other words, even though the Code is set up to administer contingent, unmatured, unliquidated and disputed claims, those claims that are "excessively" contingent, as determined by the court, are to be disallowed. As contradicting and unfounded as this theory appears to be, it has been endorsed by a number of courts.[282] The following arguments point out some of the major fallacies with the courts' fabrication of their own purpose behind § 502(e)(1)(B), to serve their own agendas.

As argued in Part IV.B.1, private party CERCLA claims are only technically contingent and are normally just a small step away from being noncontingent.[283] Assuming for argument's sake that the "excessively contingent" rationale has an arguable basis in bankruptcy law, CERCLA claims would never be the type that are considered "excessively contingent." Put more forcefully, to eliminate private party CERCLA claims because they are too contingent would logically mean that most other contingent claims, which are more contingent than private party CERCLA claims, should also be eliminated. Clearly, this is the opposite direction in which bankruptcy law has moved.

More specifically, the argument that § 502(e)(1)(B) is to alleviate claims that are "too" contingent cannot be reconciled with a number of Code provisions. Code § 502(c) demands estimation of claims that are contingent, no matter how contingent.[284] Plain and simple, claims are estimated *because* of their contingency. Furthermore, Code § 101(5) expressly includes contingent claims as valid claims able to participate in debtors' bankruptcies.[285] Code § 1141(d)(1) envisions the Code's new scheme by purporting to discharge all claims, contingent and noncontingent alike.[286] Section 1141(d)(1) presupposes that all parties will participate before having their claim discharged. However, the excessively contingent theory disallows their participation. It is impossible to justify the all pervasive discharge in Code § 1141(d)(1) if some identifiable claims cannot participate in bankruptcy. As a result of Code § 1141(d)(1), disallowed claims have no second chance at collection. Therefore, the excessively contingent theory's alleriation of private party CERCLA claims, without any shot at participation, is unjustified.[287]

C. The Case for Legislative Reform

Since the courts for the most part have to this point ignored interpretation arguments like those made above, the best medicine for the problems surrounding § 502(e)(1)(B) is to either enact an exception to it or repeal it entirely. Most of the arguments in this part apply to either

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282. *See supra* notes 178-83 and 204-08 and accompanying text.

283. *See supra* Part IV.B.2.

284. *See supra* 120-51 and accompanying text.

285. *See supra* text accompanying notes 27-30.

286. *See supra* text accompanying notes 116-19.

287. The contradictions, confusion, and inconsistency created by the excessively contingent theory, although classified here as a gross interpretation of § 502(e)(1)(B), also serves as support for amending or repealing § 502(e)(1)(B). *See infra* Part IV.C.

congressional action.[288] Many of the interpretation arguments in Part IV.B also firmly support either action of law reform for the most part. Of course though, the interpretation arguments that could appear in this part as well as the preceding part will not be explained in any great detail here. An overall argument that is perpetuated above is that since the interpretations of § 502(e)(1)(B) have been so distorted, to the point where it looks to have become a tool to exclude private party CERCLA claims, it should be repealed or amended.

As many of the arguments in Part IV.B.1 evidenced, § 502(e)(1)(B) does not easily apply to private party CERCLA claims or tort claims in general. Similarly, the standard elements to establish disallowance under § 502(e)(1)(B) were stretched very far to "fit" around private party CERCLA claims. Moreover, some courts made up their own purposes and elements for § 502(e)(1)(B) in order to capture private party CERCLA claims. These are all reasons for amending § 502(e)(1)(B) to except either tort claims or more specifically private party CERCLA claims. These reasons, like most of the arguments in Part IV.B. above, deal with aspects of § 502(e)(1)(B) itself. When looking at the big picture, how § 502(e)(1)(B) fits in the Code system, the section generates major concerns about its validity.

According to § 502(e)(1)(B)'s legislative history, Congress was concerned solely about a debtor making payments to both a guarantor and the primary creditor on the same debt.[289] This made sense under the Act because if a debtor was required to pay on a claimant's claim of reimbursement, there was nothing to stop the creditor whose claim would not be discharged from being sued again outside of bankruptcy.[290] Holders of disallowed claims under the Act may not have been able to participate in a debtor's bankruptcy, but their claims were not discharged either.[291] Under the Code, however, this could not happen since all claims must be estimated, participate and all must be discharged.[292]

Without the double payment concern to validate its existence, § 502(e)(1)(B) either must have another purpose or simply must not belong in the Code. The concern that a debtor's estate will be subject to double recovery on what should be a single claim is the only legislative purpose given for § 502(e)(1)(B). It almost looks as though § 502(e)(1)(B) slid through the cracks to be mistakenly enacted in the Code. The provision happens to be very similar to a predecessor provision.[293] The problem with this, as stated above, is that the Act was a clearly different scheme and claims were able to survive bankruptcy if they were not allowed.

Another reason to wonder about § 502(e)(1)(B)'s presence in the Code is that a bankruptcy judge would never let two parties collect twice on the same claim. A bankruptcy judge would simply apportion a payment to both creditors or allow one creditor to be paid

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288. If an argument applies to only one route, i.e., repealing or enacting an exception, the Article will say so.

289. *See supra* Part II.B.2.c.ii

290. See supra notes 120-25 and accompanying text.

291. *See supra* Part II.B.2.c.ii and text accompanying notes 120-25.

292. *See supra* notes 99, 101 and 116-19 and accompanying text.

293. *See supra* note 174 and accompanying text.

in full. It would not even be difficult to monitor the double payment concern. There is no way for either the claimant or the government to hide or disguise its claim so it sneaks pass the scrutiny of the bankruptcy court. After bankruptcy there is no concern of collection against a debtor after bankruptcy because all claims are discharged. So if its true that § 502(e)(1)(B) was inadvertently carried through from the Act to the Code, it should not be applied to any claim. It should be repealed immediately. The only purpose it is actually serving is the ability of debtors, creditors and courts to selectively exclude certain claims from participating in bankruptcy. In fact, as discussed in Part IV.B.4, the courts were forced to create their own "legislative" intent for § 502(e)(1)(B) since the express intent did not justify their disallowing private party CERCLA claims.

1. Section 502(e)(1)(B) and the Goals of CERCLA and the Code

Before discussing the goals of both statutes are affected by § 502(e)(1)(B) and how those effects favor repealing or amending the statute, it is worth explaining in detail what may be going on behind the scenes in these cases. The probable reason private party CERCLA claims are thrown out by the courts under creative rationales such as the "excessively contingent" theory is more obvious when the situation is looked at from the perspective of the bankruptcy courts or a debtor's other creditors. Contingent CERCLA claims are often for a very large amount. For a debtor to include one in its plan of reorganization or distribution means that all creditors will get much less and it may ruin an entire reorganization effort. Estimating a contingent CERCLA claim may delay a bankruptcy as a debtor and a private party CERCLA creditor hash out the debtor's responsibility for the toxic mess. The courts are making bankruptcy a popular choice for debtors simply because, without debtors seeking bankruptcy relief, there is no need for bankruptcy courts. Thus, a bankruptcy judge has sufficient motivation to throw contingent CERCLA claims out in the name of saving the reorganization effort.

This Article concludes its analysis by examining two goals lost in the shuffle by those courts that disallow private party CERCLA claims. These goals are sacrificed whenever § 502(e)(1)(B) is used to foster a debtor's reorganization. Sacrificing these congressional goals, one from CERCLA and one from the Code, certainly supports creating an exception for private party CERCLA claims and to a lesser extent § 502(e)(1)(B)'s repeal.

a. The Code's Goal of Equal Treatment of Creditors

Certainly debtors and a creditors of debtors welcome and endorse the position which disallows private party CERCLA claims. But any creditor would cheer the prospect of losing a fellow creditor, a creditor which holds what is likely a very large claim, so that the distributions to the rest of the creditors will be larger. And if a debtor is reorganizing, not only will payments be decreased, but the chances of a successful reorganization will decrease as well. Although a debtor's other creditors cheer the disallowance position, the problem is that, according to the arguments in Part IV, there is no legal basis for sacrificing this one creditor's debt for the sake of the debtor and the other creditors. This may foster the goal of a debtor's fresh start, but that is not the only goal of bankruptcy law. The

bankruptcy system is also premised upon fair and equal treatment of all creditors.[294] Therefore, this purpose of the Code is forfeited in favor of arbitrarily denying a claimant of its payment and arbitrarily releasing a debtor from its obligation to society.

Additionally, Congress expressly revamped the Code in favor of a new scheme that would permit all claims to participate in bankruptcy, regardless of whether they are contingent.[295] Congress did this so that all creditors would be treated equally and at the same time no creditor would have a claim against a debtor after a debtor is discharged. But if the courts disallow private party CERCLA claims and discharge them, these creditors will never receive anything from debtors. These cases, by ignoring the Code's goal of equal treatment of creditors, raise serious fairness issues.

Even more problematic from a constitutional perspective, singling out private party CERCLA claims has the air of unconstitutionality under the Equal Protection Clause. Under the analysis included in this Article, there does not appear to be a rational basis for this position, especially in light of Congress' legislative purpose of allowing participation of all claims including contingent claims. If the CERCLA claims really are different in the bankruptcy context to deserve such different treatment, the discrimination is legitimate, or at least legal.

b. CERCLA's Goal of Prompt Cleanup

One method that Congress chose to effectuate prompt cleanup of sites was to enable private parties to bring their own cleanup actions with the assurance that those responsible would have to pay for the cleanup.[296] Private parties are a substantial component of CERCLA's cleanup scheme.[297] Yet the number of incentives that Congress provided in the original act and the 1986 amendments are negated by disallowing private party CERCLA claims. Hence, as already displayed in Part IV.A, the implication of disallowing private party claims for reimbursement or contribution can have a severe impact on the ability of CERCLA to successfully clean up the environment. By misreading the Code and creating new purposes behind its provisions to forward the cause of a debtor's rehabilitation, bankruptcy courts in these circumstances are acting as the ultimate distributor of cleanup costs in society; a job entrusted to Congress alone under the Constitution.

Perhaps an exception to § 502(e)(1)(B) could additionally or solely be based on the important goals that CERCLA fosters, most importantly the protection of human health. One Commentator has suggested that the public at large is an involuntary creditor of any

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294. *See supra* notes 102-03 and accompanying text.

295. *See supra* notes 120-24 and accompanying text, in general Part II.B.2.

296. *See supra* notes 81-85 and accompanying text, and in general Part II.B.1.

297. *See* Charter, 862 F.2d at 1503; H.R. REP. No. 1016, 96th Cong., 2d Sess. 17-19, 25, 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120, 6128, 6136 (enactment of CERCLA to protect public health and environment); H.R. REP. No. 253, 99th Cong., 1st Sess. 100 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2822 (enactment of SARA was promote private party involvement in cleanups, primarily through the settlement and contribution provisions).

polluting debtor.[298] Based on being an involuntary creditor, the argument goes, the public should have its interests prioritized, even to the detriment of other creditors or a debtor.[299] This argument could be used as a supplement or sole basis for singling private party CERCLA claims out from the path of § 502(e)(1)(B).

On the whole, § 502(e)(1)(B) has many problems when faced with the goals of CERCLA and the Code. It is hard to see its usefulness when alternatives exist such as simply estimating all claims, even if at zero, and have the claims resolved once and for all. Without § 502(e)(1)(B) as a focal point for extravagant interpretation, this apparently would be the only thing that bankruptcy courts could do with contingent claims. This would seem to be a much sounder approach under the new bankruptcy scheme. And as has been argued above, applying § 502(e)(1)(B) to private party CERCLA claims has its own special problems. The Code and CERCLA would work more equitably in this area of the law if § 502(e)(1)(B) was repealed, or at minimum, amended.

2. *Conclusion*

With all the discrepancies and problem spots identified in Part IV above, there is obviously a need for improvement in this area of the law. Some might say a drastic overhaul of Code § 502(e)(1)(B) or its repeal is necessary to correct the harsh results the section is allowing to be perpetrated. Such an extreme position does have its support in law and policy. Possibly a more realistic approach would be to persuade the courts to reanalyze the provisions, purposes and consequences at stake before laying down any more law in this area. If Congress will not act on the subject, in some way or another the courts need to adopt a coherent, uniform approach to the issues involved. After all, the Code and CERCLA are two federal statutes, being reconciled exclusively by federal courts. Lastly, should the Supreme Court venture into this arena, the analysis contained herein hopefully will be strong enough to convince the Court of a better way to interpret Code § 502(e)(1)(B) when it is applied to private party CERCLA claims.[300]

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298. Morris G. Shanker, *A Bankruptcy Superfund For Some Super Creditors*, 61 AM. BANKR. L. J. 185, 191-93 (1987).

299. *See id.*

300. The prospect of the Supreme Court hearing an allowance issue case is extremely intriguing. The Court would be faced with a clash between traditional (historical), legislative history, plain meaning and policy arguments. How the court would decide the allowance issue is beyond sound predictions.