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Apportioning Liability for the Cleanup of Hazardous Waste Sites under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

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APPORPTIONING LIABILITY FOR THE CLEANUP OF HAZARDOUS WASTE SITES UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (CERCLA)

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I. INTRODUCTION

It has been ten years since Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in an attempt to provide a uniform federal response to the growing national crisis of uncontrolled hazardous waste sites. From its inception, CERCLA's goals were twofold: to target hazardous waste sites for cleanup and compel those par-

2. See infra notes 3-5 and accompanying text.
ties responsible for the sites to bear the burden of the cleanup costs. Since that time, disclosures of ill-conceived planning on the part of corporations, private individuals, and of states in financing, constructing, and storing hazardous wastes have continued to raise major concerns for the American public. The burden of funding these cleanups has placed an ever increasing strain on federal, state, and corporate fiscal budgets. The federal government has estimated that in the next five years private and public sectors will be spending between $13 billion and $20 billion annually on hazardous waste cleanup and disposal.

In order to prevent the bulk of these costs from falling on the innocent taxpayer, CERCLA empowers the Environmental Protection Agency (EPA) to create a system for identifying those


4. See Waste Control Issues Follows Air, Water To Become Top U.S. Environmental Concern, 16 Env't Rep. (BNA) 6-7 (May 3, 1985) (discussing emergence of waste disposal concerns on national regulatory agenda).

5. Superfund Settlements, 74 Va. L. Rev. 123, 124 (1980) (quoting from office of Technology Assessment, Superfund Strategy 14 (1985)). This Comment estimates the extent of uncontrollable hazardous waste sites around the country to be between 1,500 and 10,000, a figure not anticipated by the authors of CERCLA when they enacted these statutory provisions in 1980. Id. The overall costs of cleaning up these sites is estimated at $10 billion to $100 billion. Id. See also 53 Fed. Reg. 23,988 (1988).

6. See Comment, The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA 1988 Wis. L. Rev. 139, 140 (1988) (quoting New York Times, August 31, 1983 at 1, col. 1). See also Insurance Coverage for Superfund Liability Defense and Cleanup Costs: The Need for a Nonlitigation Approach, 19 Env't L Rep. (Envtl. L. Inst.) 10203 (1989). This more recent article suggests that the new cleanup standards incorporated into CERCLA by the adaptation of the Superfund Amendments and Reauthorization Act (SARA) amendments have driven up the costs of remedial actions at hazardous waste sites and delayed their final cleanup process. Id. The article suggests that Congress failed to take into consideration the future growth in the number and type of hazardous waste sites used by hundreds and possibly thousands of potentially responsible parties (PRPs) when formulating CERCLA and the subsequent SARA amendments. Id. As a result, this article suggests that the funds required for the cleanup of these hazardous waste sites may triple and possibly quadruple in cost, resulting in private and public expenditures in the range of $30 million to $50 million dollars per site, with half as much used to cover the costs of litigation. Id. The article suggests that if Congress had incorporated more nonlitigative means for resolving PRP disputes in CERCLA, the costs of cleaning up waste sites could have been reduced by half. Id.

7. Under section 106(a) of CERCLA, the EPA is authorized by the President of the United States to make determinations on the potential dangers to the public health or welfare of the environment based on an actual or threatened release of a hazardous substance from a waste site facility. Id. In order to enforce the CERCLA provisions, the EPA may invoke the aid of the Attorney General of the United States to bring suit against those parties who threaten the
hazardous waste sites which pose an imminent threat to the environment, while compelling those who are liable for the conditions existing at a particular site to pay for their share of the cleanup costs. Under section 107(a) of CERCLA, past and present hazardous waste site owners, operators, generators, and transporters may be subject to joint and several strict liability for the cleanup of a particular site. With the number of uncontrolled hazardous waste sites estimated in the range of 1,500 to 10,000 nationally, courts have found themselves in the sensitive role of continually redefining “owner and operator” under CERCLA in order to assure that all parties who have contributed to the hazardous waste site pay for its reclamation.

This Comment focuses on the expanding definition of health of the public and environment with the release of hazardous substances. Under section 106(b) of CERCLA, the EPA may fine up to $5,000 each day any person who willfully violates or refuses to abate the threat of a release of hazardous waste from a facility under the Act.

8. See supra note 3.

9. 42 U.S.C. § 9607(a). The persons liable under CERCLA section 107(a) are:
1. the owners and operator of a vessel or a facility,
2. any person who at the time of the disposal of any hazardous substances owned or operated a facility at which hazardous substances were disposed of,
3. any person who by contract, agreement, or otherwise arranged for the disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such a person, by another party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances, and
4. any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . or sites selected by such person, from which there is a release, or threatened release which causes the incurrence of response costs of hazardous substances shall be liable for:
   (A) all costs of removal or remedial action incurred by the United States Government or a State . . . 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; and
   (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs for assessing such injury, destruction, or loss resulting from such a release.

10. See supra note 5.

11. See generally Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989) (holding that states were subject to private actions brought under section 107(a) of CERCLA); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988) (holding developers of subdivision containing toxic waste were liable as transporters of toxic waste, even though waste had been stored on the property by a prior sublessee); New York v. Shore Realty Co., 759 F.2d 1032 (2d Cir. 1985) (holding that stockholders and corporate officers could be subject
"owner and operator" of a hazardous waste site under section 107(a) of CERCLA. After explaining the relevant statutory provisions, this Comment analyzes recent judicial decisions which demonstrate how the courts, in their efforts to apply section 107(a) in accordance with legislative intent, have continued to extend CERCLA's definition of "owner and operator" to parties previously considered exempt from the Act's jurisdiction. While acknowledging CERCLA's success in determining who is liable under the Act, this Comment will show how CERCLA has failed to provide for an equitable distribution of the cleanup costs among the responsible parties. This Comment will then present a strategy for improving the implementation of CERCLA's policy of apportioning liability, namely, an amendment to the Act requiring mandatory insurance coverage for any individual or entity engaged in the business of storing or transporting hazardous waste materials. Lastly, this Comment suggests how certain changes in the insurance industry itself could effectuate this mandatory requirement.

II. THE STATUTORY STRUCTURE OF CERCLA

A. The Environmental Protection Agency and Its Enforcement Powers Under CERCLA

CERCLA enables the EPA to exercise Presidential authority in identifying active and abandoned hazardous waste sites across the nation. The EPA is required to respond to a release or potential release of hazardous substances by removing them from a site pursuant to a National Contingency Plan (NCP). Section 131 of CERCLA provides for the establishment of a Hazard to liability under CERCLA section 107(a) for participation and management of waste facility site).

12. See supra note 9.
13. See infra notes 29-61 and accompanying text.
14. See infra notes 29-61 and accompanying text.
15. CERCLA § 103(d)(1) provides: "The Administrator of the Environmental Protection Agency is authorized to promulgate rules and regulations specifying, with respect to (A) the location, title, or condition of a facility; and (B) the identity, characteristics, quantity, origin, or condition (including containerization and previous treatment) of any hazardous substances contained or deposited in the facility . . . ." Id.
17. Found in section 105 of CERCLA, the NCP provides federal standards for responding to releases of hazardous substances. Id. The NCP sets forth updated guidelines for investigating hazardous waste sites and procedures for determining the extent of response activities. Id.
ardous Substances Response Trust Fund (Superfund) to finance the cleanup process. The EPA also enlists the aid of the Justice Department in bringing actions against potentially responsible parties to reimburse Superfund for its cleanup costs.

B. Owner and Operator Defined Under CERCLA

A major concern of Congress when it enacted CERCLA and its subsequent amendments compiled under the Superfund Amendments and Reauthorization Act of 1986 (SARA) was to assure that all parties responsible for the creation of a hazardous waste site contribute their proportionate share toward the cleanup costs. Section 101(20)(A) classifies liable parties under CERCLA as “persons” owning or operating a hazardous waste facility. Under section 101(21) of CERCLA, a “person” is defined as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, municipality, commission, political subdivisions of a State, or any interstate body.”

While sections 101(20)(A) and 101(21) stipulate who may be

18. The Hazardous Substance Response Trust Fund (better known as Superfund) was established under section 131 of CERCLA to fund actions taken by the EPA in the cleanup of hazardous waste facilities. Revenue for Superfund is obtained from taxes on crude oil, imported petroleum products, hazardous chemicals and general appropriations. As a result of the passage of SARA in 1986, Congress has made available $8 billion to Superfund over the next five years. See Superfund Revenue Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (Supp. V 1987).

19. Under subsection 106(a) of CERCLA, the EPA may delegate to the Attorney General of the United States the authority to prosecute those persons who violate any of the statutory provisions contained in CERCLA. Id.


21. 42 U.S.C. § 9601(20)(A). CERCLA section 101(20)(A) provides that: “owner and operator” means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or offshore facility, any person owning or operating such a facility, and (iii) in the case of any abandoned facility . . . any person who owned, operated, or otherwise controlled activities at such a facility immediately prior to such abandonment . . . Such terms do not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility. Id.

22. 42 U.S.C. § 9601(21). CERCLA section 101(21) provides that: “person” means 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.
a responsible "person" under the Act, section 107(a) defines four classes of individuals who would be liable as "owners and operators" of waste facility sites under CERCLA. These individuals include current owners and operators of waste site facilities, past owners and operators of waste site facilities, generators of hazardous waste, and those who accept waste for purposes of transporting it to disposal facilities.

C. Standard of Liability Under CERCLA

Defining the standard of liability under CERCLA has been a major preoccupation of courts in their interpretation of the Act. CERCLA's liability section contains no language requiring the EPA to demonstrate that a defendant acted negligently in the disposal of its waste. It also has been suggested that CERCLA provides for the imposition of joint and several liability among the responsible parties. Thus, one of several defendants could be held strictly liable under the Act to compensate the government for the entire cost of the cleanup of a particular waste site. The CERCLA defendant must prove the availability of one of the three categories of affirmative defenses found in section 107(b) of the Act. If he cannot, he will be forced to take responsibility for

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23. See supra note 9 for full text of section 107(a).
24. Id.
28. Language endorsing joint and several liability was deleted from CERCLA along with any references to strict liability. By leaving the liability standard ambiguous, CERCLA sponsors intended that the courts be free to impose joint and several liability when consistent with established common law principles. See 126 Cong. Rec. 30, 932 (1980).
29. See infra note 64 for the full text of CERCLA § 107(b).
the cleanup of a hazardous waste site. A CERCLA defendant may, however, bring suit against any other responsible parties to recover their pro-rated share of this liability.

III. JUDICIAL INTERPRETATIONS OF "OWNER AND OPERATORS" UNDER CERCLA

A. Shifting the Burdens of Hazardous Waste Cleanup to Those Responsible Under CERCLA

Federal courts have consistently interpreted section 107(a) of CERCLA in favor of the government. One may be deemed an "owner" of a hazardous waste site without possessing legal title to the land upon which the facility is built, if, as a lessee, one had the ability to determine how the land was to be used. A corporate shareholder or officer may be held personally liable for acts attributed to the corporation if that officer or shareholder controlled the corporation's decision-making process with respect to the disposal of hazardous wastes. The federal courts are re-

30. 42 U.S.C. § 9613(f)(1). CERCLA section 113(f) provides:

(f) Contribution
(1) Contribution
Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. 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 or section 9607 of this title.

Id.

31. See CERCLA § 107(a)(1)-(4) quoted supra note 9.

32. See U.S. v. Monsanto, 858 F.2d 160 (4th Cir. 1988). In Monsanto, the court held that landowners who leased land to a company on which hazardous waste was subsequently stored, were liable under CERCLA for costs incurred by the State and U.S. Government in removing the hazardous waste from the land, even though they claimed that they were innocent absentee landlords. Id. at 168. The court also held that the defendant had failed to present evidence that the release of hazardous substances from their land were caused "solely by a third party other than . . . one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant," as required by CERCLA § 107(b)(3). Id. See also Rockwell International Corp. v. UI International Corp., 702 F. Supp. 1384 (N.D. Ill. 1988).

33. See, e.g., New York v. Shore Realty Corp. 759 F.2d 1031 (2d Cir. 1985) (court of appeals affirmed lower court's finding that owner of hazardous waste site, along with corporate officers and shareholders who contributed to management of hazardous waste facility, could be liable under CERCLA for cleanup of hazardous waste site).
quired to efficiently interpret the statutory provisions found in CERCLA in such a way as to compel those deemed responsible for hazardous waste facilities to disgorge the necessary funds for their cleanup. Recent decisions by the Supreme Court and lower federal courts have established a trend toward expanding the definition of "owner and operator," in the absence of Congressional provisions limiting the scope of liability under the Act, for the purpose of generating funds for cleanup.

States have recently been held liable under section 107(a) as "owners and operators" of hazardous waste facilities. In the case of Pennsylvania v. Union Gas Company, the Supreme Court of the United States was asked to decide whether a state which contributed to the release of hazardous substances into the local environment could be held liable in a private action for its proportionate share of the cleanup costs. Before arriving at its decision, the Court addressed two main issues in its application of CERCLA: (1) whether the Act, as amended by SARA, permitted private actions against a state in a federal court; and (2) whether Congress had the right to create such a cause of action when legislating pursuant to the Commerce Clause.

In its analysis of the first issue, the Court found that section 101(20)(D) of CERCLA held liable any state or local govern-


37. Id. at 2274. In 1980, shortly after acquiring easements to the property along a creek, the state struck a large deposit of coal tar during excavation of the creek bed. Id. The tar began to seep into the creek, and the EPA determined that the tar was a hazardous substance and declared the site the nation's first emergency Superfund site. Id. The EPA brought action against the respondent Union Gas, claiming that it was liable for such costs because the company and its predecessors had deposited the coal tar near the creek. Id. Union Gas then filed a third-party complaint against Pennsylvania, asserting that the state was responsible for at least a portion of the costs because it was deemed an "owner and operator" of the site under CERCLA section 107(a). Id. For a discussion of the holding in Union Gas, see infra notes 36-45 and accompanying text.

38. Id. at 2275.

39. 42 U.S.C. § 9601(20)(D). CERCLA section 101(20)(D) provides: The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily
ment which caused or contributed to the release or threatened release of a hazardous substance. Additionally, the Court found that the language in section 120(a)(1), waiving the federal government's right to immunity against private suits brought under CERCLA, was virtually identical to that found in section 101(20)(D), which provided for state and local government liability under the Act. The Court dismissed Pennsylvania's argument that CERCLA merely makes clear that states may be liable to the *United States*, while exempting them from private actions for violations brought under the Act. The Court found that Congress "would have had no cause to stress that states would be liable to the same extent as any nongovernmental entity under section 101(20)(D), if it had meant that they would only be liable to the *United States*.

In addressing the issue of whether Congress was empowered by the Constitution to authorize such legislation pursuant to the

through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

*Id.*


41. 42 U.S.C. § 9620(a)(1). Section 120(a)(1) of CERCLA provides: "Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title . . . ." *Id.*

42. *Union Gas*, 109 S. Ct. at 2279. The Court stated that the language in this section of the Act represented an "unequivocal expression" of the federal government's waiver of its sovereign immunity. *Id.* The Court determined that in choosing this mirroring language in section 101(20)(D), Congress must have intended to override the states' immunity from suit, just as it waived the federal government's immunity in section 120(a)(1). *Id.*

43. *Union Gas*, 109 S. Ct. at 2280. Pennsylvania insisted that CERCLA merely makes clear that states may be liable to the *United States*, not that they may be liable to private entities such as Union Gas. *Id.* The Court found that, although the inclusion of states within CERCLA's definition of "persons" would not be rendered meaningless if it were held that CERCLA did not subject the states to suits brought against them by private citizens, it would deprive the last portion of section 101(20)(D) of all its meaning. *Id.* The Court stated that, "[i]n light of section 101(20)(D)'s very precise language, it would be exceedingly odd to interpret this provision as merely a signal that the United States, rather than private citizens, could sue the state for damages under CERCLA." *Id.*

44. *Id.* at 2279.
Commerce Clause, the Court determined that the language of the Eleventh Amendment placed no limitations on the power of Congress to override states' immunity when legislating pursuant to the Commerce Clause. In order to achieve the objective of apportioning liability to those parties responsible for hazardous waste sites, the Court held that the Congressional power to regulate commerce included the authority to hold states financially accountable, not only to the federal government but to private citizens as well.

While Union Gas Company clarified state liability under CERCLA, lower federal courts have continued to revise the definition of "owner and operator" under section 107(a) when applying it to one of the most conspicuous potentially responsible parties, the corporation. In Tanglewood East Homeowners v. Charles-Thomas, Inc., the United States Court of Appeals for the Fifth Circuit held that companies involved in the development of a subdivision contaminated with hazardous waste could be liable under CERCLA for response costs as an "owner and operator" of a waste facility, even though another company had been operating the facility at the time the waste had accumulated on the property.

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45. U.S. Const. art. I, § 8, cl. 3 (grants Congress the power to monitor interstate commerce).
46. Union Gas, 109 S. Ct. at 2282. The Court held that the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. Id. (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 451 (1976)). The Court found that Congress' authority to regulate commerce includes the authority directly to abrogate states' immunity under the Eleventh Amendment, from suits brought by private individuals under CERCLA. Id.
47. Id. at 2285. The Court reasoned that, because the government's resources were finite, it could not pay for all the necessary cleanups under CERCLA. Id. Therefore, Congress enacted CERCLA section 101(20)(D) to encourage private parties who voluntarily cleaned up hazardous waste sites to recover a proportionate amount of the costs from the states, which comprise a significant class of owners and operators of hazardous waste sites. Id.
50. Id. at 1571. During its operation, substantial amounts of highly toxic waste were on the property. Id. The appellants argued that CERCLA section 107(a)(1) applied only to the "owners and operators" who actually generated and discharged the hazardous waste on the
The court held that a subdivision was a “facility” under the Act for the purpose of asserting a private cause of action to recover costs. The court also held that lending institutions, developers, construction companies, and realtors may be designated “owners and operators” under section 107(a)(1) and liable for the cleanup costs of the subdivision.

The court in Tanglewood dismissed assertions made by the appellants that CERCLA liability covered only those “owners and operators” who discharged or caused the hazardous substances to accumulate on the property. Relying on the decision of the Second Circuit in New York v. Shore Realty Corp., the court determined that, because section 107(a)(2) expressly applied to past owners and operators who contaminated their property, “it was self-evident that the language contained in section 107(a)(1) imposed strict liability on the current owners of any facility that released or threatened to release a toxic substance,” even though they had not participated in the storage or transportation of hazardous substances to the site.

Corporate shareholders and officers may also find themselves individually liable for the act of a corporation in the management of a waste facility site. In United States v. Mottolo, the government, on behalf of the EPA, brought a consolidated civil action against several corporations and a specific class of shareholders for costs incurred in connection with the cleanup of a hazardous property. Id. at 1572. The court held that the wording of section 107(a) did not exclude present owners and operators of properties previously contaminated. Id. Because the appellants engaged in the activities of filling and grading the land, causing the hazardous waste in the land to be released into the local environment, they could be subject to liability under CERCLA. Id. at 1574.

52. CERCLA section 101(9) defines “facility” as:

... (A) any building, structure, installation, equipment pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft; or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any product in use or any vessel.

42 U.S.C. § 9601(a) (emphasis added).

53. Tanglewood, 849 F.2d at 1572.

54. Id.

55. New York v. Shore Realty Co., 759 F.2d 1032 (2d Cir. 1985). The Shore court held that the developer-owners were liable for the cleanup costs of their facility even though no construction or development had been undertaken. Id. at 1043.

56. Tanglewood, 849 F.2d at 1572.

waste site.58 The court first addressed the issue of whether liability under CERCLA was retroactive and included all costs that were incurred by the government and private entities in the cleanup of hazardous waste sites prior to the authorization of the Act. The court held that, because the Act failed to limit recovery of response costs to prospective violations, Congress intended CERCLA provisions to be applied retroactively.59 The court reasoned that, in order to avoid frustrating CERCLA's beneficial purposes, courts are obligated to construe CERCLA provisions liberally.60 After determining that the site was a "facility" under CERCLA,61 the district court held that the corporate form could not be used to shield the defendant site owner from cleanup costs under CERCLA. The court stated that, while the corporate entity is generally recognized for most purposes, it may not be employed to avoid overriding federal legislative policies.62

The court concluded its analysis by stating that one of CERCLA's express goals was to ensure that "those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful condition."63

58. Id. at 618. The EPA and the State of New Hampshire sought reimbursement of costs incurred in the cleaning up of a hazardous waste dump managed by a Massachusetts corporation, its president, treasurer, and owner of the corporation. Id. The court based its jurisdiction on CERCLA section 113(b), which provides in part that "the United States district courts shall have exclusive jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. . ." 42 U.S.C. 9613.

59. Mottolo, 695 F. Supp. at 621. The court stated that, because CERCLA failed to explicitly limit the recovery of response costs to prospective violations, courts have construed CERCLA's provisions to be applied retroactively. Id. (citing O'Neil v. Picillo, 682 F. Supp. 706, 729 (D.R.I. 1988)). The court also found that the retroactive application of CERCLA would not offend due process. Id.

60. Id. at 622. The court held that the express goals of CERCLA were to provide the federal government with the means necessary for a prompt response to the problems resulting from hazardous waste disposal and to ensure that those parties responsible for problems caused by the disposal of chemical poisons bear the costs of remedying the harmful conditions they created. Id. The court therefore held that it would not interpret CERCLA section 107(a) in any way that would frustrate the Act's goals, in the absence of a specific congressional intention otherwise. Id.

61. Id. at 623.

62. Id. at 624. The court stated that the fiction that a corporation is an entity independent of its stockholders is not favored in New Hampshire and will be disregarded when justice so demands it. Id. The court reasoned that, in the absence of explicit statutory language addressing the effect of incorporation, CERCLA's strict liability scheme, and the broad and encompassing categories of potentially responsible parties, leads to the conclusion that CERCLA places no importance on the corporate form. Id.

63. Id. (citing Dedham Water Co. v. Cumberland Farms Dairy Inc., 805 F.2d 1074, 1081 (1st Cir. 1989)).
The court decided that this goal would be frustrated if the mere act of incorporation were allowed to impede recovery of response costs, since a violator could avoid liability simply by changing company structure from a proprietorship or partnership to a corporation.64

B. "Defenses" Under CERCLA

Under CERCLA, federal courts have generally imposed joint and several strict liability on those parties involved in the operation of hazardous waste site facilities.65 Section 113 of the Act, however, provides that, "any person may seek contribution from any other person who is liable under section 107(a)." Thus, a person held liable under the Act may institute an action to recover a percentage of the cleanup costs from other responsible parties for the conditions at a particular waste site.

Defendants subject to section 107(a) may also seek to raise three available affirmative defenses under the Act.67 Section 107(b) allows a defendant to escape liability by establishing "by a preponderance of the evidence" that the actual or threatened release was caused solely by: (1) an act of God; (2) an act of war; (3) the act or omission of a third party; or (4) any combination of the above.68 Because of the strict liability standard applied by the majority of the courts in interpreting CERCLA, these defenses

64. Id.
65. See supra notes 21-27 and accompanying text.
66. See supra note 30 for full text of section 113(f)(1).
67. 42 U.S.C. § 9607(b). CERCLA section 107(b) provides:
There shall be no liability under subsection (a) of this section for a person who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:
(1) an act of God;
(2) an act or war;
(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with a defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerns, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omission of any such third party and the consequences that could foreseeably result from such acts or omissions; or
(4) any combination of the foregoing paragraphs.

Id.
68. See supra note 67.
would appear to provide the broadest means of avoiding liability under the Act. Two recent cases interpreting section 107(b), however, demonstrate the limited scope of these defenses.

In *Smith Land & Imp. Corp. v. Celotex Corp.*, the United States Court of Appeals for the Third Circuit found that the doctrine of "caveat emptor" was not a valid defense against liability under CERCLA. The court held that a corporate successor to a manufacturer of asbestos, who had sold land containing hazardous waste, was liable in contribution to the buyer of that land for its proportionate share of the cleanup costs.

The court reasoned that, if the doctrine of caveat emptor were incorporated as a defense under the Act, a purchaser would be barred from recovering any cleanup costs from other responsible parties and thereby "frustrate the Congress' desire to encourage cleanup by any responsible party." The court stated that if the fair apportionment of the cleanup expenses were not assured, it would be "unlikely that one party will take remedial actions promptly when it could simply delay, awaiting a legal ruling on the contribution of liability of other responsible parties.

The court affirmed the government's right to seek response costs from any of the responsible parties. Those chosen could then, in turn, receive contribution from other potentially liable parties. The court noted, however, that if the price of the tract of land in question had been reduced to allow for future environmental cleanup claims, the purchaser would not be entitled to double compensation by then seeking contribution from other potentially responsible parties.

The most effective defense raised under CERCLA is the third-party defense found in section 107(b)(3) of CERCLA, which requires that a third party be solely liable for a hazardous waste

70. Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988).
71. Id. at 88. The court interpreted CERCLA section 113(f) to allow an individual to seek contribution from anyone who is liable under section 107(a) of the Act. Id. Thus, a current owner of a facility, as well as the entity that owned the facility at the time the hazardous substances were deposited, were both liable under CERCLA for the expense of rectifying the condition. Id. at 89.
72. Id. at 89. The court found that the defense of caveat emptor was not included in those defenses found in CERCLA section 107(b). Id.
73. Id. at 89-90.
74. Id. at 90.
75. Id.
76. Id.
release. The third party must be someone other than an employee or agent of the defendant, "or other than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant."  

A third party must be solely responsible for the hazardous waste release at a particular site for section 107(b)(3) to constitute a valid defense for a CERCLA defendant. In *State of Washington v. Time Oil Co.*, the district court addressed the issue of whether a defendant corporation was entitled to the "innocent landowner defense" pursuant to section 101(35)(A) of CERCLA. This section provides, in part, that a defendant will not be held liable under the Act if, at the time of acquiring a facility he did not know and had no reason to suspect that "any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility . . . ." The court determined that, in order to successfully assert such a defense under section 101(35)(A), a defendant must first satisfy the statutory requirements found in section 107(b)(3) requiring: (1) the sole liability of a third party for the hazardous waste release; and (2) proof of due care by the defendant in his efforts to prevent releases of hazardous waste at a site.

The court found that, although the defendant corporation had established that a third party sublessee contributed to the release of hazardous waste on the defendant's property, the defendant failed to meet the two essential elements for a valid defense under section 107(b)(3). First, the defendant failed to offer

77. *See supra* note 67 for full text of CERCLA section 107(b).
79. *Id.* at 530. *See also* CERCLA section 101(35)(A) which provides in part: The term "contractual relationship" for the purpose of section 9607(b)(3) of this title includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after disposal or replacement of the hazardous substances on, in, or at the facility, and one or more of the circumstances described in clauses (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility . . .

81. *Id.* at 532-33.
proof that the release was caused solely by a third party for whom the defendant was not responsible.\textsuperscript{82} Secondly, the defendant was unable to establish that it had exercised due care in taking those necessary precautions with respect to the hazardous substances found on the site.\textsuperscript{83} Because the defendant was aware that its sublessee was running a sloppy operation on its property and failed to take precautions to prevent potential releases of hazardous substances as a result of these operations, the court found that the defendant was unable to establish that its sublessee was solely responsible for the release.\textsuperscript{84}

\textit{Smith Land \& Imp. Corp.}\textsuperscript{85} and \textit{Time Oil Co.}\textsuperscript{86} demonstrate how the courts have interpreted the CERCLA defenses in a way that minimizes the social costs of hazardous waste releases.\textsuperscript{87} The burden of cleaning up a hazardous waste site remains jointly on the landowners and land users.\textsuperscript{88} The rationale for imposing such liability on otherwise innocent landowners is that it creates incentives for these landowners to do business with responsible contractors and to monitor their activities.\textsuperscript{89} This rule is particularly pertinent when a corporation has knowledge of or control over the safety measures implemented by its corporate contractors in the hazardous waste business.\textsuperscript{90}

\textsuperscript{82.} Id. at 532. The court stated that, because the defendant corporation could not establish by a preponderance of the evidence that neither itself nor its sublessee were not responsible for the hazardous substance release on the land, they were unable to assert a section 107(b) defense under CERCLA. Id. at 532-33.

\textsuperscript{83.} Id. at 533. The court held that the defendant corporation permitted its sublessee to run a sloppy oil operation which led to the accumulation of hazardous oil byproducts and the subsequent release of the hazardous substance into the local environment. Id. The court therefore found that the defendant corporation failed to exercise due care to prevent the property from becoming contaminated by its sublessee. Id.

\textsuperscript{84.} Id.

\textsuperscript{85.} Smith Land \& Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988).


\textsuperscript{87.} See \textit{Smith}, 851 F.2d at 92; \textit{Time}, 687 F. Supp. at 530-1.

\textsuperscript{88.} See supra notes 67-83 and accompanying text.

\textsuperscript{89.} See Comment, \textit{The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA}, 1988 Wis. L. REV. 139, 159 (1988) (stating that CERCLA's broad liability provisions and limited affirmative defenses ensure that all potentially responsible parties will be made to pay for cleanup of these hazardous waste sites); see also Note, \textit{Encouraging Safety Through Insurance Based Incentives: Financial Responsibility for Hazardous Wastes}, 96 YALE L. J. 403, 413-14 (1986).

\textsuperscript{90.} Id.
IV. RECOVERING THE CLEANUP COSTS UNDER CERCLA

A. The Problem of Determining Proportionate Liability Under CERCLA

While current caselaw interpreting section 107 of CERCLA has been generally successful in defining who may be responsible for the cleanup of a hazardous waste site, the Act fails to provide a process for discerning the proportionate share of liability among multiple parties.\(^9\) The courts have been equally unable to supplement the Act with a uniform system of apportioning liability for the cleanup of hazardous wastes.\(^9\)

A typical waste storage site may contain innumerable broken and rusting barrels of toxic waste, intermingling with each other as their chemical contents seep into the local environment.\(^9\) Individual defendants may attempt to present evidence showing that the hazardous waste products for which they are responsible were segregated from the rest of the toxic substances on the site. But in such cases, apportionment may be virtually impossible. If two co-mingled hazardous substances are released from a site at the same time, the defendants will have little chance of providing precise information for the apportionment of the cleanup costs.\(^9\)

The courts' tacit approval of joint and several liability under CERCLA has provided the means by which the EPA may bring suits against the wealthiest responsible defendants to recover the full cleanup costs, without expending large amounts of money on multiple lawsuits against other potentially insolvent responsible parties.\(^9\) In this respect, joint and several liability is unfair be-

91. CERCLA section 113(f) provides a person with the right to contribution under the Act to establish a system for determining proportionate liability.
93. Comment, Developments in Toxic Waste Litigation, 99 Harv. L. Rev. 1485, 1528 (1986). Under this scenario, the harm could be indivisible if apportionment of the cleanup costs are impossible to determine. Id.
94. Id.
95. Joint and several strict liability under CERCLA allows the EPA to target responsible parties, for the cleanup of a hazardous waste site, who have the ready funds to compensate the EPA expenditures made by the EPA in its initial
cause it may force one party to contribute an exorbitant amount of funds for the cleanup of a hazardous waste site to which it contributed a fragment of the hazardous waste and derived little, if any, financial benefit.  

While the threat of joint and several liability provides an incentive for established corporations to create more efficient systems of treating and storing hazardous wastes, small companies lacking sufficient funds to cover a potential release of hazardous wastes may be protected from liability under the Act.  

Small companies realize that if they are brought into a suit by the EPA, these high-visibility corporations will also be available to share the cleanup costs. Unencumbered by the fear of potential liability under CERCLA, these smaller companies are able to manufacture products at a level and price which undermine the economic foundation of those highly visible companies that are obligated to comply with CERCLA's safety provisions.  

Highly visible defendants who have been required to compensate in full all expenditures made by the EPA in its reclamation of a waste site may implead other responsible parties in order to recover their proportionate share of the cleanup costs. By the time they are able to institute action against these smaller defendants, however, many may have already become judgment proof or filed for bankruptcy. Even if it can be determined that all impleaded parties are solvent, they are still only liable to the defendant corporations for their proportionate share of the cleanup costs. Joint and several liability does not apply to contribution actions and thus liability for the shares of absent parties must be borne by the original defendants alone.  

These original de-

96. See supra notes 92-95 and accompanying text.  
97. Id.  
98. Comment, Developments in Toxic Waste Litigation, 99 Harv. L. Rev. 1485, 1531 (1986). One of the ways to correct this inequitable result would be if the EPA was obligated to implead all responsible parties connected with the site in suits for contribution, obligating each responsible party to pay its share of the cleanup bill. Id.  
fendants may also be unable to recover excessive litigation costs from these smaller responsible parties. This legal reality is another factor protecting the subset of smaller responsible parties from liability under the Act, since a CERCLA defendant may not deem it worthwhile to sue another responsible party where that party’s proportionate share of the cleanup cost is less than the cost of litigation.101

B. A Recommended Revision of CERCLA’s Inadequate Financial Responsibility Provisions

It has been suggested that financial responsibility provisions would provide an incentive for corporations, large and small, to either establish more stringent safety measures for the disposal and storage of hazardous waste or maintain minimum levels of insurance to cover potential liability under CERCLA.102

To date, CERCLA’s financial responsibility provisions require coverage against liability for cleanup costs under an extremely expansive liability standard.103 The joint and several strict liability standard found in the Act requires insurers under section 108(c) to assume initial liability for all response costs and resource damages.104 In order to recover those losses attrib-

101. Id.
103. See supra note 9 for full text of section 107(a).
104. 42 U.S.C. § 9608(c). CERCLA section 108(c) provides:

(1) Releases from vessels
In the case of a release or threatened release from a vessel any claim authorized by section 9607 or 9611 of this title may be asserted directly against any guarantor providing evidence of financial responsibility for such facility under subsection (a) of this section. In defending such a claim, the guarantor may invoke all rights and defenses which would be available to the owner or operator under this subchapter. The guarantor may also invoke the defense of the owner or operator but the guarantor may not invoke any other defense that the guarantor might have been entitled to invoke in a proceeding brought by the owner or operator against him.

(2) Releases from facilities
In the case of a release or threatened release from a facility, any claim authorized by section 9607 or 9611 of this title may be asserted directly against any guarantor providing evidence of financial responsibility for such facility under subsection (b) of this section if the person liable under section 9607 of this title is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or if, with reasonable diligence, jurisdiction in the Federal courts cannot be obtained over a person liable under section 9607 of this title who is likely to be solvent at the time of judgement. In the case of any action pursuant to this paragraph, the guarantor shall be entitled to invoke all rights and defenses which would have been available to the person liable
utable to violations of policy restrictions, insurers must bring separate actions against their insureds. This inequitable distribution of liability under CERCLA undermines the ability of insurance companies to provide affordable insurance policies to corporations conducting business in the field of hazardous waste disposal and storage.

It is suggested that the liability provisions established in CERCLA do not induce corporations to invest in accident avoidance measures or to purchase liability insurance. This is because CERCLA has failed to specifically address the liability of parent corporations for the acts of their subsidiaries in the treatment and disposal of hazardous wastes. Parent corporations, who are the majority stockholders of their subsidiary companies, may be shielded by their shareholder status from absolute liability under CERCLA. Under section 107(a), a parent corporation is only

under section 9607 of this title if any action had been brought against such a person by the claimant and all rights and defenses which would have been available to the guarantor if the action had been brought against the guarantor by such person.

Id.

105. Because section 108(c) of CERCLA provides tort claimants under the Act with the right to recover all response costs and resource damages directly from insurers, with the exception of any willful contract violations by their insureds, insurance companies must bring separate actions against these insureds to recover deductibles and other losses resulting from policy violations. See supra note 104 for the full text of section 108(c) of CERCLA; see also Note, Encouraging Safety Through Insurance Based Incentives: Financial Responsibility for Hazardous Wastes, 96 YALE L. J. 403, 420 (1986).

106. See Joslyn Mfg. Co. v. T. L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990). The court held that the definition of "owner" and "operator" of a hazardous waste facility found in section 107(a)(2) of CERCLA did not include the parent corporation of an offending wholly-owned subsidiary. Id. at 82. The court stated that the legislative history of CERCLA failed to indicate that Congress meant to alter the traditional corporate law principle of limited liability. Id. The court further determined that if Congress had intended for section 107(a)(2) to alter the interpretation of the judicially created principle of limited liability, its intent would have been specific within the provision. Id. at 83. See also State v. Ventron Corp., 94 N.J. 473, 500, 468 A.2d 150, (1983). In Ventron, the Supreme Court of New Jersey held that, in the absence of federal or state statutory provisions to the contrary, common law principles permit courts to pierce the corporate veil to find a parent corporation liable for the acts of its subsidiary in very limited circumstances. Id. at 164. Only when it has been determined that:

(1) the parent corporation dominated the subsidiary to such an extent that it was a mere instrumentality of the parent corporation; and (2) that the parent corporation abused the privilege of incorporation to perpetuate fraud or injustice or otherwise circumvent the law. Id. The fact that a subsidiary was undercapitalized and influenced by the personnel, directors, and officers of the parent corporation in the course of running the day-to-day business was not found by the court to be a dispositive factor in the determination that the parent corporation so dominated its subsidiary that it should be liable for the acts of the subsid-
liable to the extent of its investment in the subsidiary corporation. Thus, if the subsidiary lacks the sufficient funds to adequately clean up a waste site, most of the costs for the cleanup may fall upon involuntary creditors: the government and residents of the community.

Because of the prevalence of subsidiary corporations in the waste disposal field, hazardous waste sites have increased in number at an uncontrollable rate. With well over 10,000 hazardous waste sites within the United States, the EPA has at times found it difficult to adequately monitor and enforce the safety regulations adopted under CERCLA. It is therefore implausible that the government or local residents have the ability to protect against the potential release of a hazardous substance into the local environment more effectively than the subsidiary's parent corporation. Parent corporations are organized with the purpose of monitoring activities throughout the organization inexpensively and may cheaply and effectively oversee the activities of their subsidiaries.

Additionally, a parent corporation is in a better position to bear the risk of a hazardous release than the subsidiary or local community. The parent corporation, when pricing its products, can spread part of the risk of hazardous releases among its customers. Since the parent corporation is in the position of being better informed as to the risk taken by its subsidiary in the storage of hazardous waste, it can insure against a potential release. Insurance and financial markets enable parent corporations and their shareholders to spread the risk of hazardous waste activities. Such risk-spreading considerations support imposing liability for the release of hazardous wastes by insolvent subsidiary corporations on their corporate parents. An

iary. Id. at 165. See also Caraig v. Lake Asbestos of Quebec, LTD., 843 F.2d 145, 151-52 (3d Cir. 1988); Allied Corp. v. Frola, 701 F. Supp. 1084, 1090-91 (D.N.J. 1988).


108. Id.

109. See supra note 5 and accompanying text.


112. See Id.

113. See pp. 554-55 of text.

114. See Id.
amendment to the Act providing joint and several liability for parent corporations would encourage corporations to set up hazardous waste disposal sites which are adequately capitalized and sufficiently monitored, thereby reducing the risk of future releases of hazardous waste.

V. PROVIDING MANDATORY INSURANCE COVERAGE UNDER CERCLA

Requiring corporations to obtain insurance policies to cover potential response and cleanup costs is the most effective means to: (1) monitor the safety measures taken by corporations involved in the storage and disposal of hazardous waste; and (2) recover capital taken out of Superfund to cover the cleanup costs of insolvent corporations. Insurers are adept in analyzing risks associated with particular business ventures and share the risk of undesirable outcomes with their policy holders. If Congress were to enact legislation mandating insurance coverage for the four categories of "owners and operators" under section 107(a) of CERCLA, the result, as at least one commentator suggests, would be that "insurance-based incentives would significantly improve the government's ability to control environmental risks.

115. At present, CERCLA does not require owners and operators of hazardous waste site facilities or vessels carrying hazardous waste to procure liability insurance. But sections 108(a) and 108(b) of CERCLA do require from the owner or operator of each vessel and facility evidence of financial responsibility "to cover the liability prescribed under paragraph (1) of section 9607 of this title." 42 U.S.C. 9608(b)(2). Evidence of such financial responsibility may be satisfied through "insurance guarantee, surety bond, letter of credit, or qualification as a self insuror." 42 U.S.C. § 9608(b)(2). Subchapter IV of CERCLA relating to pollution insurance requires owners and operators under the Act to insure themselves through "risk retention" groups if they are unable to procure pollution insurance from an insurance group. 42 U.C.S. § 9673. A risk retention group is defined in section 171(3) of CERCLA as:

any corporation or other limited liability association taxable as a corporation, or as an insurance company under the laws of any State -
(A) whose primary activity consists of assuming and spreading all or any portion of the pollution liability of its group members;
(B) which is organized for the primary purpose of conducting the activity described under subparagraph (A);
(C) which is chartered or licensed as an insurance company and authorized to engage in the business of insurance under the laws of any state; and
(D) which does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person.

Id.

coming from hazardous waste sites."  

At present, CERCLA's joint and several strict liability standard established under section 107  is incompatible with the formula used by insurers to calculate liability, which is based upon a corporation's net assets rather than the aggregate costs of the cleanup of a hazardous waste release. Additionally, section 108 of CERCLA states that any claim authorized by sections 107 and 111 of the Act may be asserted against any insurer.

Promoting insurance-based incentives under CERCLA would require two amendments. First, it has been suggested that the standard of joint and several liability under CERCLA section 107 should be substituted by one based on individual contribution to a particular hazardous waste site. By allowing for the possibility of a sole responsible party to bear all the expenses of cleanup of a particular hazardous waste site, CERCLA places an intolerable burden on both solvent enterprises and their insurers. While Superfund may be utilized to cover expenses incurred to remove hazardous waste, solvent generators, transporters, and owners and operators of hazardous waste sites still

118. See supra note 9 for full text of section 107(a).
119. Abraham, Environmental Liability and the Limits of Insurance, 88 COLUM. L. REV. 942, 978 (1988). With the passage of CERCLA in 1980, courts around the country have incorporated joint and several liability into their overall analysis of CERCLA cases. Id. at 959. Joint and several liability creates uncertainty among insurers because the probability of liability and loss to the insurer is affected by the actions of nonpolicyholders "whom the insurer cannot identify in advance . . . A single generator of waste may be liable for all the costs of the cleanup of a particular site despite the generator's lack of fault, the presence of waste contributed by other generators, and the partial responsibility of the owner or operator of the site for the release of material into the surrounding environment. Id. See also Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 88 (3d Cir. 1988); New York v. Shore Realty Co., 759 F.2d 1032, 1052-53 (2d Cir. 1985); State of Washington v. Time Oil Co., 687 F. Supp. 529, 532 (W.D. Wash. 1988).
120. See supra note 104 for full text of section 108(c).
121. Abraham, Environmental Liability and the Limits of Insurance, 88 COLUM. L. REV. 492, 978 (1988). It is not suggested in Professor Abraham's article that utilization of joint and several liability under CERCLA should be abandoned in all circumstances; rather, it should become the standard for contribution to Superfund by those parties generally liable for the hazardous waste problem in the country. Id. Superfund would only be utilized when those parties responsible for specific waste sites cannot be located or are insolvent. Id. With these modifications in the liability provisions of CERCLA, the group most responsible for the dumping of hazardous waste into inadequate waste site facilities, and not the average taxpayer, would be responsible for the cleanup costs. Id.
122. Id. 978-80 (1988).
bear the majority of the cleanup costs under CERCLA.123 Second, Congress should delete those CERCLA provisions under section 108(c) which require insurers to assume initial liability for all response costs and resource damages incurred by their insureds. These revisions would reduce the costs to insurers of enforcing their policy conditions by incorporating into their contracts provisions which would make their insureds directly liable for certain deductible amounts.124

Changes within the insurance industry itself are also required to provide greater access to environmental liability insurance. Two theories for implementing these necessary changes have been introduced in an article by Professor Kenneth S. Abraham in a recent edition of the Columbia Law Review. First, through the incorporation of a system of retroactive indexing, a policy would cover both anticipated and unanticipated forms of environmental liability.125 Premiums would be paid out to the insurer in a two-

123. See CERCLA § 107(c).
124. See Abraham, Environmental Liability and the Limits of Insurance, 88 COLUM. L. REV. 942 (1988). By making an insured directly liable for certain deductible amounts, the insured is given "a stake in the avoidance of losses notwithstanding the existence of coverage because the insured is responsible for the deductible amount even if a loss is otherwise covered...A party purchasing coverage subject to the deductible aligns its interests with those of the insurer because both will suffer if the insured incurs a loss." Id. at 951-52. Thus, the deductible can be used not only as a method of compensation for insurers, which can be increased or decreased depending upon the risk associated with an insured's business, it can also be used to encourage safer methods of storing hazardous wastes around the country. Id.
125. Id. at 982. Professor Abraham addresses several potential difficulties with his proposal for retroactive indexing. First, those enterprises purchasing insurance each year could be subject to extensive liabilities to their insurers on an annual basis as a result of the delayed payment of the second premium and the potential for escalation in environmental liabilities during the course of the year. Id. Professor Abraham confronts this potential flaw by arguing that retroactive indexing provides access to insurance coverage which at present is either over-priced or unavailable. Id. at 983. Additionally, if environmental liabilities diminished during the course of the year, the two-step approach could result in lower premiums for insureds. Id.

A second drawback to retroactive indexing is potential bankruptcy of the insured during the interim between payment of the first and second premiums. Id. Payment on the second premium could also be accelerated or the insured could be given priority in a bankruptcy proceeding in order to assure payment. Id.

The final difficulty in Professor Abraham's proposal for a system of retroactive indexing centers around the problem of defining those developments in the area of environmental liability which would entitle an insurer to collect on the second premium. Id. Professor Abraham suggests that this matter could be taken care of by measuring "state or national increases in claim frequency and severity in the category or categories of claims insured." Id. at 984.
step process extending over a period of years.\textsuperscript{126} The initial payment would be based upon an index of the liabilities in the areas of tort and insurance law at the time the policy was entered into between the insurer and the insured.\textsuperscript{127} Any monetary increase in the second premium would be conditioned on subsequent developments in the law which would either contract or expand the environmental liability of the insured.\textsuperscript{128} To protect against potential bankruptcy of the insured during the interim between the two payments, several precautionary measures could be taken, such as: (1) payment of the second premium based on an annual assessment by the insurer; and (2) granting priority of the insurer over other creditors in any bankruptcy proceeding involving an insured. Any increased payments on the second premium would be dependent upon new developments in the law and upon the frequency of claims brought against insurers based upon these environmental liability insurance policies.\textsuperscript{129}

A second theory to be considered is based upon the deregulation of the insurance market. This would entail the disassembling of an array of state and federal regulations in the area of environmental insurance, such as: (1) the maintenance of a minimum reserve of money to assure payment of the claims; and (2) the relaxation of state commissioners monitoring of insurance companies' financial ability to ensure solvency.\textsuperscript{130} The terms of the insurance policy, although similar to traditional insurance policies, would no longer come with a guaranty of solvency on the part of the insurer when and if the insured desired to collect on the policy.\textsuperscript{131} The risks involved in such insurance would have to be disclosed to potential insureds in the absence of regulations requiring insurer contribution to guaranty funds or minimal capi-

\textsuperscript{126} See supra note 125 and accompanying text.
\textsuperscript{127} Id.
\textsuperscript{129} Id. at 986. Professor Abraham states that present regulations preempt involvement by nontraditional entrepreneurs in the insurance industry due to their inability to secure the funds required by present insurance industry regulations in order to guaranty their solvency. Id. This Article suggests that the reason behind the disappearance of environmental liability insurance in the past few years is due to the fact that regulatory controls in the insurance industry have precluded the insured from bearing the risk of the insurer's insolvency, a step which would reduce the risks of the insurer in marketing highly uncertain environmental liability insurance. Id. at 988.
\textsuperscript{130} See supra note 129 and accompanying text.
\textsuperscript{131} See Abraham, Environmental Liability and the Limits of Insurance, 88 Colum. L. Rev. 942, 987 (1988).
tal reserves. Despite the possibility of insolvency on the part of the insurer, such a scheme would be an improvement to a market which presently offers inadequate and exorbitantly priced environmental liability insurance.

VI. CONCLUSION

This Comment has attempted to present a general overview of the current trend taken by the courts toward the expansion of CERCLA liability under section 107. While the courts have been successful in assuring that all parties who have contributed to the hazardous waste site are responsible for its cleanup, the Act's standard of joint and several strict liability has hindered equitable distribution of those costs among the responsible parties. Highly visible corporations remain the target of governmental suits for the reimbursement of capital taken out of Superfund. Small corporations remain shielded from contribution suits brought by these initial defendant corporations due to insufficient funds or bankruptcy. As a result, large corporations have promoted the creation of inadequately funded subsidiary companies to offset the high costs of meeting the safety standards established under CERCLA. These corporations are able to maintain, through their subsidiaries, waste facilities whose ineffective design and safety precautions continue to threaten local environments nationwide. CERCLA should be amended to extend full liability to such parent corporations. Mandatory insurance under CERCLA provides the most effective means of compelling all responsible parties to contribute their share of the cleanup costs.

John P. Dragani

132. Id.