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Kaiser Aluminum and Chemical Corp. v. Catellus Development Corp.: Broad Remedial Powers of CERCLA Take No Prisoners

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KAISER ALUMINUM AND CHEMICAL CORP. v. CATELLUS DEVELOPMENT CORP.: BROAD REMEDIAL POWERS OF CERCLA TAKE NO PRISONERS

I. INTRODUCTION

In Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp., the United States Court of Appeals for the Ninth Circuit held that a contractor who excavated and graded vacant land could be a potentially responsible person ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). The contractor, while excavating and grading a development site, unknowingly spread contaminated soil from one area of a property to areas throughout the property. The Ninth Circuit ruled that the contractor could be held liable for damages under section 107(a)(2) of CERCLA as an operator of a facility at which hazardous substances were disposed and under section 107(a)(4) of CERCLA as a transporter of hazardous wastes.

Congress enacted CERCLA to protect the public and the environment from the dangers posed by hazardous waste sites. To

1. 976 F.2d 1338 (9th Cir. 1992).

III. CONCLUSION

The holding in Kaiser is congruous with a commentator's assertion that "[t]he present array of environmental laws and regulations makes it increasingly likely that environmental hazards and liability can entangle the unsuspecting contractor, even on the simplest of projects." Robert C. Chambers, Environmental Developments, in 1993 WILEY CONSTRUCTION LAW UPDATE § 4.2 (Overton A. Currie & Neal J. Sweeney eds., 1993).

For a further discussion of the facts and holding of Kaiser, see infra notes 78-108 and accompanying text.

achieve this significant goal, CERCLA authorizes the establishment of a 1.6 billion dollar trust fund, known as "Superfund." The United States Environmental Protection Agency ("EPA") expends this trust fund to cleanup and contain hazardous waste sites. EPA may seek reimbursement of the response costs it incurs for cleanup and containment from PRPs. PRPs are members of one or more of the four enumerated groups upon which CERCLA permits response costs to be imposed: owners, operators, generators, and transporters. PRPs may, in turn, seek contribution from

9. CERCLA defines “respond” or “response” to mean “remove, removal, remedy, and remedial action; all such terms (including the terms ‘removal’ and ‘remedial action’) include enforcement activities related thereto.” CERCLA § 101(24), 42 U.S.C. § 9601(24).
11. CERCLA § 107(a), 42 U.S.C. § 9607(a). Section 107(a) of CERCLA provides as follows:

Notwithstanding any other provision or rule of law, and subject to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such 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
(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 costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.
other PRPs for the others' share of the total response costs expended in performing the cleanup.\textsuperscript{12}

Permitting PRPs to seek contribution from other PRPs furthers Congress' goal of ensuring that those persons responsible for damages associated with hazardous waste sites bear the costs of cleaning up the sites.\textsuperscript{13} A steady judicial expansion of persons qualifying as PRPs has also furthered Congress' goal.\textsuperscript{14} For example, courts have extended operator liability to the corporate parents of subsidiaries,\textsuperscript{15} lessees,\textsuperscript{16} governmental bodies and agencies,\textsuperscript{17} and corpo-

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\item Section 113(f)(1) of CERCLA provides as follows:
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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 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 9607 of this title.
\end{quote}
\item United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). The Reilly Tar court concluded that CERCLA "should not be narrowly interpreted to . . . limit the liability of those responsible for cleanup costs beyond the limits expressly provided." \textit{Id.}
\item For examples of the steady judicial expansion of persons qualifying as PRPs, see \textit{infra} notes 15-20 and accompanying text.
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rate officials. In addition, courts have extended transporter liability to include persons who selected the sites where hazardous wastes were taken as well as persons who actually participated in transporting the hazardous wastes.

This Note first maintains that courts, for the most part, correctly interpret CERCLA's remedial goals so as to broaden the scope of persons qualifying as PRPs. This Note then discusses and analyzes the Ninth Circuit's holding in Kaiser, focusing on the court's exorbitant use of CERCLA's remedial goals. Next, this Note discusses the limited alternatives available to contractors to avoid liability under CERCLA following the Ninth Circuit's holding in Kaiser. Finally, this Note demonstrates that the holding in Kaiser will do little to achieve Congress' goals in enacting CERCLA: protecting the public and the environment from the dangers posed by hazardous waste sites.


Courts have also extended the scope of generator liability. However, a discussion of this topic is beyond the scope of this Note and will not be addressed. For a discussion of the judicial expansion of generator liability, see generally Meigan Flood Cooper, Note, Jones-Hamilton Co. v. Beazer Materials & Services, Inc.: The Bottomless Pit of CERCLA Generator Liability, 4 VILL. ENVTL. L.J. 417 (1993).
II. BACKGROUND

A. Purposes and Construction of CERCLA

Despite a legislative history that has been described as "shrouded with mystery," courts have consistently identified two essential goals that Congress intended to achieve by enacting CERCLA. First, Congress intended for the federal government to have the necessary tools for prompt and effective responses to the problems caused by hazardous wastes. Second, Congress intended for those responsible for the damages and problems caused by hazardous wastes to bear the costs associated with their cleanup.

Both of these congressional goals are remedial in nature. Courts have determined that the best way to effectuate these remedial goals and to accomplish Congress' objectives is to interpret CERCLA broadly and liberally.

B. Actions for Contribution Under CERCLA

Prior to the 1986 amendments to CERCLA, most courts followed the common law rule that permitted liable parties to seek contribution for CERCLA damages from other liable or potentially responsible parties. However, courts have interpreted CERCLA to require actions for contribution to be brought in a comprehensive manner, seeking contribution from all potentially responsible parties.

21. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); see also United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history."). A commentator has noted that "[a]lthough Congress . . . worked on 'Superfund' . . . for over three years, the actual bill which became law had virtually no legislative history at all." Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 COLUM. J. ENVTL. L. 1 (1982).

22. See, e.g., Dedham Water, 805 F.2d at 1081.


24. Id. Courts have also recognized the additional objectives of: (1) encouraging the use of maximum care and responsibility when handling hazardous wastes, (2) encouraging the voluntary cleanup of hazardous waste spills, and (3) encouraging the early reporting of CERCLA violations. See, e.g., Chemical Waste Management, Inc. v. Armstrong World Indus., Inc., 669 F. Supp. 1285, 1290 (E.D. Pa. 1987).

25. Dedham Water, 805 F.2d at 1081 (citing United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985)); Reilly Tar, 546 F. Supp. at 1112. The Reilly Tar court stated that "[t]he statute should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively . . . to hazardous waste emergencies. Id. See also New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) ("We will not interpret [a provision of CERCLA] in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intention otherwise."); 3A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 71.02 (5th ed. 1992) ("[T]he courts [are] committed to giving statutes which are enacted for the protection and preservation of public health an extremely liberal construction in order to accomplish and maximize their beneficial objectives.").
liable parties.\textsuperscript{26} To clarify its intentions, though, Congress amended CERCLA and codified the common law rule at section 113(f)(1).\textsuperscript{27} Section 113(f)(1) of CERCLA clearly provides PRPs with a right to contribution from other PRPs.\textsuperscript{28}

To prevail in an action for contribution under CERCLA, a plaintiff must satisfy four requirements: (1) the site where the hazardous substances are or were contained must be a “facility” as defined by the statute;\textsuperscript{29} (2) a “release”\textsuperscript{30} or threatened release of a “hazardous substance”\textsuperscript{31} occurred at the facility; (3) the release or
threatened release caused the plaintiff to incur "response"\textsuperscript{32} costs that were necessary and consistent with the National Contingency Plan;\textsuperscript{33} and (4) the potentially liable person falls within one of the four classes of persons subject to liability under section 107(a) of CERCLA.\textsuperscript{34} Therefore, past and present owners and operators, parties who arranged for disposal, and transporters can each be required to contribute to the response costs incurred in a CERCLA claim.\textsuperscript{35}

To avoid liability, a party from whom contribution is sought can refute, in its pleadings and at trial, the opposing party's assertions of the above requirements.\textsuperscript{36} In addition, CERCLA enumerating the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the administrator has taken action pursuant to section 2606 of title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

\textit{Id.} § 101(14), 42 U.S.C. § 9601(14).

32. For CERCLA's definition of "response," see supra note 9.
34. 3550 Stevens Creek Assoc. v. Barclays Bank of Cal., 915 F.2d 1355, 1358 (9th Cir. 1990) (citing Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1152 (9th Cir. 1989), \textit{cert. denied}, 500 U.S. 917 (1991)). For the text of section 107(a) of CERCLA, see supra note 11.
35. See CERCLA § 107(a), 42 U.S.C. § 9607(a). For the text of section 107(a), see supra note 11.
36. See generally Stevens Creek, 915 F.2d at 1355.
ates several affirmative defenses to avoid liability.\textsuperscript{37} However, these defenses are available only in limited situations.\textsuperscript{38}

If a court determines that contribution can be obtained from a party, the court must next determine how the damages are to be apportioned among the parties. Congress did not provide specific factors for courts to utilize in making this determination. Rather, the legislative history of the 1986 amendments to CERCLA merely states that courts are to take "relevant equitable considerations into account."\textsuperscript{39} However, Congress did label the "Gore Factors" as relevant criteria that courts may consider when deciding whether to grant apportionment and when deciding how to apportion cleanup costs among responsible parties.\textsuperscript{40} Even so, a court may use other

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37. CERCLA's affirmative defenses are set forth in section 107(b), which provides as follows:

There shall be no liability under subsection (a) of this section for a person otherwise liable 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 of 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 the 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 concerned, 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 omissions 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.

\textit{CERCLA} § 107(b), 42 U.S.C. § 9607(b).


40. The "Gore Factors" are:

(1) the amount of hazardous substances involved;
(2) the degree of toxicity or hazard of the materials involved;
(3) the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of the substances;
(4) the degree of care exercised by the parties with respect to the substances involved;
(5) and the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment.

equitable factors in addition to or instead of the "Gore Factors," as the "Gore Factors" are neither "exhaustive nor exclusive." 41

C. Claims under Section 107(a)(2) of CERCLA

A party may be liable under section 107(a)(2) of CERCLA for the costs of cleaning up a contaminated facility if, "at the time of disposal of any hazardous substance [the party] owned or operated [the] facility at which such hazardous substances were disposed of." 42 Therefore, there are three prerequisites to liability under section 107(a)(2) of CERCLA: (1) the potentially liable party must be a past or present owner or operator (2) of a facility (3) when hazardous wastes were disposed at the facility.

The determination of who are past and present owners is fairly straightforward and will not be addressed in this Note. 43 On the other hand, the determination of who are past and present operators, especially when the potentially liable party is an excavator or property developer, can be quite complicated and, therefore, will be analyzed in depth.

In Edward Hines Lumber Co. v. Vulcan Materials Co., 44 the past owner of a contaminated wood treatment plant, Edward Hines Lumber Co. ("Hines"), sought contribution under section 113(f)(1) of CERCLA from the entity that designed and built a portion of the Hines plant, Osmose Wood Preserving, Inc. ("Osmose"), for the costs Hines incurred to decontaminate the site of its wood treatment plant. 45 Hines submitted that because Osmose had constructed a portion of the Hines plant and had maintained a continuing relationship with Hines after it completed construction, 46

41. Ensco, 969 F.2d at 509. See, e.g., B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1206 (2d Cir. 1992) (financial resources of parties involved can be considered in allocation process); Weyerhaeuser Corp. v. Koppers Co., Inc., 771 F. Supp. 1406, 1426 (D. Md. 1991) (benefits received by parties from contaminating activities and knowledge and/or acquiescence of parties in contaminating activities considered by court for allocation purposes).


44. 861 F.2d 155 (7th Cir. 1988).

45. Id. at 156. The plant constructed by Osmose contained a "closed-loop" system designed to prevent any toxic chemicals from escaping into the environment. It was built on a concrete platform so as to trap any chemicals that might escape from the system before they reached the soil. Id.

46. Id. Osmose (1) supplied Hines with chromated copper arsenate, the chemical that Hines used to treat wood in the system designed and built by Os-
Osmose was an operator of Hines’ plant and was, therefore, required to contribute to the cleanup costs of the plant.47

The Seventh Circuit, after noting that CERCLA did not define the term “operator,” analyzed Osmose’s relationship with Hines under traditional common law concepts of business relationships.48 The court determined that Osmose’s status with Hines was akin to that of an independent contractor49 and not that of a joint venturer.50 Thus, as an independent contractor, Osmose was unable to exert the requisite control to be considered an operator of Hines’ plant.51 Therefore, the court held that Osmose could not be held

47. Id. at 157. Hines maintained that these facts demonstrated that Osmose exerted a significant amount of control over Hines’ operations and that Osmose could, therefore, be required to contribute to the cleanup costs. Id.


49. Id. at 157-58. The Hines court noted that: [Osmose] designed and built the plant, a turnkey operation on behalf of Hines, which became the operator of the finished facility. Thereafter Hines had day-to-day control, hiring employees, deciding how much to produce, where to sell it and at what price. Osmose hovered in the background, concerned about the quality of the finished product, which could affect its reputation, but did not interfere with operational decisions. So Hines was the operator of the plant as well as its owner, Osmose the independent construction contractor.

50. Id. The Seventh Circuit determined that at least three elements of the common law definition of joint venturer were missing from the relationship between Osmose and Hines. Id. There was no willingness to be joint venturers, no shared control, and no division of profits. Id. (citing Secon Serv. Sys., Inc. v. St. Joseph Bank & Trust Co., 855 F.2d 406, 416 (7th Cir. 1988)). In addition, the contract stated that Osmose was not a joint venturer with Hines. Id.

51. Id.
liable under section 107(a)(2) of CERCLA because Osmose was not an operator of the Hines plant.\textsuperscript{52}

Even when a court determines that a party is an operator, it cannot hold that party liable unless the court also determines that a disposal\textsuperscript{53} of a hazardous substance occurred while that party was operating the facility.\textsuperscript{54} Courts have liberally construed the two terms subject to interpretation in this provision, "disposal" and "facility," to promote the broad and remedial purposes of CERCLA.\textsuperscript{55} For example, in \textit{Tanglewood East Homeowners v. Charles-Thomas, Inc.},\textsuperscript{56} the Fifth Circuit extended the definition of disposal to include situations "when hazardous materials are moved, dispersed, or released during landfill excavations and fillings."\textsuperscript{57}

The Fourth Circuit likewise extended the definition of a facility when it determined that the portion of a property in and around underground storage tanks was a facility in \textit{Nurad, Inc. v. William E. Hooper & Sons Co.}.\textsuperscript{58} However, in \textit{Nurad}, the former tenants of the

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\item Hines, 861 F.2d at 158. The court also refused to develop a new business classification into which Osmose could have been fit to find it liable. \textit{Id.} The court believed that such an effort would have made the law less functional and less stable. \textit{Id.}
\item CERCLA defines "disposal" as:
\[ \text{the discharge, deposit, injection, dumping, spilling, leaking, or placement of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.}\]
\textbf{CERCLA § 101(29), 42 U.S.C. § 9601(29).}
\item CPC Int'l Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 789 (W.D. Mich. 1989) ("An operator of a site is . . . not liable under CERCLA section 107(a)(2) unless, during the time of [its] tenure as owner-operator, a disposal of hazardous substances at the site occurred."). For CERCLA’s definition of "facility," see \textit{supra} note 29.
\item 849 F.2d 1568 (5th Cir. 1988).
\item \textit{Id.} at 1573. In \textit{Tanglewood}, purchasers of subdivision lots sought damages under CERCLA from the developers of the subdivision. \textit{Id.} at 1571. The developers had filled in and graded creosote pools left on the property from the prior owner, a wood treatment facility. \textit{Id.} The Fifth Circuit dismissed the developers' contention that the provisions of CERCLA could only be used against the party that caused the hazardous substances to be on the site. \textit{Id.} at 1572. The court held that there could be more than one disposal of the same hazardous substances at a site, and that the developers' actions could be considered a disposal of hazardous substances. \textit{Id.} at 1573.
\item 966 F.2d at 842-43. The Fourth Circuit based its determination on CERCLA's broad definition of "facility," which includes "any site or area where a haz-
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property could not be held liable as operators of the facility because
the former tenants never exercised control over the underground
storage tanks which were the sources of the hazardous wastes.59

D. Claims Under Section 107(a) (4) of CERCLA

Section 107(a) (4) of CERCLA imposes liability on a trans-
porter of hazardous wastes if there was a release or a threatened
release of a hazardous substance and the party transported60 the
hazardous wastes to one of four destinations: (1) a disposal facility,
(2) a treatment facility, (3) an incineration vessel, or (4) a site se-
lected by the transporter.61 This Note will analyze only liability that
arises when a transporter transports hazardous wastes to a site se-
lected by the transporter.

ardous substance has . . . come to be located." Id. at 842 (quoting CERCLA
§ 101(9), 42 U.S.C. § 9601(9)).

59. Id. at 843. The tenants' lease agreements did not extend to the under-
ground storage tanks. Id. at 842. Furthermore, the court deemed it unreason-
able to assume that the tenants possessed implicit authority to control the tanks. Id. at
843.

This determination is consistent with CERCLA's goal of placing "accountabil-
ity in the hands of those capable of abating further environmental harm." Id. For
a discussion of the broad remedial goals of CERCLA, see supra notes 21-25 and
accompanying text.

60. CERCLA defines "transport" or "transportation" as
the movement of a hazardous substance by any mode, including pipeline
(as defined in the Pipeline Safety Act), and in the case of a hazardous
substance which has been accepted for transportation by a common or
contract carrier, the term "transport" or "transportation" shall include
any stoppage in transit which is temporary, incidental to the transporta-
tion movement, and at the ordinary operating convenience of a common
or contract carrier, and any such stoppage shall be considered as a con-
tinuity of movement and not as the storage of a hazardous substance.

61. Id. § 107(a)(4), 42 U.S.C. § 9607(a)(4); see also Jersey City Redevelopment
1987)(listing only first, second and fourth destinations). Also, courts have con-
strued the phrase "selected by such person" in section 107(a)(4) of CERCLA as
modifying all four destinations — disposal facilities, treatment facilities, incinera-
tion vessels and sites. See, e.g., United States v. Western Processing Co., 756 F.
Supp. 1416, 1420 (W.D. Wash. 1991). But see Alice Theresa Valder, Note, The Erro-
neous Site Selection Requirement for Arranger and Transporter Liability Under CERCLA, 91
COLUM L. REV. 2074, 2085-96 (1991)(arguing that such interpretations frustrate
congressional intent). As this distinction is not determinative in Kaiser, it will not
be addressed in this Note.

In Tanglewood, the Fifth Circuit determined that a developer who spread con-
taminated soil that was previously concentrated in a specific area of a property to
areas throughout the property could be held liable under section 107(a)(4) of
CERCLA as a transporter. Tanglewood, 849 F.2d 1568, 1573 (5th Cir. 1988). How-
ever, the Tanglewood court did not provide any rationale for its holding, nor did it
specify to which of the four destinations the hazardous substance was taken. See id.
CERCLA does not define the phrase “to a site selected by the transporter,” nor have any cases discussed its meaning. To provide some guidance in interpreting the phrase this Note examines a case in which the interpretation of this phrase was influential in finding liability under section 107(a)(4) of CERCLA. *Danella Southwest, Inc. v. Southwestern Bell Tel. Co.* is such a case. In *Danella*, a regional telephone company hired a construction contractor to excavate, remove dirt, and lay cables. The construction contractor accepted an offer by the lessee of an abandoned gas station to dump the displaced soil from the job site at the gas station. The contractor transported the excavated earth to the abandoned gas station. After the contractor completed most of the excavation and transportation of the soil, the contractor learned that the soil was contaminated with dioxins. The *Danella* court held that the contractor could be held liable as a transporter of the hazardous substances because it selected the site where the hazardous substances were taken.

64. *Id.* at 1230. It was the construction contractor's responsibility to select the site where the excavated earth was to be disposed of. *Id.* at 1231.
65. *Id.* While an agent for the contractor was asking the city's building commissioner if there were any available sites to dump the excavated earth, another man intervened and offered to allow the contractor to dump the earth at the abandoned gasoline station that he leased. *Id.*
66. *Id.*
67. *Danella*, 775 F. Supp. at 1231. Prior to discovering the contamination, there was no reason for the contractor to suspect that the soil was contaminated with dioxins. *Id.* at 1234. This was true despite the fact that city officials were aware that the site was contaminated, because they neglected to tell the contractor this fact. *Id.*
68. *Id.* at 1234. Although the *Danella* court determined that the contractor was a PRP, it refused to impose liability on the contractor. *Id.* The court based its determination on six considerations. *Id.* The considerations that swayed the *Danella* court were:

First, [the contractor] did the job it was contracted to do in a safe, professional, and workmanlike manner. . . . Second, there was no reason for [the contractor] to suspect that the dirt underneath [the site] was contaminated by dioxin. . . . Third, [the contractor] was responsible for checking with local utilities to ascertain the locations of buried pipes and cables along the excavation route. . . . Fourth, [the hiring party] drafted and submitted the application for the excavation permit. . . . Fifth, [the hiring party] was notified periodically by the EPA and [local authorities] of confirmed dioxin sites in the . . . area. . . . [And] sixth, [the contractor] did not exacerbate the problem after it learned of the dioxin contamination.

*Id.* at 1234-35.
Therefore, according to the Danella court, when a party contracts with another party for the latter to receive materials, under CERCLA the first party selects the site where the materials are to be transported, and thus is exposed to potential liability. However, as Kaiser illustrates, the facts and circumstances of a case do not always afford such a clear determination as to which party selects the site where hazardous wastes are transported.  

E. Indemnification and CERCLA

Section 107(e) of CERCLA authorizes PRPs to enter into indemnification agreements to allocate financial responsibility for cleanup costs. However, the apparent inconsistency between the first two sentences of section 107(e)(1) has caused courts to differ with regard to the question of with whom PRPs may enter into indemnification agreements. A minority of courts have held that indemnification agreements are valid only against non-PRPs (for example, insurance carriers). However, a vast majority of courts have held that indemnification agreements among PRPs and between PRPs and non-PRPs are valid.

For example, in Mardan Corp. v. C.G.C. Music, Ltd., the United States Court of Appeals for the Ninth Circuit did not prohibit PRPs from contractually allocating financial responsibility for

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69. For a discussion of the facts and circumstances of Kaiser, see infra notes 78-89 and accompanying text.

70. The statute provides:

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

CERCLA § 107(e), 42 U.S.C. § 9607(e).

71. The first sentence seems to prohibit allocation of responsibility for CERCLA liability and the second sentence seems to permit it. Danella, 775 F. Supp. at 1240.


73. See, e.g., Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 959 F.2d 126 (9th Cir.), reh'g denied and op. amended and superseded on other grounds, 973 F.2d 688 (9th Cir. 1992); Danella, 775 F. Supp. at 1227.

74. 804 F.2d 1454 (9th Cir. 1986).
cleanup costs between themselves. The court stressed that its interpretation did not affect the underlying statutory liability. Rather, the interpretation only affected those "who ultimately pa[id] that liability." The *Mardan* court thus considered apportionment agreements among PRPs to be "essentially tangential to the enforcement of CERCLA's liability provisions."77

This Note assumes that the majority rule, allowing PRPs to enter into indemnification agreements with both other PRPs and non-PRPs, is applicable for purposes of its analysis.

III. *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*

In *Kaiser*, the City of Richmond, California ("Richmond") acquired 346 acres of land from Catellus Development Corporation's ("Catellus' ") predecessor, Santa Fe Land Improvement Company.78 Richmond hired James L. Ferry & Son ("Ferry") to excavate and grade a portion of the property for a proposed housing development.79 While excavating, Ferry spread some of the displaced soil over other areas within the development site.80 This soil contained paint thinner, lead, asbestos, petroleum hydrocarbons, and other hazardous chemical compounds.81

75. *Id.* at 1459. The Ninth Circuit did not articulate its reason for adopting this interpretation of section 107(e), but other courts have stated that the subsection was not designed to prevent the allocation of financial responsibility among liable parties; rather, it was designed to prevent an allocation between responsible parties and EPA. See, e.g., Danella, 775 F. Supp. at 1240-41.

76. *Mardan*, 804 F.2d at 1459.

77. *Id.*

78. *Kaiser*, 976 F.2d at 1339. Santa Fe Land Improvement Company owned the land from 1941 until 1977, when it sold it to the City of Richmond. Appellant's Opening Brief at 4, Catellus Dev. Corp. v. James L. Ferry & Son, Inc., 976 F.2d 1338 (9th Cir. 1992) (No. 92-15506) [hereinafter Appellant's Opening Brief].

79. *Kaiser*, 976 F.2d at 1339. As part of the development project, Richmond sold or leased 15 different parcels within the 346 acre tract to various developers. *Appellant's Opening Brief*, supra note 78, at 4. Richmond and the developers hired various construction contractors to excavate and grade their properties. *Id.* Richmond hired Ferry in 1982. *Id.* at 6.

80. *Kaiser*, 976 F.2d at 1339.

81. *Id.* at 1339-40. These substances apparently collected on the property when it was a shipbuilding plant during the 1940's. *Id.* at 1340 n.1. The Richmond Shipbuilding Corporation, Kaiser Aluminum & Chemical Corporation's predecessor, leased the property from Santa Fe Land Improvement Company and operated the shipyard from 1941 to 1946. Appellant's Opening Brief, *supra* note 78, at 5.

Richmond and the developers contended that subsequent occupants of the property covered, filled with soil and graded certain areas of the property to conceal the presence of these hazardous substances. *Id.* These activities, Richmond
Richmond paid for the site cleanup and then sued Catellus to recover some of its cleanup costs. Catellus then filed a third party complaint against Ferry under section 113(f)(1) of CERCLA. Catellus alleged that Ferry exacerbated the extent of the contamination and increased the cleanup costs by spreading the contaminated soil over previously uncontaminated areas of the development site. The district court dismissed Catellus' complaint for failure to state a claim upon which relief could be granted.

The Ninth Circuit agreed with the district court's determination that Catellus did not allege that Ferry currently owns or operates the development site, nor that Ferry arranged for disposal of hazardous wastes at the site. Therefore, the Ninth Circuit agreed with the district court's determination that Catellus did not state a claim for which relief could be granted under sections 107(a)(1) claimed, made it impossible for Richmond to have detected the hazardous substances by any reasonable inspection prior to acquiring the property. Id.

82. Kaiser, 976 F.2d at 1340. Richmond and the developers incurred millions of dollars in response costs to clean up contaminated areas of the development site. Appellant's Opening Brief, supra note 78, at 5.

Richmond also brought suit against the federal government for contribution, because the Richmond Shipbuilding Corporation constructed ships for the United States Navy at the site. Kaiser, 976 F.2d at 1340 n.2. This claim was not at issue in the instant case. Id.

83. Kaiser, 976 F.2d at 1340. Catellus also sued Kaiser Aluminum & Chemical Corporation for contribution under CERCLA. Id. at 1340 n.3. This claim was also not at issue in the instant case. Id. at 1340. For a discussion of contribution under CERCLA, see supra notes 26-41 and accompanying text.

84. Kaiser, 976 F.2d at 1340. Ferry admitted that it noted that the soil was discolored, informed Richmond of this fact, and discontinued its operations. Appellant's Opening Brief, supra note 78, at 6. However, Catellus alleged that Ferry did not properly dispose of the discolored materials that it uncovered. Id. Rather, Catellus "allege[d] that Ferry excavated the hazardous substances it had uncovered [sic], mixed them with soil and other materials and negligently spread the resulting mixture throughout the [p]roperty, . . . releasing contaminants on the [p]roperty." Id.

85. Kaiser, 976 F.2d at 1340. The district court determined that Ferry was not a person who could be held liable under section 107(a) of CERCLA, and, therefore, dismissed Catellus' complaint. Id.

86. Id. at 1341. The Eleventh Circuit determined that liability for present owners and operators was only available against individuals or entities that owned or operated a facility at the time a plaintiff filed its complaint. United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991). Ferry discontinued all work at the site prior to the filing of the complaint in the instant action. See Appellant's Opening Brief, supra note 78, at 5-6.

87. Kaiser, 976 F.2d at 1341. Catellus alleged that Ferry disposed of the hazardous wastes itself by spreading the displaced soil over uncontaminated areas of the development site. Therefore, Ferry did not arrange for any other party to dispose of the wastes. Id. For a discussion of Catellus' allegations against Ferry, see supra note 84 and accompanying text.
and 107(a)(3) of CERCLA. The Ninth Circuit, however, reversed the remainder of the district court’s holding. The court held that Catellus did state claims upon which relief could be granted under sections 107(a)(2) and 107(a)(4) of CERCLA against Ferry.

IV. NARRATIVE ANALYSIS OF KAISER

A. Ferry’s Liability Under Section 107(a)(2) of CERCLA

The Ninth Circuit began its analysis of liability under section 107(a)(2) of CERCLA by recognizing that Ferry was not an owner of the facility. Therefore, to support a claim under section 107(a)(2) of CERCLA, Catellus’ complaint had to allege that Ferry was an operator of the facility when it or another person disposed of hazardous substances at the development site.

Ferry argued, based on the Seventh Circuit’s holding in Hines, “that a contractor [could] never be liable as an operator under [section] 107(a)(2)” of CERCLA. However, the Ninth Circuit read Hines as merely reiterating the well-settled rule that to be liable as an operator, one must be able to exert control over the cause of the contamination.

88. Kaiser, 976 F.2d at 1341. For the text of sections 107(a)(1) and 107(a)(3) of CERCLA, see supra note 11.
89. Kaiser, 976 F.2d at 1341-43. For the text of sections 107(a)(2) and 107(a)(4) of CERCLA, see supra note 11.
90. Kaiser, 976 F.2d at 1341. The facility in the instant case is the site that Richmond hired Ferry to excavate and grade. Id. at 1341 n.5. This determination is consistent with CERCLA’s definition of a facility. For CERCLA’s definition of “facility,” see supra note 29.
91. Kaiser, 976 F.2d at 1341. However, CERCLA does not provide much guidance with which to make this determination, as it “defines an owner or operator as ‘any person owning or operating such facility . . . .’ ” Id. (quoting CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A)). The Ninth Circuit deemed this circular definition useless. See id.; see also United States v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317, 1330 (S.D.N.Y. 1992) (“[T]he circularity of this definition necessarily precludes its use as an interpretive device.”). But see Hines, 861 F.2d at 156 (“The circularity strongly implies, however, that the statutory terms have their ordinary meanings rather than unusual or technical meanings.”). The Ninth Circuit, therefore, confined its analysis of the term operator to the relevant case law. See Kaiser, 976 F.2d at 1341-42.
92. Kaiser, 976 F.2d at 1341. For a discussion of the facts and holding of Hines, see supra notes 44-52 and accompanying text.
93. Kaiser, 976 F.2d at 1341 (emphasis in original).
94. Id. (citing Nurad, 966 F.2d at 842). Catellus contended that the construction contractor in Hines, Osmose, was held not to be in control of the facility at the time of disposal of hazardous substances because the release of hazardous substances occurred while the plant was operating and not during Osmose’s construction of the plant. Appellant’s Reply Brief at 7, Catellus Dev. Corp. v. James L. Ferry & Son, Inc., 976 F.2d 1338 (9th Cir. 1992) (No. 92-15506) [hereinafter Appellant’s Reply Brief].
The contamination in *Kaiser* occurred while Ferry was excavating and grading the development site. The Ninth Circuit concluded that Ferry was able to exert control over the cause of the contamination, its own excavating activities, and thus could be considered an operator of the facility.

The Ninth Circuit next determined that Ferry had disposed of hazardous substances. The court based this decision on its determination that spreading contaminated soil throughout a property could constitute a disposal of hazardous substances. The court reasoned that by not limiting a "disposal" to the initial introduction of hazardous substances to a property, it was acting in accordance with CERCLA's broad remedial goals. Thus, the Ninth Circuit held that Ferry could be held liable under section 107(a)(2) of CERCLA because it operated the facility when it disposed of hazardous substances at the facility.

### B. Ferry's Liability Under Section 107(a)(4) of CERCLA

The Ninth Circuit determined that in order for Catellus to be able to obtain contribution from Ferry under section 107(a)(4), Catellus had to allege that Ferry both accepted a hazardous sub-

95. *Kaiser*, 976 F.2d at 1342. Conversely, in *Hines* the contamination occurred after the construction process had been completed. *Id.*

96. *Id.* At the time of disposal, Ferry was in day-to-day control of the site. Appellant's Reply Brief, *supra* note 94, at 7. "Thus, the disposal occurred on Ferry’s watch." *Id.*

97. *Kaiser*, 976 F.2d at 1342. For CERCLA's definition of “disposal,” see *supra* note 53.

98. *Kaiser*, 976 F.2d at 1342. The court followed the Fifth Circuit's interpretation of the term “disposal” put forth in *Tanglewood*. *Id.* In *Tanglewood*, the Fifth Circuit noted that the “definition of disposal [did] not limit disposal to a one time occurrence - there may be other disposals when hazardous materials are moved, dispersed, or released during... excavations and fillings.” *Tanglewood*, 849 F.2d at 1573. For a discussion of the facts and holding of *Tanglewood*, see *supra* notes 56-57.

The Fourth Circuit took this interpretation one step further by holding that a landowner disposes of hazardous materials when he passively allows them to migrate into the environment. *Nurad*, 966 F.2d at 846. However, the Fourth Circuit’s holding in *Nurad* is in direct conflict with the decision of a district court in the Ninth Circuit. See Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 1456-57 (N.D. Cal. 1989) (general movement and migration of hazardous wastes does not constitute disposal). As the instant case involved the active disposal of hazardous wastes, this conflict was not addressed by the *Kaiser* court. *Kaiser*, 976 F.2d at 1342 n.7.

99. *Kaiser*, 976 F.2d at 1342. The court stated that “Congress did not limit the term to the initial introduction of hazardous material onto property. Indeed, such a crabbed interpretation would subvert Congress’s goal that parties who are responsible for contaminating property be held accountable for the cost of cleaning it up.” *Id.* at 1342-43.

100. *Id.* at 1342.
stance for transport and selected the site where the hazardous substances were taken.\textsuperscript{101} The court noted that CERCLA's definition of "transportation" included "the movement of a hazardous substance by any mode . . . ."\textsuperscript{102} The court then concluded that Ferry moved hazardous substances when it excavated and graded the development site.\textsuperscript{103}

Next, the Ninth Circuit had to determine the meaning of the phrase "to . . . sites selected by such person . . . ."\textsuperscript{104} Ferry contended that the phrase did not include "on-site" dispersals.\textsuperscript{105} The court disagreed with Ferry's contention and instead noted that there was no logical basis for liability "to hinge solely on whether [one] move[d] hazardous substances across a recognized boundary."\textsuperscript{106} The court held that liability under section 107(a)(4) of CERCLA could be imposed upon a transporter for moving hazardous materials to uncontaminated land, whether or not the uncontaminated land was a separate parcel.\textsuperscript{107} Therefore, the court

\begin{itemize}
\item \textsuperscript{101} Id. at 1338. The Kaiser court never discussed whether Ferry took the hazardous substances to disposal or treatment facilities or to incineration vessels. These are the other sites for which transporter liability may be imposed. \textit{See} CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4); \textit{see also supra} note 61 and accompanying text.
\item \textsuperscript{102} \textit{Kaiser,} 976 F.2d at 1343 (quoting CERCLA § 101(26), 42 U.S.C. § 9601(26)). \textit{For the text of CERCLA section 101(26), see supra} note 60.
\item \textsuperscript{103} \textit{Kaiser,} 976 F.2d at 1343.
\item \textsuperscript{104} Id. (quoting CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4)).
\item \textsuperscript{105} Id. Ferry contended that such a dispersal did not fall within the scope of section 107(a)(4) of CERCLA. \textit{Id.} However, the Fifth Circuit's interpretation of disposal in \textit{Tanglewood} provided otherwise. \textit{See supra} note 98.
\item \textsuperscript{106} \textit{Kaiser,} 976 F.2d at 1343. CERCLA is silent on whether hazardous substances have to leave the property. Appellant's Opening Brief, \textit{supra} note 78, at 18. Catellus stated in its opening brief that:

\begin{quote}
[under CERCLA, when hazardous substances are transported from a contaminated corner of a piece of property to other portions of the property not yet contaminated, cleanup is required of the entire property affected. The owner as well as any other persons responsible must pay to cleanup the contamination, including the increased cost attributable to the spreading of previously confined contamination.]
\end{quote}

\textit{Id.}

This determination is consistent with CERCLA's broad remedial goal of imposing liability on those persons responsible for the damages. \textit{Kaiser,} 976 F.2d at 1343 (citing H.R. \textit{REP. No.} 1016, 96th Cong., 2d Sess. 17 (1980), \textit{reprinted in} 1980 U.S.C.C.A.N. 6119, 6136 ("Congress intended to impose liability on those parties who 'caused or contributed to a release or threatened release of hazardous waste.' ")).
\item \textsuperscript{107} \textit{Kaiser,} 976 F.2d at 1343. The Ninth Circuit based its holding on the fact that whether or not hazardous substances were taken to another property did not change the fact that contamination had spread. \textit{Id.}
\end{itemize}
concluded that liability under section 107(a)(4) of CERCLA could be imposed upon Ferry.108

V. CRITICAL ANALYSIS OF KAISER

In Kaiser, the Ninth Circuit used the "broad remedial goals of CERCLA" as the cornerstones of its holdings.109 The court held that a construction contractor, hired to excavate and grade a development site, could be held liable under section 107(a)(2) of CERCLA as an operator of a facility and under section 107(a)(4) of CERCLA as a transporter of hazardous wastes for inadvertently spreading contaminated soil from one portion of a development site to areas throughout the site.110

In holding that Ferry could be held liable as an operator of a facility, the Ninth Circuit properly clarified the Seventh Circuit's holding in Hines.111 In Hines, the Seventh Circuit held that the owner of a facility where hazardous substances were disposed could not seek contribution from an alleged operator of the facility.112 The Ninth Circuit properly interpreted this holding not to mean that operators could never be held liable for contribution under CERCLA, but rather that the party from whom contribution was sought in Hines was not an operator of the facility.113

The court also properly distinguished the amount of control that Ferry was able to exert over the development site from the amount of control that Osmose was able to exert over Hines' plant. In Kaiser, "Ferry performed excavation, dredging, filling, grading and other construction and demolition" at the site during the time of contamination.114 In Hines, however, Osmose exerted control over the Hines plant only while it constructed the plant and not

108. Id. However, the Ninth Circuit never made a determination that Ferry selected the site where the hazardous substances were disposed. See id. For criticism of this aspect of the Ninth Circuit's holding, see text accompanying infra notes 120-121.

109. See Kaiser, 976 F.2d at 1340-43. For a discussion of CERCLA's broad remedial goals, see supra notes 21-25 and accompanying text.

110. See Kaiser, 976 F.2d at 1341-43. For a discussion of the facts and holding of Kaiser, see supra notes 78-89 and accompanying text.

111. For a discussion of the Ninth Circuit's clarification of the holding in Hines, see supra notes 92-96 and accompanying text.

112. Hines, 861 F.2d at 158. For a discussion of the facts and holding of Hines, see supra notes 44-52 and accompanying text.

113. But see Hines, 861 F.2d at 157 ("The statute does not fix liability on slipshod architects, clumsy engineers, poor construction contractors, or negligent suppliers of on-the-job training — and the fact that [an entity] might [be] all four rolled into one does not change matters.").

114. Kaiser, 976 F.2d at 1342 n.6.
when the plant’s operation caused the contamination. Thus, sufficient facts were alleged to determine that Ferry exerted significant control over the development site, and could be considered an operator.

However, to hold that Ferry could be held liable under section 107(a)(2) of CERCLA, the Ninth Circuit also had to determine whether the development site that Ferry excavated was a “facility” and whether Ferry disposed of “hazardous wastes” there. The Ninth Circuit did not explicitly state that the development site was a facility. However, such a determination is implicit in its holding that Ferry could be held liable under section 107(a)(2) of CERCLA. This determination is also consistent with CERCLA’s expansive definition of “facility,” which includes “any site or area where a hazardous substance has . . . come to be located.”

The Ninth Circuit, relying primarily on CERCLA’s broad remedial powers, further determined that there had been a “disposal” of “hazardous wastes” when Ferry excavated the contaminated soil. The court correctly reasoned that a distinction limiting “disposals” to transfers from one property to another property would be illogical as well as inconsistent with Congress’ goal of making those persons who cause damages at hazardous waste sites pay for their cleanup. In addition, Congress’ goal of protecting the public and the environment from the dangers of hazardous waste sites would certainly not be furthered if persons could not be held liable for spreading hazardous wastes from one area of their property to another.

The Ninth Circuit noted the absence of a definition of the phrase “to . . . sites selected by such person . . .” when it considered whether Ferry could also be held liable as a transporter of hazardous wastes. However, the court did nothing to clarify the meaning of this phrase when it held that Ferry could also be held liable as a transporter. The court merely determined that this phrase

115. Id. at 1342.
116. For a summary of the prerequisites to liability under section 107(a)(2) of CERCLA, see text accompanying supra note 42. For the text of section 107(a)(2) of CERCLA, see supra note 11.
117. Nurad, 966 F.2d at 842 (quoting CERCLA § 101(9), 42 U.S.C. § 9601(9)).
118. See Kaiser, 976 F.2d at 1342.
119. See id. at 1342-43.
120. Id. at 1343.
could apply to sites within as well as outside of the property, just like the term disposal could.\textsuperscript{121}

It is true that Ferry transported hazardous substances to a site within the property, but that does not necessarily mean that the site within the property was a site selected by Ferry, as the statute requires. Indeed, the facts of the case support the opposite conclusion. Inherent in a contract to excavate and grade property is a determination by the hiring party that the excavated earth be used for grading purposes. Therefore, the hiring party is telling the contractor to excavate the earth and move it to areas of the property in need of grading. Under this type of arrangement, it is not possible to say that the contractor selects the site where the excavated earth is to be placed. Even though the contractor probably makes the determination as to which portions of the property require the grading, it is the hiring party who is telling the contractor where to deposit the displaced soil.

The only plausible basis for the Ninth Circuit's determination that Ferry selected the site where the hazardous substances were disposed is the broad remedial goals of CERCLA. However, this result is far in excess of the scope intended by Congress and illogical in its practical business applications.

To hold a construction contractor, hired to excavate and grade a development site, potentially liable for contribution under CERCLA as a person who transported hazardous materials to a site of his choosing is inconsistent with well settled theories of liability. The implications of this holding have the potential to be far-reaching and disastrous to the construction industry. Now contractors will never agree to excavate and grade a property without first having soil samples taken to determine potential toxicity levels. These costs will have to be passed on to developers. Therefore, the development companies who hire contractors to excavate and grade land will have to pay higher fees for these services in the future. Thus, allowing development companies to seek contribution from contractors in these circumstances merely defers the amount that the development company should pay in response costs until the development company has to pay its next excavation fee.

Alternatively, contractors can affirmatively seek to avoid pecuniary liability. The two most readily available methods through

\textsuperscript{121} See \textit{id}. "There is no logical basis for a defendant's liability as a 'transporter' . . . to hinge solely on whether he moves hazardous substances across a recognized property boundary." \textit{Id.}
which a contractor can avoid paying damages in these circumstances are indemnification agreements and insurance.\textsuperscript{122}

Insurance is a standard alternative to bearing the risk of most substantial liabilities. However, due to the exorbitant liability amounts that may be imposed under CERCLA and the fact that even careful contractors are susceptible to liability, insurance may very well be difficult or even impossible to obtain.\textsuperscript{123}

CERCLA explicitly permits parties to enter into indemnification agreements.\textsuperscript{124} However, the statute does not allow an indemnification agreement to transfer statutory liability to the indemnifying party.\textsuperscript{125} Thus, an indemnification agreement is of value to a contractor only if the hiring party is able to satisfy the liability subject to the agreement. Contractors would, therefore, be well served by requiring hiring parties to post a bond to cover their potential indemnification obligations.\textsuperscript{126}

\textbf{VI. IMPACT}

The broad remedial goals of CERCLA are important. They serve as an excellent barometer through which courts can gauge the probable effects of their holdings to ensure that they are acting in accordance with Congressional intent. However, courts cannot get caught up in the frenzy of expanding interpretations and remedial goals. When this happens, common sense seems to go by the wayside.\textsuperscript{127}

After the Ninth Circuit's decision in \textit{Kaiser}, the only viable options for innocent contractors to avoid CERCLA liability are through indemnification agreements with developers and by passing on the risks of self-insurance and the costs of field testing to developers. However, both of these alternatives only bring us around full-circle to where we started. They both shift the costs of

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124. See CERCLA § 107(e), 42 U.S.C. § 9607(e).

125. See \textit{id}.

126. Frost, \textit{supra} note 122, § 9.16.

127. "[L]aws such as CERCLA and SARA do not pursue their ends to logical limits. A court's job is to find and enforce stopping points . . . ." Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988).
\end{flushleft}
cleanup back to the developers. Therefore, the major impact of the *Kaiser* decision will be to keep attorneys busy drafting indemnification agreements and to provide a potential windfall to the contractor who never strikes hazardous wastes, because he will have been compensated by developers for the risk he takes every time he excavates and grades a property. More importantly, this decision will have little or no beneficial impact on protecting the public and the environment from the dangers posed by hazardous waste sites, which is, after all, the reason that Congress enacted CERCLA in the first place.

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