Resolving Multi-Party Hazardous Waste Litigation

Jerome B. Simandle

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RESOLVING MULTI-PARTY HAZARDOUS WASTE LITIGATION

Jerome B. Simandle†

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I. INTRODUCTION

Past predictions of substantial hazardous waste litigation in our federal courts involving Superfund1 sites are becoming reality. Of the 988 proposed and final sites that the United States Environmental Protection Agency (EPA) has designated for inclu-

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1. Superfund is a name for the statutory scheme created under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101-175, 42 U.S.C. §§ 9601-9675 (1988) [hereinafter CERCLA], as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (codified in scattered sections of 42 U.S.C.) [hereinafter SARA]. In a typical Superfund case, the federal and/or state governmental plaintiffs may seek recovery of costs of removal or remedial action, other necessary response costs, damages for injury to natural resources, and health assessment costs [hereinafter remedial costs] from potentially responsible persons in connection with a facility such as a landfill containing hazardous substances, pursuant to section 107(a) of CERCLA. The responsible persons may be the owners or operators of the facility, the generators which arranged for disposal of hazardous wastes, and the transporters taking such hazardous substances for disposal to the facility.
sion in the National Priorities List, many are in litigation, or are in the administrative process leading to the record of decision that will become an element of remediation litigation in which billions of dollars are at stake.

The "multi-party hazardous waste" cases discussed here are those actions brought by governmental authorities, usually under the Superfund statute, seeking to remedy the problems of past disposal of hazardous wastes at landfills or other sites. Sometimes the conduct at issue occurred years or even decades ago, and records may be missing or non-existent. Such cases are "multi-party" because of the usual joinder of the many parties believed to be responsible for the ownership or operation of the facility, or those believed to have generated the wastes or transported them to the site. Such litigation may seek to enforce the government's remedial plan for abatement of the release or substantial threat of release of hazardous substances, either through injunctive relief against responsible parties under section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), or through collecting the response costs for actions taken to remedy the problem consistent with section 107(a) of CERCLA. The latter type of case—called a "cost recovery" action—provides the context of our present discussion and presents the most challenging and complex issues for case management and settlement processes.

The burdens that traditional adversarial litigation place upon the governmental plaintiffs, the potentially responsible person (PRP) defendants, and the courts themselves can hardly be overstated. In the District of New Jersey alone, more than a dozen major multi-party Superfund site cases have been filed, involving from two dozen to over 600 parties. Several of these cases in our court in Camden have been amicably resolved wholly or in large part, or the ranks of the PRPs have been thinned by a settlement.

4. Id. § 9607(a).
5. See United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981), aff'd, 688 F.2d 204 (3d Cir. 1982), denied motion 577 F. Supp. 1103 (D.N.J. 1983). In this case before Judge Stanley S. Brotman, a settlement fund of $17.2 million plus interest was created among all 50 parties in 1987, providing for the remediation of the landfill ranked sixth on the National Priorities List. EPA National Priorities List, supra note 2. Settlement issues included the proposed remedial plan, its projected costs, the allocated share for each participant, and the extent of settlement reopeners and covenants as required by SARA.
with *de minimis* parties,\(^7\) using court-supervised settlement methods similar to those discussed in this article.

The creation of fair alternatives to trial-centered litigation has become imperative in these cases. Without an alternative dispute resolution mechanism, the multi-party case becomes a chaotic, expensive, and inefficient effort. Multiple independent waves of discovery requests lead to redundant discovery without assuring creation of an overall database. Efforts to join new parties become fragmented, and pleadings, including cross-claims and counterclaims, multiply exponentially. Motion practice quickly becomes an exercise in tedium, beginning with service of motion papers upon perhaps hundreds of other parties or counsel, and receipt of multiple submissions in opposition, to assure that all have been "heard." Similar recurrent issues emerge without prospect for addressing them efficiently. The trial itself, even if limited to an issue such as allocating past and future remedial costs among PRPs, extends for many months as each party participates in the gymnasium-sized trial.\(^8\) The process leading to amicable resolution is likewise fragmented, as no party wishes to thrust itself forward at the risk of being perceived as weak on the merits of its case. It goes without saying that the transaction costs for such an uncoordinated undertaking—measured by attorneys' fees, delay and uncertainty—become enormous. The dollars spent in the process of reaching a final judgment may well outstrip the underlying costs of remediation and future operation

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7. United States v. Rohm & Haas Co., 721 F. Supp. 666 (D.N.J. 1989). In this case, Chief Judge John F. Gerry reviewed and approved the proposed *de minimis* settlement decree between the United States, the State of New Jersey and ten parties believed to have minimal exposure, pursuant to section 122(g) of CERCLA, 42 U.S.C. § 9622(g), at the Lipari Landfill, which is the site ranked first on the National Priorities List. EPA National Priorities List, *supra* note 2.

8. See, e.g., United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985), and 694 F. Supp. 977 (D.N.H. 1988), aff'd in part, vacated in part, remanded in part, 900 F.2d 429 (1st Cir. 1990), in which the non-jury trial consumed almost 19 months on the first phase (finding liability to perform cleanup or pay costs, or both), and over five additional months in the second phase (determining the costs to be borne by each of 15 responsible parties). 900 F.2d at 431.
and maintenance of the Superfund site if such litigation is uncontrolled.

These cases, in short, place new demands upon the professionalism and skills of counsel while calling upon the courts for creative judicial management and leadership to overcome these pitfalls of complex litigation. Within the litigation process—the most formalized dispute resolution technique—lies the capacity for an efficient, crisp, judicially-supervised alternative dispute resolution process. The seeming paradox of creating a settlement vehicle from within the formalized litigation process is not hard to comprehend if the ingredients for a fair negotiated settlement are understood and incorporated into the pretrial process. This article seeks to identify the ingredients of a fair dispute resolution process within the management of multi-party Superfund site cases.

The court (through the District Judge, the Magistrate, or both) is in a position to coordinate case management in a manner designed to foster deliberate attempts by the parties to negotiate the settlement of the case, while minimizing transaction costs, delays and uncertainties. The notion that a case benefits from consistent and thoughtful judicial intervention is not new. The cries of litigants for greater judicial involvement in case management have led to the 1983 amendments to Rules 16 and 26 of the Federal Rules of Civil Procedure pertaining to pretrial management conferences and control of discovery abuse, respectively. Rule 16 of the Federal Rules of Civil Procedure was rewritten to require early scheduling conferences and pretrial conferences in most civil cases, while affording broad latitude to the judge to enlarge upon these procedures for complex cases.

9. References herein to “judge” will mean the District Judge or the Magistrate to whom case management responsibilities have been delegated. Congress has recently changed the title of United States Magistrate to “Magistrate Judge.” Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, — (1990). In the District of New Jersey, most civil case management functions and settlement processes are performed by the Magistrate Judges, preparatory to the dispositive motion practice or trials before the District Judges. See General Rule 40A, U. S. District Court for the District of New Jersey.

10. The Advisory Committee on the Civil Rules noted the increasing necessity for judicial involvement:

Empirical studies reveal that when a trial judge intervenes personally at an early stage to assure judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.

FED. R. CIV. P. 16 advisory committee’s note (1983) (citation omitted). Thus, Rule 16 empowers the court to enter scheduling orders and other case manage-
Likewise, Rule 26(b) calls upon the court to curb overuse of discovery by identifying the litigation activities that are proportionate to the nature of the case, the amount involved or the issues or values at stake; Rule 26(f) invokes judicial supervision of a suitable program of discovery through discovery conferences; and Rule 26(g) places an affirmative duty upon counsel to act responsibly in demanding and supplying pretrial discovery.\textsuperscript{11}

Further, the \textit{Manual for Complex Litigation (MCL 2d)}\textsuperscript{12} remains a valuable source of suggestions for the judicial management of complex cases. Although the \textit{MCL 2d} does not have specific suggestions for multi-party hazardous waste cases, and although its rather begrudging tone\textsuperscript{13} on the use of Magistrates for pretrial management of complex cases is outdated in many districts,\textsuperscript{14} it does contain many proven ideas for streamlining case management that are equally applicable to these cases.

Most recently, Congress has enacted the Civil Justice Reform Act of 1990,\textsuperscript{15} which principally addresses compulsory judicial involvement in the case management processes. Title I of the Act is concerned with redressing the problems of excessive costs and delay,\textsuperscript{16} and it calls upon the district courts to formulate "civil justice expense and delay reduction plans"\textsuperscript{17} for effectuating

\textsuperscript{11} The Advisory Committee here noted the following:
The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. . . .
The court may act on motion, or its own initiative. It is entirely appropriate to resort to the amended rule in conjunction with a discovery conference under Rule 26(f) or one of the other pretrial conferences authorized by the rules.


\textsuperscript{12} \textit{Federal Judicial Center, Manual For Complex Litigation}, (2d ed. 1986) [hereinafter MCL 2d].

\textsuperscript{13} \textit{Compare} MCL 2d § 20.14 (suggesting that judicial supervision be exercised by trial judge in complex cases) \textit{with id.} § 23.12 (suggesting appointment of another judge or magistrate to coordinate settlement negotiations).


\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.} § 103(a) (to be codified at 28 U.S.C. § 471).
closer judicial supervision. Significantly, the Civil Justice Reform Act embraces the concepts that judicial case management can lead to the swift and fair resolution of cases, and that the judicial officer must explore alternatives to trial that may resolve the case.

Utilizing these statutory and procedural tools, the judge can do much to foster an environment for settlement negotiations. It is not only possible but, in my view, desirable to apply the benefits of judicial case management to the creation of the settlement process within the litigation. Court-supervised settlement processes are also not a startling development. Among the subjects to be discussed at pretrial conferences, according to Rule 16(c)(7) of the Federal Rules of Civil Procedure are "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." The judicially-supervised settlement process may be designed to promote the opportunity for judicial participation directly in negotiations or to lead to "extrajudicial procedures," as both alternatives are contemplated by Rule 16(c)(7). Further, Rule 16(c)(10) authorizes adoption of "special procedures" for complex cases.

The degree of judicial involvement in the settlement process has been the subject of debate over the years. Key criticisms of

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18. Id. § 103(a) (to be codified at 28 U.S.C. § 473).

This provision states that the court shall consider implementation of a district plan addressing the following principles for complex cases:

(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer -

(A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;
(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;
(C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to -

(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and
(ii) phase discovery into two or more stages.

Id.

20. These concerns were summarized in MCL 2d as follows:

Neither the bench nor the bar agrees on the role a trial judge should play in bringing about a settlement. The temperament, style,
judicial participation are that the trial judge could prejudge the case by information learned in informal negotiations, and that the attorneys may feel forced to reach agreement in order to avoid the judge’s “wrath.”21

Several common practices, followed in our district as a routine matter, address these concerns. First, the trial judge usually delegates judicial supervision of day-to-day settlement discussions to the magistrate.22 If a settlement is not concluded, the trial judge can reach the merits of the case on a clean slate at trial. Second, information that may be used in the multi-party settlement negotiation will typically be of high quality, screened and analyzed by proponents and opponents alike. This database itself is the product of careful pretrial discovery, and fears that settlement negotiations will infect the truth-finding process are thus unfounded. If the case reaches trial, the discussion and evaluation of this information in the settlement effort will enhance the

and philosophy of the individual judge are important factors, as is the nature of the case. Some judges do little more than suggest the general desirability of settlement and see that the case moves steadily towards trial. Others take an active part in leading settlement discussions, pointing out strengths and weaknesses of the respective positions of the parties, presenting additional considerations and alternative forms for compromise, meeting separately with the parties if all consent, and even recommending specific terms of settlement. Some ask or require that a representative of each party with settlement authority attend the discussions; others prefer to conduct settlement conferences with only counsel present. Many judges limit their settlement activities to jury cases; others believe that they can, without jeopardizing their impartiality in fact or appearance, take an active role in non-jury cases as well. Some are active from the outset of the litigation, while others prefer to wait until later in the proceedings or until the time of trial. . . .

Id. § 23.11 (footnote omitted).


22. Such delegation to the magistrate is consistent with the suggestion of the Advisory Committee on Civil Rules, which commented as to Rule 16(c)(7) as follows:

It is not the purpose of Rule 16(b)(7) [sic] to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it . . . . For instance, a judge to whom a case has been assigned may arrange, on his own motion or at a party’s request, to have settlement conferences handled by another member of the court or by a magistrate.

Fed. R. Civ. P. 16(c) advisory committee’s note (1983) (citations omitted).

As a practical matter, the magistrate can usually devote more time to the daily aspects of such an intense process, while the district judge conducts hearings and trials that cannot afford the interruptions.
quality of the trial evidence. Finally, litigants' fears of incurring the displeasure of the court or clients if settlement efforts are unsuccessful may well motivate parties to work harder to achieve settlement, which can be productive if the supervising judge has not actually cultivated such fears.23 The acknowledgement that any judicial system, including supervised negotiations, can be abused in extreme cases by judges or litigants, does not suggest that such a process should not be created. The potential for abuse suggests instead that the supervising judge must be vigilant and work within a pre-arranged framework for settlement conferences and negotiations. Any judicial conduct suggesting that non-settling parties will receive less than a fair trial would be improper.24

II. INGREDIENTS ENHANCING THE PROSPECT OF SUCCESSFUL MULTI-PARTY HAZARDOUS WASTE SETTLEMENT PROCESS

The creation of the court-supervised settlement process seems to require certain understandings between the court and litigants, and among the parties themselves. If there is no consensus that negotiations may be worthwhile, and if parties do not agree to be forthcoming with information and to participate in good faith, the settlement process is jeopardized at its outset. While the particular features of multi-party hazardous waste case settlement processes will be as varied as the underlying cases, several ingredients would seem to enhance the prospect of a successful outcome.

Overall, these elements may be grouped into four areas of concern: (A) agreeing to seek to agree—defining the process within a good faith compact; (B) organization through liaison counsel and timing of negotiations; (C) assembly of a database

23. Indeed, judicial measures viewed by participating counsel as coercive "will be resented and are rarely productive." MCL 2d § 23.11.
24. The observations regarding limitations upon the judicial role in supervising settlement negotiations set forth in MCL 2d § 23.11, are well taken:

Judicial involvement in settlement discussions, however extensive, must not be permitted to affect the perception of the parties that the judge will be fair and objective, both at trial if negotiations fail and in passing on the merits of the settlement if, as in class actions, it must be submitted to the court for approval. Although the court may aid settlement discussions by indicating its current views on some issue, it should never distort those views for strategic effect and should give the same information to all parties.

*Id.*
concerning the litigants, the landfill, and each litigant's relative connection to it; and (D) analysis and negotiation of settlement positions. Each area will be discussed and illustrated with examples involving typical Superfund litigation issues. Finally, a sample "Case Management Order for Settlement Purposes" appears as an Appendix to further illustrate the pre-settlement mechanisms that the judge can put into place.

A. Agreeing to Seek to Agree—Defining the Process within a Good Faith Compact

The settlement process is, at its heart, consensual. The court cannot do more than provide a forum and enforce the rules of negotiation that the participants have agreed to.

The first step occurs at a case management conference, when the subject of a settlement process first emerges. Such discussions are appropriate if it appears that the timing for settlement negotiations is correct and that the underlying data for informed settlement discussions has been obtained or can be obtained, through tightly-managed pretrial discovery procedures, and that the requisite parties have been joined in the case, as discussed further below. The conference gives counsel the opportunity to discuss whether various issues are ripe for negotiations. Whether it is possible to negotiate a "global" settlement, a "partial" settlement, or a settlement of only "de minimis" parties, will depend on the varying circumstances of the case. Obviously, the more well developed the remedial plan has become, and the more inclusive the list of PRPs joined in the litigation, the more realistic it becomes to consider a "global" settlement.

If the remediation of the landfill has proceeded in stages, a partial settlement as to past remediation may be achievable. Where the governmental plaintiff's proposed choice of remedy has received approval through summary judgment motion practice, or where the defendant PRPs have determined not to contest the proposed remedy itself, the settlement negotiations will logically focus upon remaining issues such as past and future costs and the allocation of such liability among the PRPs.

At earlier stages of the proposed remedial process, it may still be possible for the PRPs to significantly negotiate and affect the choice of remedy, allowing the issue of "remedy" itself to become a topic of negotiation. 25

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25. For example, in the pretrial phase of United States v. Price litigation, the plaintiffs and defendants participating in settlement discussions agreed that the
If a consensus emerges that the time is ripe to launch settlement negotiations upon some or all issues, the court next asks those parties wishing to participate in settlement negotiations in good faith to identify themselves. This is accomplished through an order requiring each party to choose whether or not it wishes to participate in the settlement negotiations. An appropriate form of order appears in the "Case Management Order for Settlement Process," Appendix A below.

The phrase "participate in good faith in settlement negotiations" in paragraph one of the order connotes an affirmative promise to be a participant, that is, to engage in dialogue in the settlement negotiations. "Good faith" participation also anticipates that the party will be forthcoming with all information reasonably needed for informed negotiations and that the party, by agreeing to participate, will not use negotiations as an artifice or tool of delay.

As the form in paragraph one of the sample "Case Management Order for Settlement Process" makes clear, the party pledging to negotiate in good faith is not deemed to thereby bind itself to agree to any settlement or to any allocated share. The party, of course, may withdraw its agreement to participate in the settlement negotiations upon written notice to all liaison counsel, provided that such notice is served prior to agreeing to the settlement. Naturally, a party cannot freely withdraw from a settlement agreement once it has given final assent.

When the completed forms are returned to liaison counsel for each group, and liaison counsel render their reports to the court, the list of the participants (or "potential settlors") is complete.27

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26. See infra note 30, for a discussion of the term "liaison counsel."

27. A similar process was used in the GEMS Landfill case, except that all counsel were required to come to the courthouse on September 15, 1988, to execute the form at a case management conference. GEMS Landfill, 719 F. Supp. 325. When it became clear that several hundred attorneys were appearing for that special conference, the venue was shifted to the largest available courtroom. Even so, there was not sufficient room and counsel were literally sitting on window sills and spilling into the hallway. This otherwise insignificant detail is men-
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For parties deciding not to participate in the settlement negotiations, their positions are preserved. The court must choose whether to manage the case at this point on two tracks, a settlement track and a litigation track, or whether to defer the litigation and other pretrial preparation pending either the completion or the discontinuance of settlement efforts.\textsuperscript{28} Just as the rights of the non-settlors are preserved, so too are the settling parties' rights to seek contribution or indemnification from non-settlors preserved for a subsequent trial, if necessary.

B. Organization Through Liaison Counsel and Timing of Negotiations

Although the settlement decree, if negotiations are successful, will amount to an agreement among the participating parties, it would be difficult, if not impossible, to conduct multilateral negotiations among all participants, in the first instance. Instead, the multiple parties are grouped into appropriate functional units for purposes of preliminary negotiation. These units are the "liaison groups" or "defense groups" that have presumably been established at an earlier stage of the litigation.\textsuperscript{29} The court may have mentioned only because it became clear to anyone attending that special conference that the trial of the GEMS Landfill case, if it were to involve several hundred active litigants, was practically unthinkable and that settlement efforts had to be pursued. Most parties appearing that day signed the form, the lists were published, and the settlement negotiations unfolded with intensity throughout the next four months, leading to a settlement of the first major phase of remediation efforts.

\textsuperscript{28} The MCL 2d, suggests that a general stay of discovery and pretrial proceedings, or a postponement of trial, pending settlement negotiations, should rarely be granted. MCL 2d § 23.13. Multi-party hazardous waste litigation may present such an exception to the no-stay rule. The length of the settlement process is not easily controllable. Coordination among dozens, if not hundreds, of adverse parties, decisionmaking by administrative agencies including Justice Department officials in Superfund settlements, resolution of collateral disputes regarding insurance coverage, expanding knowledge of the landfill site and of the roles of the PRPs, can consume large blocks of time despite everybody's diligent efforts. A supervisory judge refusing to stay such litigation pending settlement negotiations may be creating the pressure of a firm trial date while depriving the participants of another strong settlement incentive, namely, avoidance of substantial pretrial transaction costs. If there is a palpable sense that the process of negotiations will be lengthy but probably successful, it would make good sense to temporarily stay pretrial preparation, reassessing the stay at a later date if settlement progress is unsatisfactory. It is well to impose a reasonable timeline upon the parties, however, to avoid settlement drift and negotiation hang-ups on relatively minor points. A series of deadlines for accomplishing each settlement stage serves well to keep the process on course.

\textsuperscript{29} For example, the liaison groups in a CERCLA section 107 case involving multiple parties may include the governmental plaintiff(s), the alleged owner/operators of the site (CERCLA § 101(20)), the alleged generators which
also wish to give thought to creating or recognizing sub-groups whose interests may collectively diverge for settlement purposes from the existing group.

While recognizing that the settlement process may proceed most smoothly if the initial negotiations are conducted through group representatives, the identity of the representative and the degree of authority reposed in the representative by the group members should be the product of group deliberation and choice. The settlement participants in each group should be afforded the opportunity to consider whether they wish to use their existing liaison counsel as the settlement representative, or whether they wish to choose a new settlement liaison counsel whose roles and duties would be confined to the group's settlement processes. Similarly, the group members will have the opportunity to decide whether their group settlement representative has the capacity to bind any group members, or whether the representative's authority is more circumscribed to being a "go-between" in negotiations with other groups and chairperson of the group's internal settlement processes. Because ultimately the group must have confidence in the representative and in the process, it seems most

produced hazardous substances allegedly disposed of at the site, the alleged transporters which moved hazardous substances to the site (CERCLA § 101(26)), and the Municipalities which allegedly disposed of hazardous substances in municipal waste at the site, or any other functional grouping of parties alleged to be potentially responsible persons for release of hazardous substances and sharing common characteristics. Creation of a "municipalities" group, in this example, recognizes a category of litigants that may technically be generators or transporters, but which share common issues and circumstances with one another more than with the standard group members.

30. "Liaison counsel" are the attorneys designated to coordinate activities and communications of a group in complex litigation. The liaison counsel concept is flexible to best meet the needs of each case. Each group or sub-group generally selects its own liaison counsel, and the functions of liaison counsel are designated by the court after consultation with the affected parties. The term is described in MCL 2d as follows:

LIAISON COUNSEL is a term generally used to describe attorneys whose primary duties for the group involve essentially administrative matters, such as communications with other counsel and the court. Typically they receive various notices, orders, motions, and briefs on behalf of the group, and then make appropriate distributions within the group. They may initiate and convene meetings of the group, give notice of and report on major developments in the case, and otherwise aid in coordinating activities and positions. Such counsel may act for the group in managing document depositories and in resolving scheduling conflicts. An attorney with offices in the same locality as the court is usually selected as liaison counsel.

MCL 2d § 20.221.

31. The negotiation of settlement in a multi-party hazardous waste case, as in any complex litigation, is dependent in large part upon the chemistry between
appropriate that the group members decide by consensus who the individual representatives are and what their powers will be, subject to court approval.

A procedure for the selection of settlement liaison counsel and establishment of their roles is set forth in paragraph two of the sample "Case Management Order for Settlement Process," Appendix A below.

The settlement liaison counsel will then be the attorneys who assemble and analyze the settlement-related data and who meet most frequently with each other and the court. Especially in the early stages of negotiations, when issues are being discussed that transcend individual parties, it becomes important to paint with a broader brush to avoid being bogged down in individual parties' concerns. This can be done by limiting the early phase of settlement negotiations among the groups to just the settlement liaison counsel. At a later time, when individual concerns start to emerge within the general settlement context, other negotiators are naturally brought into the process.

At the same time as the court-supervised negotiations are being conducted, of course, the negotiations within each group also go forward. The group meets at a distance from the courthouse, and in practice it is seldom necessary for the supervising judge to become involved in individual party negotiations within the group.

Settlement liaison counsel should be compensated for their efforts by all participants who benefit from their services. As suggested in MCL 2d, "the terms and procedures for payment should be established by agreement among counsel. If a consensus cannot be reached, however, the judge has the power and duty to order fair reimbursement and compensation." \(^{32}\) By providing for an agreement before substantial services are rendered, the issue of fair compensation need never come before the court.

The court can also seek a consensus among the participants concerning the timing of settlement negotiations. In settlement litigants, which in turn depends upon the temperaments and skills of the settlement liaison counsel. Such counsel "should not be selected or approved by the court to serve in these positions unless they have the resources, the commitment, and the ability to accomplish the assigned tasks. They should be able to command the respect of their colleagues and work cooperatively with opposing counsel and the court." \(\text{Id.} \ § 20.224\). The ideal settlement liaison counsel would possess demonstrated skills of a mediator, marriage counselor, civil engineer, economist, clairvoyant, diplomat and, finally, litigator.

\(^{32}\) \text{Id.} \ § 20.223 (citations omitted).
discussions, as in many areas of litigation, "timing is everything." At too early a stage, the parties are uninformed of the facts upon which a fair settlement can be based; at too late a stage, the parties may feel they have little to lose by going to trial.

Coordination of the settlement process with the administrative proceedings before either the EPA or the relevant state environmental agency must also be achieved. Where federal and state agencies are both involved in the site, inter-governmental coordination of settlement positions must also occur. Usually, multiparty hazardous waste litigation exists concurrently with some stage of an administrative remediation process. For example, the United States may be seeking past response costs under section 107(a) of CERCLA,\(^3\) with respect to a completed early phase of remediation at the same time that the EPA is conducting the remedial investigation and feasibility study (RI/FS) leading to a record of decision on a final phase of remediation. In this example, whether it may be more productive to seek to resolve only the past response costs, or to seek a complete settlement of future liability as well, requires a sensitive judgment. The settlement liaison counsel, always including the attorneys for the governmental plaintiff(s), are in the best position to advise the court on this question of timing. In this example, the "global" approach to settlement may be desirable in the sense that nothing "drives" a settlement like finality; when a participant knows that it can resolve the entire case against it, it is in a position to achieve a final peace through a single negotiated payment. On the other hand, in this example, if the RI/FS has not been completed, and if no alternative design has been proposed by the PRPs for the final phase, it may be unproductive to seek to resolve anything other than the past remediation and response cost issues, while awaiting future phase developments.

It may also be possible to coordinate the administrative and judicial processes in a multi-phase remedial program. In the example above, where the later-stage remediation is still being studied and designed, the court may wish to conduct the settlement process in phases. The resolution of the past response cost issues, because they are more concrete, may appropriately be the first phase of negotiations. When such agreements have been reached, the parties can then turn to the overall resolution of the case, including the ongoing and future remedy issues. Agreements upon the "known" issues may lead to agreements upon fu-

\(^3\) 42 U.S.C. § 9607(a).
ture "unknown" issues. In any event, the process should accommodate a common-sense acknowledgement of the ongoing administrative agency processes and the real-world actions taken or contemplated by the governmental plaintiff at the landfill.

Finally, the participating PRPs may choose to organize and fund the design of an alternative remedial plan. Such engineering studies and design efforts can be coordinated through the settlement liaison counsel. Funds for the study are raised by the self-assessment of the participating groups including each of the members who stand to gain from the study and design efforts. It is not inconceivable that a hybrid remedial plan could emerge from the settlement process, taking the best characteristics of the competing plans of the government and of the participating PRPs. In the best of settlement worlds, the final settlement may embrace a remedial plan having greater efficiency than either of the "competing" plans. This settlement effort can result in a better cleanup and a lower cost than might otherwise occur. The likelihood of such an outcome can be enhanced by the reasonable sharing of information and direct discussions between the various engineering experts for the government and PRPs, as discussed further below.

In short, it is important to select settlement liaison counsel who are knowledgeable, experienced and respected by group members. The issues to be part of the settlement discussions should be identified at the outset, especially if less than the entire case is to be resolved. The participants should clearly delineate the authority of their selected settlement representative, through whom all inter-group negotiations will take place and who should generally have authority to convene intra-group meetings of participants. The participants should agree up front to an equitable sharing of settlement liaison counsel's fees. The timing of the phase or phases of negotiations should emerge from the consensus of the representatives, within deadlines imposed by the court, and negotiations upon the larger issues should go forward, supervised by the court.

C. Joining Necessary Parties and Assembly of Database
   Concerning the Litigants, the Landfill, and Each Litigant's Nexus to the Landfill

A major ingredient in a multi-party hazardous waste litigation settlement process is the assembly of a "critical mass" of potentially responsible parties willing to undertake a settlement. It
is recognized that the governmental plaintiff does not always choose to name each potentially responsible person as a direct defendant, nor is it obligated to do so. As a consequence, however, settlement participants may seek to join absent PRPs as parties in the litigation, to increase the number of active parties. Since the settlement process becomes most viable when most parties believed to have a substantial connection to the landfill have been joined, it may be desirable to assure the prompt joinder of such parties before settlement negotiations are underway.

The court can create a window for joinder of additional parties, granting leave to the governmental plaintiff and/or the existing defendants to file an amended complaint or third-party complaint, as the case may be, within a fixed deadline. The identification of additional parties has presumably been an early objective in the regular management of the complex case. If not already done, however, the beginning of the settlement process presents a sensible opportunity for the amendment of pleadings to join new parties.

In the settlement process, as in the litigation generally, the court should not encourage the joinder of insignificant parties. The creation of the “critical mass” should not depend upon the addition of parties of dubious liability or doubtful connection to the landfill. The court has discretion to condition amendment of pleadings accordingly. While granting a “window” of opportunity to join additional parties, such leave to amend may be accompanied by a reminder of counsel’s obligations under Rule 11 of the Federal Rules of Civil Procedure, pertaining to a good faith basis for the joinder. Leave may be further conditioned upon the self-discipline of the liaison counsel in exercise of their discretion. Counsel may be urged to join only the parties thought to have a

34. Rule 11 requires, among other things, that the signature of an attorney upon a pleading:

[C]onstitutes a certification by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11.

The Rule 11 obligation thus anticipates that new parties will not be joined without first completing reasonable inquiry into the underlying facts. This requirement is underscored by the need for the initiating party to later serve the new party with “a statement of the complete present evidential basis for the inclusion of that defendant or third-party defendant,” as part of the court-ordered common discovery, discussed below.
RESOLVING MULTI-PARTY LITIGATION

substantial connection who are still viable. An appropriate order permitting such prompt joinder appears in paragraph three of the sample "Case Management Order for Settlement Process," Appendix A below.

The proposed order also cures potential conflicts in the joinder of new parties by permitting a defendant to opt out of the third-party complaint, so that it would not be regarded as a third-party plaintiff as to some or all of the new third-party defendants. This mechanism can be used to avoid situations where, for example, a generator defendant would otherwise be perceived as joining another generator as third-party defendant, creating an adverseness that could be detrimental to the common settlement efforts within the generator group. This procedure anticipates that there will be some coordination among the defense groups and that the appropriate pleadings would emerge. This procedure, like any other litigation short-cut, calls upon the professionalism of the attorneys. The alternative, however, is a fragmented motion practice instituted by various plaintiffs and defendants, each seeking to join new parties, identical or not, resulting in a paper-chase that literally complies with the rules but unduly complicates the proceedings.

This procedure for speedy joinder of new parties also requires service of the new pleading to take place promptly (within thirty days of filing), accompanied by the summons, the previous pleadings in the case, and copies of all case management orders, including the case management order for settlement process. The shortened time for such service is justifiable because the existence and whereabouts of each of the new parties has presumably already been confirmed through records discovery. The new parties should not be hard to find, as they are all believed to be viable and to have a substantial connection to the landfill after the "reasonable inquiry" required by Rule 11. Service of the case management orders will bring the new parties up to date on the unfolding litigation and settlement processes.

There are many ways to assemble a reliable database for settlement purposes. The most formal mechanism would rely upon the exchange of interrogatories, document production requests and the conduct of depositions, followed by expert witness reports under Rule 26(b)(4)(A)(i) of the Federal Rules of Civil Procedure. By taking advantage of the case management opportunities, the court can facilitate the speedy and efficient as-
assembled of reliable discovery information from all settlement participants.

Settlement liaison counsel can assist the court in identifying the type of information that should be obtained from each party and about the landfill. Such information will probably include the following:

1. The administrative record of actions taken to date before the administrative agency or agencies.
2. A summary of reasons why plaintiff has joined each defendant.
3. A summary of reasons why each third-party defendant has been joined.
4. Studies undertaken by any party regarding the landfill, including investigations obtained during the litigation by coordinated efforts, such as split-sampling or joint experts.
5. All transportation and landfill records from which a waste-in list can be compiled, showing the type of substances and volume disposed of at the landfill, and identifying each responsible person disposing of such substances.
6. Documents from each party reflecting hazardous substances allegedly shipped to the landfill.
7. Documents reflecting the waste-disposal practices of each party concerning hazardous substances.
8. Other information tending to establish or to disprove a nexus of hazardous materials between the PRP and the landfill.

To be sure, the above list resembles most of the information that would be obtained in plenary discovery absent a settlement process. The supervising judge must reconcile the conflict between the need for a full but costly fact-gathering and the desire for a less costly and more efficient, but also less complete, discovery process in aid of settlement negotiations. In a case where the settlement process comes toward the end of full formal discovery, one would expect that relatively less additional information would be needed to "complete the picture" for meaningful negotiations. In such a case, the process must assure that all parties have met their reasonable discovery duties, so that recalcitrant parties are not rewarded at the expense of those that have been more forthcoming with discovery information.
In a case where the settlement process occurs at an early time, before most parties have engaged in formal discovery, the opportunity for focusing discovery and saving transaction costs is greatest. In my experience, the quickest way to obtain a uniform database for settlement purposes is through court-ordered common interrogatories and document production requests, with depositions available only from those parties that are unwilling or unable to provide responsive answers. Standardized interrogatories and document production requests are proposed by liaison counsel, or by a special committee of counsel, for the court's approval. These common requests are themselves the product of some negotiation. Disputes as to the form or scope of the interrogatories or document production requests are resolved by the court. When these written discovery requests have been submitted by liaison counsel and approved by the court, an order is entered to compel each party to serve responsive answers and to arrange for the production of responsive documents.

The advantages of court-approved common discovery requests should be obvious. First, the negotiated drafting and initial court approval eliminates later quibbling about the scope or relevance of the information requested. Second, all participants know that they need only supply responsive answers to these discovery requests, and that further discovery will not generally be required of them within the settlement process. Third, the compulsion of a court order assures compliance by litigants. Fourth, the certification of discovery responses under oath, as required by Rules 33 and 34 of the Federal Rules of Civil Procedure, enhances reliability. Fifth, common requests lead to a common database that can be analyzed and arrayed in computer-assisted format; this analytical aid extends not only to the numerical data, but also to the important relationships between the PRPs.

An example of an order requiring answers to such interrogatories and document requests appears in paragraph four of the sample Case Management Order for Settlement Process, in Appendix A below. The process described in paragraph four provides for two-way discovery, first from the party who joined the PRP, whether the initiating party was a plaintiff or defendant, and then from the newly joined party. In this example, there are four short sets of common interrogatories and document requests, each serving a separate but related function. The process starts, as indicated, by requiring the party which is the first party to file and serve a claim upon a defendant or a third-party defendant, to
provide that defendant or third-party defendant with "a statement of the complete present evidential basis for the inclusion of that defendant or third-party defendant" by serving answers to the first uniform discovery set. After such service, the second exchange involves the joined party automatically answering the second common set of discovery, providing "a statement of its complete presently known information concerning issues of quantity and quality of material and the nexus of that material to the Site," as required in the second set. The third common discovery set in this example involves the interrogatories and document production requests that may be used by the plaintiff to obtain from any defendant or third-party defendant further information concerning quantity, quality and nexus. When the plaintiff makes such a request, it is obligated to provide reply information to that party by answering the fourth set of common discovery requests, which generally seek any additional information in the governmental plaintiff's possession, concerning that party's nexus to the landfill.

In this example, depositions are generally not permitted as part of the court-ordered discovery process in aid of settlement negotiations. An exception may be necessary concerning information not necessarily reflected in documents—such as the methods of operating the landfill. Depositions are costly and highly variable in the quality of information gained. Where a party is unable or unwilling to answer the written discovery within the court-imposed deadlines, however, depositions can be ordered and the costs and counsel fees associated with those depositions can be awarded as a discovery sanction against the recalcitrant party for breach of the discovery order, pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure.

The interrogatory answers and the documents produced in response to the common requests are not served upon all litigants. To achieve greater efficiency, they need only be served upon the parties directly involved and liaison counsel. The liaison counsel maintain the document repositories for their group. Group members have access to the information in the repository, and arrangements are made with liaison counsel for inspection and duplication. Consultants working with settlement liaison counsel can analyze the data and put it into a useful format for settlement negotiation purposes. Even in a complex case with no prior discovery, there is no reason to believe that it should take more than four months to draft and propound and answer this
court-ordered discovery which serves as a basis for settlement negotiations. In the event that settlement negotiations are unsuccessful, of course, this discovery would complete an important first phase of plenary discovery, setting the stage for depositions.

Another element of data necessary for such settlement negotiations involves insurance discovery. Discovery of a party’s liability insurance information is permitted pursuant to Rule 26(b)(2) of the Federal Rules of Civil Procedure. Even though insurance carriers should not be joined as parties in the multi-party hazardous waste cases, insurance disputes between PRPs and their insurance carriers concerning alleged coverage are a recurring reality. By gathering information about such insurance coverage and disputes in a common discovery set, such coverage issues can be identified and insurance coverage limits can be explored.

An example of court-ordered insurance discovery is set forth in the fifth paragraph of the sample “Case Management Order for Settlement Process,” Appendix A below. In this example, every party other than the governmental plaintiff shall provide this insurance information, and the settlement liaison counsel are obliged to identify any group member which has not timely supplied the information. In practice, it has proved difficult to assemble this insurance discovery. Where landfill operations occurred several decades ago, it may not be possible to retrieve complete information in so short a time. On the other hand, defendant PRPs seem increasingly attuned to the need to explore their comprehensive general liability insurance policies that may provide coverage for the conduct at issue.

At a later stage of settlement negotiations it may be advisable to invite representatives of the insurance carriers for individual parties into the process to attempt to resolve coverage disputes while pursuing the opportunity for the insured’s settlement of the underlying litigation. As a practical matter, however, it may not be possible for a court-supervised settlement process to address the nuances of each party’s insurance coverage dispute. Presumably, the insured and the insurer are engaged in collateral coverage litigation and they may wish to avail themselves of that dispute resolution process either before or after the insured’s actual share of the proposed settlement is known. It can benefit both the defendant PRP and its insurer, however, who make their peace while the party still has an opportunity to conclude the proposed settlement. The possibility for resolving the insurance coverage dispute is enhanced by knowledge of the insured’s
proposed individual settlement share. The savings of transaction costs in the underlying litigation, as well as in the insurance coverage suit that would otherwise go forward, can bridge what would otherwise be substantial monetary gaps.

The court supervised settlement process can also be designed to promote the informal exchange of views between the experts or consultants retained by the opposing parties. The topics of such dialogue can involve the proposed remedial design, the on-site and off-site degradation, ground water monitoring and modeling, projected remedial costs, and projected operations and maintenance costs for the remedial action. Such informal discovery can be promoted through the procedure in the sixth paragraph of the sample “Case Management Order for Settlement Process,” Appendix A below.

The experts conduct informal dialogue at a distance from the courthouse, and even settlement liaison counsel may be excluded from some or all of the meetings. Candid discussions between experts in aid of settlement negotiations can emerge from an environment protected by an appropriate confidentiality order, negotiated among settlement liaison counsel and approved by the court.

An example of an order providing for confidentiality of settlement discussions appears in the seventh paragraph of the sample “Case Management Order for Settlement Process,” Appendix A below. When the “critical mass” of parties has been assembled and a comprehensive and reliable database has been obtained, the participants are in position to actually negotiate upon the settlement issues.

D. Analysis and Negotiation of Settlement Positions

The approaches that can be taken to the actual negotiation of the settlement are as varied as the issues to be addressed and the circumstances in which the parties find themselves. One hesitates to generalize in this area, and a few suggestions follow. A logical first step is to determine which issues are not in dispute. Is there general acceptance of the remedial plan? Has a reasonably firm nexus to the landfill been established for each participant and group? Is there agreement about the hazardous nature of the substances discharged by each party at the landfill? Is there agreement about the landfill’s characteristics, including the degree of harm both on-site and off-site?

It would be a rare case to find substantial agreement among
all participants on most of these issues. The nature and character of the data may not permit such easy stipulations that could result in the preparation of the comprehensive waste-in list of hazardous substances by each PRP. More often, data are incomplete, genuine disputes exist as to the quantity and hazardous quality of the substances discharged, and disputes may still exist regarding even a party's connection to the landfill.

Putting aside such individual party concerns for a moment, the next logical step may be to seek agreement about the overall contours of settlement of each large issue. What is the most likely total cost of past and future responses consistent with the national contingency plan? Should a "premium" be required to be paid for early settlement to insure against risk of overruns? Which substances, if any, have proved to be the most detrimental to the landfill in terms of remediation costs and is any party or group most responsible? Should there be negotiated reopeners to the overall settlement in the event that actual response costs fall below or above a specified range? What steps should be taken to preserve settlors' rights of contribution against non-settlors? Other questions present themselves, depending upon the circumstances of the case. By working from the general issues to the specific, the negotiators may be able to reach tentative working hypotheses concerning the overall settlement criteria.

A third level of negotiation may involve the respective shares of the settlement to be borne by the various groups. At this point, the submission of confidential settlement brochures by settlement liaison counsel may prove to be beneficial. If there can be an equitable settlement proposing the relative portions of the total to be raised by each group, then the apportionment of individual shares within each group can be considered. There is no set formula for deciding upon a fair settlement share for the owners/operators, the transporters, the generators, the municipalities, and any other groups. As with any settlement, such shares will presumably take into account the statutory liabilities created for each such group, the relative strength of the evidence, the risk of non-settlement, the ability to pay (or, stated conversely, the degree of indifference to an adverse judgment), and other appropriate factors.

The supervising judge can provide a forum for these discussions and inject suggestions for consideration of the negotiators when appropriate. Such negotiations can present immensely
complicated issues of fact and law, and the supervising judge should not venture suggestions carelessly.

The fourth level of specificity of negotiations will be the individual settlement shares of each participant. As the number of such participants increases, so does the desirability of engaging an outside, independent dispute resolution mechanism. The independent analyst can quickly process the data, receive the parties' positions and comments, mediate competing positions, and suggest a settlement "grid" based upon appropriate factors. Excellent private dispute resolution firms exist, and some public entities are also seeing the wisdom of providing such services.35

Again, no simple formula suggests what these ultimate allocations should be. Settlement schemes can logically apportion such liability in accordance with volumetric measures, adjusted or not for the degree of toxicity, enhanced for the highly toxic and diminished for the borderline situation. Alternatively, participants can be placed into broad tiers of minimal, moderate and enhanced amounts. Another logical method is to examine the waste streams comprised of specific groupings of generators and the transporters that connect them to the landfill, allowing for adjustments to this allocation based upon the existence of, for example, indemnification agreements and other contractual waste disposal relationships.

The selection of the ultimate allocation mechanism becomes a sensitive economic issue, as well as a political decision within the settlement process. The settlement rationale must not only be fair, but it must be perceived as fair by the participants. This does not mean that an individual participant needs to be overjoyed by the result. It means that participants should generally be able to point to substantially similarly situated parties and see that there are not gross disparities in the settlement shares. The settlement liaison counsel must also be sensitive in their negotiation of the ultimate allocation mechanism to avoid using this opportunity to confer a benefit upon a private client through selection of an unfair allocation scheme.

This can be a time-consuming, computer-intense process. It is therefore more likely to be fit for the outside dispute resolution mechanism than for multilateral negotiation before the judge.

35. For example, in New Jersey, the Center for Public Dispute Resolution has been created within the Department of the Public Advocate. The Center provides a mediation process which can be annexed to the litigation as an alternative dispute resolution mechanism at low cost and high effectiveness.
The settlement judge can more productively review, upon request of the participants, any seemingly gross disparities that may have emerged in the proposed settlement grid.\(^{36}\)

The next level of concern, as previously mentioned, arises when the individual party's proposed share is known. Whether the payment of that share will come from the party, the party's insurance carrier, or a combination of both may require resolution of insurance-related disputes. Deadline pressures to achieve the overall settlement do not normally permit individualized judicial attention to single-party insurance disputes. The disputants may decide to resolve their claims, or that the insured or insurer may "front" the settlement payment, preserving all rights for subsequent insurance coverage litigation.

When it becomes clear that sufficient money has been raised among the participants to fund the bulk of the proposed settlement, and that settlement is therefore highly likely, a new settlement dynamic emerges. Parties that may have been lukewarm participants or concerned about some minor aspect of the proposal become justifiably concerned that the case will be resolved without them. The consequences and risks of such non-participation can be great enough to supply the final impetus for agreement by undecided participants.

The drafting of the consent decree in conformity with the applicable statutes and regulations can be assigned to a drafting committee of counsel. Such drafting can be a tedious task, especially as to the non-economic issues. Again, the settlement judge can help with suggestions of language if the drafters are unable to agree. Finally, each participant votes whether to accept the settlement and, if it accepts, it submits its signature page to settlement liaison counsel within the court-established deadline. The lodging of the decree for public comment, and ultimately for the con-

\(^{36}\) A similar procedure was followed at this stage of the *United States v. Price* settlement process. The settlement participants agreed upon a private dispute-resolution firm to help the group achieve its internal allocations. The firm's fees were paid by a special assessment upon the participants. When the private process was concluded (it took about 60 days), a special subcommittee of counsel, nicknamed the "Gang of Four," worked with settlement participants who believed their final proposed allocation shares to be unfair. The settlement judge also met with these participants, in the presence of "Gang of Four" attorneys, to discuss and review their specific allocations within the overall settlement. Special hardships were also considered at that point. The end result of this lengthy series of meetings was a proposed settlement decree in which most parties probably wished that they could pay less, but which every party in the litigation joined.
The judicial process—the most formal of dispute resolution mechanisms—can also become a tedious and ineffective mechanism in multi-party hazardous waste cases. The judicial forum, however, can also give rise to a settlement process characterized by enhanced judicial supervision, flexible and responsive design, good faith elective participation of parties, streamlined discovery, and negotiation by committees of counsel selected by the parties. This model recognizes that case management directed explicitly at settlement efforts employs judicial tools which are distinct from ordinary pretrial management, yet consistent with the recent amendments to Rules 16 and 26 of the Federal Rules of Civil Procedure, MCL 2d, and the Civil Justice Reform Act of 1990.

Necessity generates solutions to complex Superfund litigation. The incentives for creative bench-bar settlement programs have become obvious. The court, faced with the prospect of barely manageable litigation, including lengthy multi-phase trials and appeals, is spurred to expend the extra thought and effort for supervision of settlement. Governmental plaintiffs enjoy the prospects of quick recoupment of public funds, resolution of the Superfund site remedy or recovery action, and conservation of enforcement resources, which face the demands of almost one thousand National Priorities List sites, making exploration of settlement options desirable. For the PRPs, a successful settlement process virtually eliminates risks of litigation and substantially reduces transaction costs of discovery, motion practice, trial, and appeal.

Elements for a fair Superfund settlement process, as discussed above, include provisions for consensual creation of the settlement rules, such as those concerning good faith information sharing and bargaining. Under court supervision, the participants identify themselves and take a role, along with governmental plaintiffs, in defining the objectives of the process and the means for achieving agreement. Participants organize themselves into settlement groups and choose representatives for the overall negotiations.

The topics and timing for negotiation efforts will depend upon the stage of litigation, the status of related administrative proceedings, and the degree of self-organization among the
PRPs. Court-supervised processes are flexible enough to encompass settlements by *de minimis* parties, settlements of partial phases of site remediation, allocation of past and/or future projected remedial costs, funding of the proposed governmental remedy, or funding of a partial or total remedy to be performed by the PRPs. Agreement may first occur on an overall funding goal, subject to allocation among individual participants. The non-monetary terms of settlement are also the product of negotiations, within Superfund’s statutory framework. The various agencies of federal, state and local government involved at the Superfund site may also use the court-supervised process to resolve differences in a forum that a private dispute resolution mechanism cannot provide.

The judicially supervised model does not contemplate that all steps toward settlement will be taken in the courthouse. To the contrary, significant and complex issues, such as the allocation of the defense group’s share among its individual participants, may best be handled in a private intra-group forum such as mediation or arbitration by experts of the group’s choice.

When there has been initial agreement about the rules, procedures and goals of the settlement process, accompanied by the affirmation of good faith participation, the obvious advantage of judicial supervision becomes manifest. Judicial remedies, including compulsion and sanction, are available to enforce the rules, speed the process, share the costs, and address legitimate concerns for fair and equitable conduct among participants, while preserving due process rights.

The multi-party hazardous waste settlement process assigns challenging and somewhat unfamiliar roles to attorneys, liaison counsel, governmental agencies and the court itself. How well we measure up to these challenges may determine what legacy of hazardous substance site remediation we leave to the next generation.
APPENDIX A

UNITED STATES OF AMERICA, Plaintiff, V. CASE MANAGEMENT ORDER FOR SETTLEMENT PURPOSES

ABC CO., et al., Defendants.

Upon consideration of the views of all litigants appearing at a Case Management Conference before the undersigned on date, the court concludes that a process for amicable resolution of this multi-party hazardous waste case may be conducted under judicial supervision among participating parties. The issues to be negotiated include: [(a), (b), and (c)]. Accordingly, pursuant to Rules 16 and 26, Fed. R. Civ. P.;

IT IS this __________ day of __________, hereby ORDERED as follows:


Not later than __________, each party to this litigation shall execute a form and return it to the Liaison Counsel for that party, indicating whether the party chooses to participate in good faith in settlement negotiations concerning the issues remaining in this case [or such partial issues as to which the negotiations will be limited]. The Choice of Participation Form to be utilized follows:

Check as appropriate and sign below:

— Yes, I wish to participate, in good faith, in settlement negotiations to resolve the issues remaining in this case. I understand that by pledging to negotiate in good faith I am not bound to agree to any settlement or allocated share, and that I may withdraw my agreement to participate in these settlement negotiations upon written notice to all Liaison Counsel prior to agreeing to any settlement.
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No, I choose not to participate in settlement negotiations at this time and I wish to further litigate this case to its conclusion.

Date:__________________________  Signature:_____________________________
Name:____________________________
Title:____________________________
Party:____________________________

2. Selection of Settlement Liaison Counsel.

Not later than ____ date ____, Liaison Counsel for each Group shall convene a meeting of all group members who are participants in the settlement process. Each Group shall select its Settlement Liaison Counsel, who may be the same attorney as the Liaison Counsel or who may be different. The Group shall also agree upon the powers and responsibilities of Settlement Liaison Counsel, and the Group shall also agree upon an equitable reimbursement for the services of Settlement Liaison Counsel in this regard. Settlement Liaison Counsel shall identify themselves to the court and to each other Group not later than ____ date ____. All Settlement Liaison Counsel shall thereafter attend a Settlement Conference with the undersigned on ____ date ____. Generally, such Settlement Conferences are open only to Settlement Liaison Counsel until such future date when individual parties’ settlement negotiations are undertaken.


The plaintiff is hereby granted leave to file an Amended Complaint without the necessity of motion practice, joining additional parties, not later than ____ date ____. The defendants, through Liaison Counsel, are hereby granted leave to file a Third-Party Complaint adding new parties not already joined in the Complaint or Amended Complaint not later than ____ date ____. To the extent feasible, this joinder shall be selective and limited to new parties with a relatively higher degree of alleged responsibility and continuing viability, and avoiding joinder of parties with a relatively lower degree of alleged responsibility or which are of doubtful viability. Counsel are reminded that any such joinder must be supported by reasonable basis in fact and in law as required by Rule 11, Fed. R. Civ. P. Any defendant not wishing to be identified as a third-party plaintiff in the new Third-Party Complaint shall so indicate by filing an appropriate notice and serving
same upon all Liaison Counsel within thirty (30) days after filing of the new Third-Party Complaint. The Amended Complaint and the new Third-Party Complaint shall be served upon the new parties accompanied by the appropriate summons, copies of all pleadings, and copies of all Case Management Orders (including this Order) within thirty (30) days of filing the new pleading.

4. **Form Interrogatories and Document Requests.**

The plaintiff, or any other party which is the first party to file a claim against a defendant or third-party defendant shall, within thirty (30) days of the date of this Order, provide that party with a statement of the complete present evidential basis for the inclusion of that party by answering the Interrogatories and Document Request attached as Set A. Within thirty (30) days of receipt of this Set A discovery, the responding party shall provide the initiating party a statement of its complete presently known information concerning issues of quantity and quality of material and the nexus of that material to the Site, with respect to all material which the responding party knows went to the Site or about which the party has any reason to believe may have gone to the Site, and shall include the factual basis for any denial of any element of the information provided to it pursuant to the Set A responses above. These statements shall be provided by answering the Interrogatories and Document Production Requests attached in Set B. With respect to obtaining information from parties which are not direct defendants, the plaintiff may serve the Interrogatories and Document Production Requests in the form attached as Set C which shall be responsively answered within thirty (30) days of service. Correspondingly, within thirty (30) days of receipt of Set C answers and documents, plaintiff shall automatically serve reply information in the form of answers to Interrogatories attached as Set D.

5. **Insurance Discovery.**

Pursuant to Rule 26(b)(2), Fed. R. Civ. P., each defendant and third-party defendant shall, within sixty (60) days of the entry of this Order, serve responsive answers and supply documents as requested in the attached Interrogatories and Document Production Requests Concerning Liability Insurance (Set E). Each party shall certify and deliver its Set E answers and documents to Settlement Liaison Counsel for the Group to which the party belongs. Settlement Liaison Counsel shall keep these answers in the Group's Documents Repository for inspection and copying by other settlement participants. Settlement Liaison Counsel shall
furnish the undersigned with the identification of a Group member not timely providing this information.

6. **Informal Discovery.**

Participants shall be forthcoming with responses to reasonable requests for informal discovery in addition to court-ordered discovery above, including informal communications between retained experts and consultants for purposes of settlement.

7. **Confidentiality of Settlement Negotiations.**

All discussions and communications conducted by and among participants as part of these court-supervised settlement negotiations, also including discussions among consultants or experts retained by parties for this litigation, are confidential. The contents of such discussions and communications shall remain confidential and shall not be revealed to persons or parties not within this settlement process, nor shall they be revealed to the District Judge to whom this non-jury case is assigned.