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CRY, NO RECOVERY!: NARROWING JUDICIAL INTERPRETATION OF CERCLA'S DOUBLE RECOVERY PROVISION

ABSTRACT

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted to ensure the cleanup of thousands of hazardous waste sites throughout the United States. The Act also purports to provide parties who must assume the astronomical costs of cleanup with a federal right to contribution or recovery from responsible parties. The language of the Act clearly prohibits plaintiffs from recovering the same costs under both CERCLA and another comparable state or federal law. However, the judiciary has expanded the Act's double recovery provision to prevent plaintiffs from recovering from both responsible parties and collateral sources such as settlements, insurance assets, and other economic benefits. Judicial gloss on Congress's double recovery provision prevents plaintiffs from asserting their right to recovery, thus discouraging parties from voluntarily undertaking cleanup and encouraging protracted litigation.

This Comment argues that CERCLA's double recovery provision should be narrowly interpreted to create economic incentives for parties to shoulder the burdens of hazardous site cleanup. Plaintiffs should be allowed to recover from collateral sources as well as other responsible parties. Because every federal court has prohibited collateral source recovery, this Comment also proposes that courts should not place undue weight on the plaintiff's economic benefit from site remediation in double recovery cases. This factor merely represents a thin guise for further expanding the double recovery prohibition and works to prevent plaintiffs from recovering their full remediation costs. This Comment will demonstrate that a narrow interpretation of CERCLA's double recovery prohibition will ultimately further the Act's goals of expeditious cleanup and environmental protection.

INTRODUCTION

Picture a typical, working-class neighborhood in the United States. Modest row houses stand side by side. Children walk home from a brick school building “with burns on their hands and faces.”¹ A girl has a cleft palate and an extra row of teeth in her mouth.² The boy beside her has an eye defect.³ The trees in the small, fenced yards are black and bare.⁴ It rained recently, and noxious puddles fill the streets.⁵ The air is choking; a stench hangs in the breeze.⁶ Huge corroding metal barrels and bits of trash seem to rise from the ground, breaking up the earth in the brown yards.⁷ This place is poisonous.⁸

This place is also real.⁹ Love Canal, a neighborhood in Niagara Falls, New York, was built above 21,000 tons of buried toxic waste.¹⁰ The area became a dumping ground in the 1920s after William T. Love abandoned his attempt to create a model city powered by Niagara Falls, leaving a partially dug canal intended to connect the upper and lower Niagara Rivers.¹¹ “[I]n the 1940s, Hooker Chemical Company began dumping industrial waste” into the canal.¹² In 1953, Hooker Chemical covered the waste site with dirt and sold it to the city of Niagara Falls for one dollar.¹³ Approximately one hundred homes and a school were built on the site in the late 1950s.¹⁴ Two years later, a twenty-five-foot area collapsed, exposing toxic waste drums throughout the canal area and puddles of chemicals in yards, basements, and on the school grounds.¹⁵ Residents, who were ultimately evacuated from the site,¹⁶ reported

¹ Eckardt C. Beck, *The Love Canal Tragedy*, EPA J., Jan. 1979, at 17, 17.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* High concentrations of benzene, a human carcinogen, were detected in the ground of the Love Canal development. *Id.*

⁹ *Id.*

¹⁰ Laura Moss, *America's 10 Worst Man-Made Environmental Disasters*, MOTHER NATURE NETWORK (June 14, 2010), <http://www.mnn.com/earth-matters/wilderness-resources/photos/americas-10-worst-man-made-environmental-disasters/love>.

¹¹ Beck, *supra* note 1, at 17.

¹² Moss, *supra* note 10.

¹³ Beck, *supra* note 1, at 17. Professor Beck quipped that even at that bargain price, “[i]t was a bad buy.” *Id.*

¹⁴ *Id.*

¹⁵ Moss, *supra* note 10.

¹⁶ Beck, *supra* note 1, at 17.

blue goo bubbling up from their basements, strange odors, and exploding rocks.¹⁷

The nearly eighty different toxins that had seeped from the canal¹⁸ caused a plethora of health problems for Love Canal residents; many suffered from urinary tract disorders, nervous breakdowns, epilepsy, and miscarriages.¹⁹ Fifty-six percent of children born between 1974 and 1978 in the Love Canal area suffered from birth defects.²⁰ These health problems brought the area into national headlines in 1978, and Love Canal became the first man-made federal disaster area.²¹

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or the Act) in 1980 as a response to the Love Canal disaster.²² At the time, the number of abandoned hazardous waste sites in the United States was estimated at approximately 20,000, and CERCLA provided the means for a comprehensive cleanup scheme.²³ The Act was hurriedly passed and has led to complex and protracted litigation.²⁴

One of the most controversial issues in recent CERCLA litigation, however, has been the Act's double recovery provision.²⁵ CERCLA

¹⁷ Moss, *supra* note 10.

¹⁸ *Id.*

¹⁹ CTR. FOR HEALTH, ENV'T & JUSTICE, LOVE CANAL 7, http://chej.org/wp-content/uploads/Documents/love_canal_factpack.pdf (last visited Feb. 24, 2016). Over thirty years later, many of the children of Love Canal suffer from cancer and reproductive problems. Susan Donaldson James, *Love Canal's Lethal Legacy Persists*, ABC NEWS (Aug. 11, 2008), <http://abcnews.go.com/Health/story?id=5553393&page=1>. Proving causation can be difficult because most diseases that can be linked to toxic substance exposure can be caused by multiple factors. NAT'L CTR. FOR ENVTL. ECON., THE UNITED STATES EXPERIENCE WITH ECONOMIC INCENTIVES FOR PROTECTING THE ENVIRONMENT 150 (2001), [http://yosemite.epa.gov/ee/epa/eeerm.nsf/vwAN/EE-0216B-13.pdf/\\$file/EE-0216B-13.pdf](http://yosemite.epa.gov/ee/epa/eeerm.nsf/vwAN/EE-0216B-13.pdf/$file/EE-0216B-13.pdf); see also *Anderson v. Cryovac, Inc.*, 96 F.R.D. 431, 432 (D. Mass. 1983), *aff'd sub nom.*, *Anderson v. Beatrice Foods Co.*, 900 F.2d 388 (1st Cir. 1990). In *Anderson*, the plaintiffs did not have conclusive evidence that their leukemia was caused by contaminated groundwater, but they could assert a good faith basis sufficient to state a claim. *Id.*

²⁰ Moss, *supra* note 10.

²¹ *Id.* The effects of Love Canal can still be felt; six families who purchased homes there because they were assured the area was safe have sued, alleging that the properties were not properly remediated, and that toxic chemicals continue to leach onto the residents' land. *'Love Canal' Still Oozing Poison 35 Years Later*, N.Y. POST (Nov. 2, 2013, 11:03 PM), <http://nypost.com/2013/11/02/love-canal-still-oozing-poison-35-years-later/>.

²² VALERIE M. FOGLEMAN, HAZARDOUS WASTE CLEANUP, LIABILITY, AND LITIGATION: A COMPREHENSIVE GUIDE TO SUPERFUND LAW 7 (1992).

²³ 3 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.02(1)(a) (2014), LexisNexis.

²⁴ *Id.*

²⁵ See generally Peter E. Seley & Stacie B. Fletcher, *Profit or Profiteering: The Growing Fight over 'Double Recovery' in CERCLA*, 24 TOXICS L. REP. (BNA) 1282, 1282-83 (2009) (noting that the double

theoretically provides strictly liable responsible parties who undertake site cleanup, such as past and present owners and operators as well as hazardous waste transporters, with a federal claim for cost recovery or contribution against other parties who are also responsible for the contamination.²⁶ For example, an owner of a current hazardous site may undertake cleanup voluntarily or by a consent order.²⁷ Such an owner may then sue for contribution under CERCLA to recover some of the costs of cleanup from other responsible parties, including past owners of the site who also contributed to the contamination.²⁸

The Act prohibits plaintiffs from recovering under any other comparable state or federal law, thus preventing them from receiving a windfall double recovery.²⁹ The judiciary, however, has expanded the double recovery provision to prevent plaintiffs seeking contribution from also recovering from collateral sources such as settlements with other responsible parties and insurance payouts.³⁰ For example, if a potentially responsible plaintiff who has undertaken cleanup seeks contribution from another responsible party, and has already recovered some costs from insurance, the defendant's share of liability will be offset by the plaintiff's insurance recovery.³¹ Defendants in these contribution cases have jumped at the chance to assert a double recovery defense to reduce or extinguish their own responsibility to pay for site cleanups.³² Even when the double recovery defense is rejected, courts have allowed defendants to escape liability by examining any economic benefit the plaintiff may have incurred from undertaking cleanup.³³

Judicial expansion of CERCLA's double recovery provision prevents responsible parties from voluntarily assuming the costs of hazardous waste site

recovery cases can "each be dismissed with the maxim 'bad facts make bad law'" but that "together they advance the dubious proposition that any cost recovery that can even remotely be associated with remediation can offset a plaintiff's damages").

²⁶ 42 U.S.C. § 9613(f)(1) (2012).

²⁷ Martha L. Judy & Katherine N. Probst, *Superfund at 30*, 11 VT. J. ENVTL. L. 191, 195 & n.23 (2009).

²⁸ 3 GRAD, *supra* note 23, § 4A.02(1)(f)(i).

²⁹ 42 U.S.C. § 9613(f).

³⁰ Seley & Fletcher, *supra* note 25, at 1282–83.

³¹ Basic Mgmt. Inc. v. United States, 569 F. Supp. 2d 1106, 1119–20 (D. Nev. 2008).

³² *Id.* Most equitable defenses such as unclean hands, laches, no proximate cause, preemption by another federal statute, and negligence-based defenses in contribution actions have failed, making a new double recovery defense particularly attractive to defendants. See FOGLEMAN, *supra* note 22, at 238–44 (discussing CERCLA defenses).

³³ See Seley & Fletcher, *supra* note 25, at 1285–86; see also Lockheed Martin Corp. v. United States, 35 F. Supp. 3d 92, 155–56, 162 (D.D.C. 2014) (mem.) (holding that contract pricing offset did not constitute double recovery, but the economic benefit to the plaintiff extinguished the defendant's share of liability).

cleanup.³⁴ Federal courts should allow plaintiffs to recover from responsible parties as well as collateral sources like settlements and insurance assets. The judiciary should also place less weight on the economic benefit to the plaintiff in double recovery cases. This approach would ultimately encourage responsible parties to shoulder the initial burden of cleanup because there would be market-based incentives to acquire future profit from both collateral sources and contribution.³⁵ The possibility of some future windfall would stimulate responsible parties to claim ownership of contaminated sites, expedite remediation, and alleviate the burden on the taxpayer.³⁶

This Comment, proceeding in four Parts, will demonstrate the efficacy of a narrow judicial interpretation of CERCLA's double recovery provision. Although this Comment does not suggest that courts should allow profiteering by those responsible for site contamination, there must be some incentive for affected parties to take on the initial costs of cleanup and assume their environmental responsibilities. Collateral source recovery and less judicial consideration of a plaintiff's economic benefit will provide the incentives for responsible parties to remediate the thousands of sites that pose a risk to human health and the environment.³⁷ Because the Environmental Protection Agency (EPA) estimates that one in four Americans lives within three miles of a contaminated site, incentives for cleanup will prove especially pertinent in the coming years.³⁸

First, Part I discusses CERCLA's imperfect framework. Section A explains the Act's principled purpose but fragile passage, which resulted in a compromised draft. Section B details CERCLA's objectives and how parties who have incurred hazardous waste site remediation costs may recover those expenses. Section C illuminates how courts have apportioned liability among responsible parties using a mishmash of equitable factors.

Second, Part II examines the judicial expansion of CERCLA's double recovery provision. Section A discusses the judiciary's refusal to apply the

³⁴ Seley & Fletcher, *supra* note 25, at 1283, 1286.

³⁵ *See id.*

³⁶ *Id.*

³⁷ *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-380, SUPERFUND: EPA'S ESTIMATED COSTS TO REMEDIATE EXISTING SITES EXCEED CURRENT FUNDING LEVELS, AND MORE SITES ARE EXPECTED TO BE ADDED TO THE NATIONAL PRIORITIES LIST 1 (2010). Since 1980, the EPA has identified over 47,000 sites that require potential cleanup. *Id.*

³⁸ U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-252, SUPERFUND: EPA SHOULD TAKE STEPS TO IMPROVE ITS MANAGEMENT OF ALTERNATIVES TO PLACING SITES ON THE NATIONAL PRIORITIES LIST 1 (2013).

traditional tort doctrine, the collateral source rule, to CERCLA cases. Section B analyzes recent cases that have contributed to double recovery expansion. This section details how recovery from insurance assets and increased property value can prevent a plaintiff from recovering full cleanup costs from defendants in a contribution action. This section also discusses how double recovery has not been expanded to encompass rate recovery.

Third, Part III illustrates the most recent double recovery defense of contract pricing offset in *Lockheed Martin Corp. v. United States*. In this case, the court declined to find a double recovery, but placed undue weight on the economic benefit to the plaintiff, using this factor as a guise to further expand the double recovery prohibition.³⁹ Section A describes how the court used traditional allocation factors to determine liability. Section B examines the court's finding that contract pricing offset does not constitute a double recovery. Section C analyzes the economic benefit to Lockheed and how the court used this factor to reduce the government's share of liability.

Finally, Part IV demonstrates the merits of narrowing the judicial interpretation of CERCLA's double recovery provision. Section A suggests the benefits of allowing plaintiffs to recover from collateral sources as well as other responsible parties in contribution actions. Section B describes why less weight should be placed on the economic benefit factor to create more incentives for responsible parties to undertake the costs of cleanup.

I. HISTORY AND APPLICABILITY OF CERCLA

Although CERCLA was enacted with noble intentions,⁴⁰ the Act's methods of allocating liability have created confusion for the courts.⁴¹ This Part addresses the history and applicability of CERCLA with a primary focus on its recovery provisions and liability allocation. Section A provides a brief legislative and judicial history of the Act in an effort to describe its drafting imperfections. Section B focuses on CERCLA's principal objectives and its

³⁹ See *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 156–57 (D.D.C. 2014) (mem.) (examining the plaintiff's economic benefit to extinguish the defendant's equitable share).

⁴⁰ See Patrick E. Tolan Jr., *Environmental Liability Under Public Law 85-804: Keeping the Ordinary out of Extraordinary Contractual Relief*, 32 PUB. CONT. L.J. 215, 230 (2003) (noting CERCLA's objectives of expeditious cleanup and polluter pays).

⁴¹ *Id.*; Kenneth Kilbert, *Goodbye to Joint and Several Liability in CERCLA Actions*, AM. B. ASS'N (Sept. 10, 2012), <http://apps.americanbar.org/litigation/committees/environmental/email/summer2012/summer2012-0912-good-bye-joint-several-liability-private-cercla-actions.html> (noting that district courts disagreed about whether PRPs could recover under § 113 for nearly twenty years).

recovery provisions. Section C details how courts have determined the relevant equitable factors to apportion liability when allocating hazardous waste cleanup costs. CERCLA's liability scheme allows plaintiffs to recover from other responsible parties but gives courts broad discretion to diminish or even extinguish that recovery.⁴²

A. A Brief Legislative and Judicial History

Congress enacted CERCLA in 1980 to address the growing number of abandoned hazardous waste sites throughout the country.⁴³ These sites posed serious health and environmental risks since many of the 20,000 estimated areas involved contaminated groundwater.⁴⁴ CERCLA, also known as the "Superfund Law," offered ways and means to begin a much-needed cleanup of leaky landfills and toxic dumping sites.⁴⁵ The Act, which authorized the cleanup of pollutants, contaminants, and hazardous substances, boasted an initial \$1.6 billion fund with an additional \$17 billion provided in 1987, which certainly justified the impressive title "Superfund."⁴⁶

Critics of the Superfund, however, label the Act a misnomer.⁴⁷ Litigation surrounding CERCLA has been anything but "super" because of the complexity and ambiguity of the legislation.⁴⁸ Its passage rested on fragile support, which resulted in a hurried and imperfect draft.⁴⁹ Although CERCLA was enacted almost thirty-five years ago, courts have taken a considerable amount of time to develop a basic understanding of the statute.⁵⁰ "Continuing

⁴² See *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 529 (N.D.N.Y. 2011), *aff'd in part, vacated in part*, 766 F.3d 212 (2d Cir. 2014); see also *Lockheed*, 35 F. Supp. 3d at 162.

⁴³ 3 GRAD, *supra* note 23, § 4A.02(1)(a).

⁴⁴ *Id.*

⁴⁵ Tolan, *supra* note 40, at 230.

⁴⁶ 3 GRAD, *supra* note 23, § 4A.02(1)(a).

⁴⁷ See Timothy B. Wheeler, *Toxic Waste Cleanup Sluggish: Critics See Overhaul of 'Superfund' Law as Expensive, Inefficient*, BALT. SUN (May 19, 1996), http://articles.baltimoresun.com/1996-05-19/news/1996140003_1_uperfund-law-toxic-waste-federal-superfund-program (describing the law as "completely broken"); see also Jane Shaw & Richard Stroup, *Superfund: The Shortcut that Failed*, PROP. & ENV'T RES. CTR. (May 1996), <http://perc.org/articles/superfund-1> (quoting President Clinton, who said that "Superfund has been a disaster").

⁴⁸ 3 GRAD, *supra* note 23, § 4A.02(1)(a).

⁴⁹ *Id.* "CERCLA . . . was hastily enacted on the eve of the lame-duck session of the 96th Congressional term." *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 88 (2d Cir. 2009).

⁵⁰ John R. Jacus & Dean C. Miller, *Coming Full CERCLA: An Update on Superfund Developments*, ENVTL. LIABILITY (June 1999), <http://www.dgslaw.com/images/materials/291564.pdf>.

controversy over CERCLA's "draconian liability scheme" and complex judicial proceedings have led to costly litigation and confused courts.⁵¹

B. Principal Objectives and Recovery Provisions

CERCLA's "inartful drafting" is most evident in the ambiguous language of the Act, and with little legislative history to aid courts in gleaned Congressional intent, the judiciary has been "mystified" by "many of the controlling provisions."⁵² CERCLA is a remedial statute; it digs into the past to determine who is responsible for hazardous waste at contaminated sites.⁵³ Courts have construed the Act liberally in order to give effect to its principal objectives: the primary purpose is expeditious cleanup, and the secondary objective is making responsible parties pay the cost.⁵⁴ This logic is sound, and the concept is simple, but CERCLA's application has been confounding.⁵⁵ One of the primary points of confusion has been recovery under the Act.⁵⁶ CERCLA imposes strict liability on potentially responsible parties (PRPs);⁵⁷ PRPs may include hazardous waste arrangers or transporters,⁵⁸ present site owners, or owners and operators at the time of the hazardous disposal.⁵⁹ Those who have incurred hazardous waste site cleanup expenses, also known as

⁵¹ *Id.*

⁵² *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 486 (N.D.N.Y. 2011), *aff'd in part, vacated in part*, 766 F.3d 212 (2d Cir. 2014).

⁵³ *Id.* at 486–87 (quoting *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 130 (2d Cir. 2010)).

⁵⁴ Tolan, *supra* note 40, at 230; *see also N.Y. State Elec. & Gas Corp.*, 808 F. Supp. 2d at 486; Fogleman, *supra* note 22, at 1. CERCLA assures "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." *Adobe Lumber, Inc. v. Hellman*, 658 F. Supp. 2d 1188, 1198 (E.D. Cal. 2009) (quoting S. REP. NO. 96-848, at 13 (1980)).

⁵⁵ Tolan, *supra* note 40, at 230. In the first twenty years, there was considerable litigation over whether potentially responsible parties (PRPs) could bring recovery actions under § 107, which provides for joint and several liability, or § 113, which only saddles defendants with their equitable share of cleanup costs. Kilbert, *supra* note 41. District courts were split in their interpretation of the two provisions until the appellate courts unanimously determined that PRPs could only sue under § 113. *Id.* The controversy continued, however, when the Supreme Court allowed a PRP who had incurred cleanup costs to sue under § 107. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 134 (2007).

⁵⁶ *See N.Y. State Elec. & Gas Corp.*, 808 F. Supp. 2d at 487 (describing the courts' reconciliation of recovery provisions as a "tortured path").

⁵⁷ *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 240 (D. Conn. 2012). "[T]he traditional tort concept of causation plays little or no role in the liability scheme." *Id.* (quoting *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993)).

⁵⁸ Tolan, *supra* note 40, at 231.

⁵⁹ *N.Y. State Elec. & Gas Corp.*, 808 F. Supp. 2d at 487.

response costs,⁶⁰ can recover under §§ 107(a) or 113(f).⁶¹ Section 107(a) allows those who have incurred necessary costs to seek reimbursement from a PRP, while § 113(f)(1) allows a PRP to recover contribution from a defendant PRP.⁶² Thus, a party sued for cost recovery under § 107(a) may counterclaim for contribution from another PRP under § 113(f)(1).⁶³ The crucial difference between the two recovery provisions rests in the allocation of liability: § 107(a) provides for joint and several liability among PRPs while § 113(f) allows a presiding court to “allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”⁶⁴ A defendant in a § 113 claim is not subject to joint and several liability, and is only liable for an equitable share of the cleanup costs determined by the presiding court.⁶⁵ For example, a potentially responsible owner of a contaminated site who remediates that site may then sue for contribution from a former site owner under § 113(f).⁶⁶ The presiding court would then determine the concerned parties’ equitable share of costs for the cleanup.⁶⁷

C. Response Cost Allocation: Equitable Factors and Liability Apportionment

Section 113(f) provides no insightful details as to *which* equitable factors should be considered or *how* liability should be apportioned.⁶⁸ Because liability is not joint and several under § 113(f)—but merely several—plaintiffs bear the burden to prove each defendant PRP’s liability and equitable share of the

⁶⁰ *Id.* at 519–20. “[T]he term ‘response costs’ is subject to liberal construction” and usually covers any actions taken to clean up, monitor, assess, remedy or prevent the release of hazardous substances. *Id.*

⁶¹ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 107(a), 94 Stat. 2781 (codified as amended at 42 U.S.C. § 9607(a) (2012)); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 113(f), 100 Stat. 1647–48 (codified at 42 U.S.C. § 9613(f)(1) (2012)).

⁶² *N.Y. State Elec. & Gas Corp.*, 808 F. Supp. 2d at 489.

⁶³ *Id.* at 487. CERCLA recovery actions may be analyzed under traditional game theory principles. Under such an analysis, plaintiff PRPs seeking contribution from defendant PRPs must act in such a way as to maximize their wins. See Mary A. Taft, *Modeling Superfund: A Hazardous Waste Bargaining Model with Rational Threats* 16–36, 50–56 (Sept. 2000) (unpublished Ph.D. dissertation, University of Massachusetts, Amherst), *microformed on* UMI Microform 9988845 (Bell & Howell Info. & Learning Co.) (presenting a settlement and negotiations model for the EPA and responsible parties based on game theory principles).

⁶⁴ *N.Y. State Elec. & Gas Corp.*, 808 F. Supp. 2d at 489.

⁶⁵ Kilbert, *supra* note 41.

⁶⁶ See *N.Y. State Elec. & Gas Corp.*, 808 F. Supp. 2d at 489.

⁶⁷ *Id.*

⁶⁸ Steven Ferrey, *Inverting the Law: Superfund Hazardous Substance Liability and Supreme Court Reversal of All Federal Circuits*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 633, 640 (2009). “Once liability has been established, the question is how to allocate that liability.” *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 241 (D. Conn. 2012).

cleanup costs.⁶⁹ Such a plaintiff cannot shift his own liability; he retains the costs of his equitable share of the cleanup, plus the share of any defendant PRP against whom the plaintiff cannot sustain his burden.⁷⁰ This liability scheme has resulted in drastically different outcomes for PRPs caught in CERCLA litigation.⁷¹

Another cause of disparate litigation outcomes is the range of equitable factors courts use to apportion liability.⁷² The expansive language of CERCLA § 113(f)(1) has afforded the judiciary broad discretion.⁷³ Federal courts often use three sets of factors to allocate liability in CERCLA cases: the Gore factors, the Torres factors, and a nebulous grouping of “other” equitable factors.⁷⁴ A presiding court may choose to consider several of these factors, a few factors, or just one determining factor, depending on the circumstances of the case.⁷⁵

The Gore Factors, named after then-Representative Al Gore’s unsuccessful amendment to CERCLA, focus on the amount and toxicity of the hazardous

⁶⁹ Ferrey, *supra* note 68, at 641.

⁷⁰ *Id.*

⁷¹ *Id.* PRPs are often unable to predict outcomes of litigation due to a court’s broad discretion in applying equitable allocation factors. See Daniel Riesel & Ashley S. Miller, *Cleanup & Liability: Fundamental Issues in Private Party Hazardous Materials Litigation*, SR045 ALI-ABA 841, 855 (2010). For example, courts may focus on highly technical Gore factors like waste volume, toxicity and hazardous mobility. *Id.* at 911–12. However, a court’s addition of a non-technical factor, such as cooperation with the government, would significantly increase a site owner’s response costs. See *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1504 (6th Cir. 1989) (holding that the site owner’s lack of cooperation with the EPA increased his share of response costs). By contrast, the court in *Allied Signal, Inc. v. Amcast International Corp.* ignored the Gore factor of cooperation with the government in determining allocation costs even though the site owner had been deficient in its waste analysis. 177 F. Supp. 2d 713, 754 (S.D. Ohio 2001).

⁷² Fogleman, *supra* note 22, at 153 (noting that courts may consider “any factor they deem to be in the interest of justice”); see also *N.Y. State Elec. & Gas Corp.*, 808 F. Supp. 2d at 529 (explaining that the expansive powers vested in the courts to allocate costs have resulted in differing approaches to the equitable distribution of remedial costs), *aff’d in part, vacated in part*, 766 F.3d 212 (2d Cir. 2014). The majority of federal courts agree that parties have no right to a jury trial in a § 113(f) contribution action because allocation is equitable in nature. *E.g.*, *CPI Plastics, Inc. v. USX Corp.*, 22 F. Supp. 2d 1373, 1376–77 (N.D. Ga. 1995); see also *Consol. City of Indianapolis v. Union Carbide Corp.*, No. 1:02-CV-1340, 2003 U.S. Dist. LEXIS 18180, at *6 (S.D. Ind. Oct. 8, 2003).

⁷³ See 42 U.S.C. § 9613(f)(1) (2012). A reviewing court may “allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” *Id.*; see *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 122 (D.D.C. 2014) (mem.) (noting that courts have universally held that CERCLA grants courts a significant amount of discretion in allocating liability); *N.Y. State Elec. & Gas Corp.*, 808 F. Supp. 2d at 529.

⁷⁴ *Lockheed*, 35 F. Supp. 3d at 123 (“Given the broad discretion granted in CERCLA § 113(f)(1), courts also look beyond the Gore and Torres factors when equitably allocating response costs.”).

⁷⁵ *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 247 (D. Conn. 2012).

waste and the degree of involvement and care of the parties.⁷⁶ The Torres Factors include a party's responsibility and culpability, the degree to which a party benefited from the hazardous waste disposal, and the parties' abilities to pay.⁷⁷ Other factors may include the acquiescence of the parties in the contamination,⁷⁸ the value of the contamination-causing activities to the government's national security efforts,⁷⁹ the existence of an indemnification agreement,⁸⁰ the financial benefit a party may gain from site remediation,⁸¹ the potential that a plaintiff might make a profit on the contamination,⁸² and the principle that PRPs, not taxpayers, should bear the cleanup costs.⁸³

The discretionary approach to cost allocation among PRPs forestalls predictable outcomes for litigants and provides district courts with the means to disallow full recovery.⁸⁴ Because a PRP who has incurred response costs may not be able to fully recover those costs in a contribution action, there is little incentive to undertake cleanup and risk financial loss.⁸⁵ Creating economic, market-based incentives for contribution plaintiffs, like the incentives in the "cap and trade" approach,⁸⁶ will motivate corporate PRPs to assume cleanup while still advancing the policies of environmentalism underlying CERCLA.⁸⁷

⁷⁶ *Lockheed*, 35 F. Supp. 3d at 123.

⁷⁷ *Id.*

⁷⁸ *Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420, 1426 (D. Md. 1991).

⁷⁹ *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 299 F.3d 1019, 1029 (9th Cir. 2002).

⁸⁰ *See Halliburton Energy Servs. Inc. v. NL Indus.*, 648 F. Supp. 2d 840, 877, 884 (S.D. Tex. 2009).

⁸¹ *Litgo N.J., Inc. v. Martin*, No. 06-2891, 2011 WL 65933, at *9 (D.N.J. Jan. 7, 2011), *aff'd in part, vacated in part sub nom. Litgo N.J., Inc. v. Comm'r N.J. Dep't of Env'tl. Prot.*, 725 F.3d 369 (3d Cir. 2013).

⁸² *Vine St., LLC v. Keeling ex rel. Estate of Keeling*, 460 F. Supp. 2d 728, 765 (E.D. Tex. 2006).

⁸³ *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 256 (D. Conn. 2012).

⁸⁴ *Riesel & Miller*, *supra* note 71, at 855.

⁸⁵ *Seley & Fletcher*, *supra* note 25, at 1286.

⁸⁶ The cap sets a minimum level of allowable pollution and punishes corporations that exceed that level. Companies may trade, buy, or sell allowances on the market. The same pollution cuts are achieved, and companies who make more cuts can make a profit by selling their unused allowances. *How Cap and Trade Works*, ENVTL. DEF. FUND, <http://www.edf.org/climate/how-cap-and-trade-works> (last visited Feb. 10, 2015).

⁸⁷ "If we can make conservation profitable, people will find ways to make it happen." *Economics: Making it Profitable to Protect Nature*, ENVTL. DEF. FUND, <http://www.edf.org/approach/markets> (last visited Mar. 4, 2016).

II. A NEW ISSUE IN ALLOCATING RESPONSE COSTS: DOUBLE RECOVERY

One controversial and evolving factor among the “other” factors has been the issue of double recovery.⁸⁸ The Act’s double recovery provision expressly prohibits parties from recovering costs due to claims arising from hazardous sites under CERCLA and “recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law.”⁸⁹ This provision seems to disallow recovery only for the same damages under both CERCLA and other laws, but federal courts have interpreted the Act to prohibit all forms of double recovery.⁹⁰ This broad interpretation has prevented plaintiff PRPs from obtaining response costs through contribution from other liable parties, which thwarts CERCLA’s purpose of promoting voluntary corporate cleanup.⁹¹ Part II of this Comment considers how federal courts have expanded CERCLA’s double recovery provision, which has discouraged responsible parties from undertaking cleanup and allowed defendants to escape liability.⁹² Section A discusses courts’ disinclination to apply the collateral source rule to CERCLA recovery actions. Section B presents a case-by-case analysis examining the judicial expansion of the double recovery defense.

A. *The Collateral Source Rule and CERCLA*

In accordance with the language of the double recovery provision,⁹³ CERCLA preempts state-law remedies of indemnification and restitution in contribution claims.⁹⁴ A plaintiff cannot recover the same damages under state law and also under CERCLA, which comports with the plain meaning of § 9614(b).⁹⁵ However, federal courts have expanded this plain meaning by interpreting the double recovery provision to prohibit the application of the

⁸⁸ See *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 154 (D.D.C. 2014) (mem.) (discussing the judicial history of CERCLA double recovery).

⁸⁹ 42 U.S.C. § 9614(b) (2012).

⁹⁰ *Lockheed*, 35 F. Supp. 3d at 154 (discussing how courts have developed a broader equitable double recovery theory based on the principle that a PRP cannot recover more than it paid in response costs).

⁹¹ *Seley & Fletcher*, *supra* note 25, at 1284.

⁹² *Id.* at 1284–86.

⁹³ See 42 U.S.C. § 9614(b) (disallowing recovery for the same damages under other law).

⁹⁴ *Price v. U.S. Navy*, 39 F.3d 1011, 1014 (9th Cir. 1994); *Raytheon Aircraft Co. v. United States*, No. 05-2328-JWL, 2007 WL 4300221, at *2 (D. Kan. Dec. 8, 2007). CERCLA prohibits a party from “receiving the same recovery under both CERCLA and a comparable state statute—an interpretation that is supported by a litany of cases.” *Id.*; *New York v. Hickey’s Carting, Inc.*, 380 F. Supp. 2d 108, 112 (E.D.N.Y. 2005).

⁹⁵ 42 U.S.C. § 9614(b).

collateral source rule in contribution actions.⁹⁶ Every federal court that has considered the question has held that the collateral source rule is inapplicable to CERCLA contribution claims, despite the efforts of numerous PRPs in litigation.⁹⁷ By labeling collateral source payments such as insurance assets and settlements as forms of double recovery, courts discourage plaintiff PRPs from undertaking costly hazardous waste cleanup and encourage protracted litigation.⁹⁸ This Comment argues that federal courts should allow this traditional tort doctrine in CERCLA contribution actions to encourage PRPs to assume cleanup costs.

The collateral source rule is derived from the common law and rooted in tort actions.⁹⁹ The rule provides that payments made to, or benefits conferred on, an injured party from other sources are not credited towards the tortfeasor's liability, even if those payments cover all of the harm for which the tortfeasor is liable.¹⁰⁰ Under the collateral source rule, a plaintiff may recover more than the damages he has suffered.¹⁰¹ This principle of double recovery provides that compensation or indemnity from a collateral source would not diminish the damages recoverable from the tortfeasor.¹⁰² Courts applying the collateral source rule refuse to reduce compensation simply because the plaintiff has recovered from a collateral source even if it results in the plaintiff recovering twice for a single loss.¹⁰³ The rule often applies in tort cases when a plaintiff has been compensated by unemployment compensation, social security disability payments, or the plaintiff's insurance.¹⁰⁴ For example, if a plaintiff recovered from his insurance assets, he may still recover from a defendant tortfeasor for the same injury under the collateral source rule.¹⁰⁵

The purpose of the collateral source rule in tort suits is to prevent a wrongdoing defendant from receiving credit for another source's compensation of an injured party.¹⁰⁶ Such a credit to the defendant would reduce the amount payable to the plaintiff.¹⁰⁷ Courts have reasoned that where one party would

⁹⁶ *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 255 (D. Conn. 2012).

⁹⁷ *Id.*

⁹⁸ *Seley & Fletcher*, *supra* note 25, at 1283.

⁹⁹ *Friedland v. TIC-The Indus. Co.*, 566 F.3d 1203, 1205–06 (10th Cir. 2009).

¹⁰⁰ RESTATEMENT (SECOND) OF TORTS § 920A(2) (AM. LAW INST. 1979).

¹⁰¹ *Id.*

¹⁰² *Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1074 (Colo. 1992) (en banc).

¹⁰³ *Id.*

¹⁰⁴ *Friedland*, 566 F.3d at 1206.

¹⁰⁵ *See id.*

¹⁰⁶ *Van Waters & Rogers, Inc.*, 840 P.2d at 1074.

¹⁰⁷ *Id.*

receive a windfall, the benefit of a double recovery for a plaintiff is preferable to reduced liability for a tortfeasor.¹⁰⁸ Application of the collateral source rule reflects the public policy that wrongdoers must pay, which enforces an idea of responsibility and prevention.¹⁰⁹

Every federal court that has examined the issue has declined to apply the collateral source rule to CERCLA actions.¹¹⁰ The Tenth Circuit reasoned that the common law collateral source rule does not apply because the Act itself clarifies that claims for contribution “shall be governed by federal law.”¹¹¹ The court also rejected the purpose of the collateral source rule: the idea that it is preferable for a plaintiff to receive a windfall than for a tortfeasor to escape liability. The Tenth Circuit concluded that there is no innocent party in a CERCLA contribution claim; all parties are culpable tortfeasors.¹¹² Federal courts have determined that the public policy of bestowing a windfall upon an innocent, injured party is simply inapplicable in CERCLA actions because there is no injured party.¹¹³ The environment is the only injured party for CERCLA’s purposes.¹¹⁴

Because the judiciary has determined that the collateral source rule does not apply in CERCLA cases, plaintiffs can only receive reimbursement for cleanup costs expended beyond their allocated share of responsibility.¹¹⁵ Federal courts have placed too much emphasis on preventing windfalls to plaintiffs seeking contribution for cleanup.¹¹⁶ The judiciary’s refusal to invoke the collateral source rule in CERCLA cases discourages voluntary cleanup and produces protracted, costly litigation.¹¹⁷ This Comment proposes that courts should allow plaintiffs to recover from collateral sources as well as from other responsible parties as a means of providing a financial incentive to undertake the initial and necessary costs of hazardous site cleanup.¹¹⁸ Assigning a

¹⁰⁸ *Id.*; see also *Gypsum Carrier Inc. v. Handelsman*, 307 F.2d 525, 534–35 (9th Cir. 1962) (holding that collateral source funds are for the benefit of the injured party, not for the party who injures him).

¹⁰⁹ *Green v. Denver & Rio Grande W. R.R.*, 59 F.3d 1029, 1032 (10th Cir. 1995); see, e.g., *Windsor Sch. Dist. v. State*, 956 A.2d 528, 542–43 (Vt. 2008).

¹¹⁰ *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 255 (D. Conn. 2012).

¹¹¹ 42 U.S.C. § 9613(f)(1) (2012); *Friedland v. TIC-The Indus. Co.*, 566 F.3d 1203, 1206 (10th Cir. 2009).

¹¹² *Friedland*, 566 F.3d at 1206–07.

¹¹³ *Id.* at 1206; *Yankee Gas Servs.*, 852 F. Supp. 2d at 255.

¹¹⁴ *Yankee Gas Servs.*, 852 F. Supp. 2d at 255.

¹¹⁵ *Basic Mgmt. Inc. v. United States*, 569 F. Supp. 2d 1106, 1124 (D. Nev. 2008).

¹¹⁶ See generally *Seley & Fletcher*, *supra* note 25 (proposing that courts should not consider double recovery as an equitable factor in CERCLA cases).

¹¹⁷ *Id.* at 1283.

¹¹⁸ *Id.* at 1282, 1286.

property right to remediation and allowing a contribution plaintiff increased recovery through collateral sources will lead to the optimal solution of expedited cleanup.¹¹⁹

B. The Expansion of the Double Recovery Defense: A Case-by-Case Analysis

This section investigates the history of CERCLA double recovery cases and the expansion of the double recovery defense. First, it discusses settlements with other PRPs as a form of double recovery. Second, it details the expansion of double recovery to prohibit plaintiffs from recovering cleanup costs from their insurance assets. Third, this section addresses how courts have considered a plaintiff's economic benefit from increases in property value to similarly prevent plaintiff recovery and allow defendant sidestepping. Finally, it focuses on the federal courts' surprising narrowing of double recovery expansion in the rate recovery cases.

1. Settlement: A Traditional Area of CERCLA Double Recovery Dispute

The traditional areas of double recovery dispute in CERCLA actions include collateral recovery under state or federal law¹²⁰ and recovery from settlements with other PRPs.¹²¹ The federal courts have concurred in proscribing litigating parties from recovering cleanup costs that had been previously recovered through settlements with other PRPs.¹²² CERCLA § 9613(f)(2) provides that a judicially approved government settlement “does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.”¹²³ This ban prevented plaintiff PRPs from recovering response

¹¹⁹ See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (theorizing that assigning property rights leads to an optimal solution, regardless of who receives those rights); *How Cap and Trade Works*, *supra* note 86. For example, the cap and trade approach assigns a property right to pollution allowances. Companies who do not use their allowances may sell them freely on the market to companies who need additional allowances. In accordance with Professor Coase's theory, cap and trade has achieved an optimal solution by reducing the negative environmental impact.

¹²⁰ See *Price v. U.S. Navy*, 39 F.3d 1011, 1014 (9th Cir. 1994) (noting that CERCLA's double recovery provision prohibits collateral recovery under state or federal law).

¹²¹ *Seley & Fletcher*, *supra* note 25, at 1282.

¹²² *United States v. Davis*, 31 F. Supp. 2d 45, 69 (D.R.I. 1998) (noting that settlements must be considered under CERCLA § 113(f)(1) to prevent double recovery), *aff'd*, 261 F.3d 1 (1st Cir. 2001); *Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1140 (D. Or. 1996) (determining, without reason, that settlements must be considered as an equitable factor in the allocation of response costs under CERCLA § 113(f)), *aff'd in part*, 207 F.3d 1177 (9th Cir. 2000).

¹²³ 42 U.S.C. § 9613(f)(2) (2012).

costs through settlements with other PRPs, and then recovering those same costs from another defendant PRP in a CERCLA contribution claim.¹²⁴ Section 9613(f)(2) only applies to settlements with the government; however, the Eighth Circuit broadened this prohibition to govern all CERCLA settlements in contribution actions.¹²⁵ The court determined that § 9613(f)(2) should be considered as an equitable factor in apportioning response costs in accordance with CERCLA's policy against double recovery.¹²⁶ The Eighth Circuit broadened § 9613(f)(2) to apply not only to government settlements, but also settlements between private parties in CERCLA contribution suits, and expanded double recovery under the Act.¹²⁷ A majority of federal courts have followed the Eighth Circuit, consistently holding that settlements with other liable parties in fact fall under CERCLA's double recovery prohibition.¹²⁸

Several district courts, however, have adopted a flexible methodology by applying a proportionate share approach to allocating settlements.¹²⁹ This proportionate share approach reduces a defendant PRP's liability by the equitable share of liability of the settling parties.¹³⁰ It makes no difference that parties may have settled for more than their equitable share.¹³¹ Therefore, a plaintiff may reap a windfall from a settlement with a defendant for more than a defendant's equitable share because the liability of the remaining defendants will only be reduced by the share amount, not the actual settlement amount.¹³² The proportionate share approach represents a more flexible attitude toward

¹²⁴ K.C. 1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009, 1017–18 (8th Cir. 2007).

¹²⁵ See *id.* at 1017 (“By failing to consider the effect of the settlements as required by CERCLA, the district court failed to consider a relevant factor that should have been given significant weight.”).

¹²⁶ *Id.*

¹²⁷ See *id.* at 1017–18 (“Although § 9613(f)(2) governs only the effect of settlements with the government, not private parties, . . . CERCLA plainly requires that the district court take these settlements [between private parties] into its equitable consideration in the allocation process.”).

¹²⁸ *Id.* at 1018; e.g., Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1189 (9th Cir. 2000); Raytheon Aircraft Co. v. United States, No. 05-2328, 2007 WL 4300221, at *3 (D. Kan. Dec. 8, 2007); Vine St., LLC v. Keeling, 460 F. Supp. 2d 728, 765 (E.D. Tex. 2006), *rev'd on other grounds sub nom.* Vine St. LLC v. Borg Warner Corp., 2015 U.S. App. LEXIS 581 (5th Cir. Jan. 14, 2015); United States v. Davis, 31 F. Supp. 2d 45, 64 (D.R.I. 1998), *aff'd*, 261 F.3d 1 (1st Cir. 2001).

¹²⁹ Seley & Fletcher, *supra* note 25, at 1285; see also Adobe Lumber, Inc. v. Hellman, No. 05-1510, 2009 U.S. Dist. LEXIS 10569, at *23 (E.D. Cal. Feb. 3, 2009) (holding that a proportionate share approach would be more equitable than a pro tanto method); Pneumo Abex Corp. v. Bessemer & Lake Erie R.R., 936 F. Supp. 1274, 1279 (E.D. Va. 1996) (approving a proportionate share settlement); Am. Cyanamid Co. v. King Indus., Inc., 814 F. Supp. 215, 218 (D.R.I. 1993) (applying a proportionate share).

¹³⁰ Seley & Fletcher, *supra* note 25, at 1285.

¹³¹ *Id.*

¹³² *American Cyanamid*, 814 F. Supp. at 218; Seley & Fletcher, *supra* note 25, at 1285.

plaintiff profiteering.¹³³ Federal courts should broaden this flexible attitude to allow plaintiffs to recover from non-government PRPs without regard to former settlements with other responsible parties. Such an approach would create financial incentives for parties who shoulder the burden of the initial cleanup.

2. *Judicial Expansion of Double Recovery to Encompass Insurance*

The traditional areas of double recovery dispute—recovery under a comparable state or federal law and recovery through prior settlements with other PRPs¹³⁴—have been expanded to include insurance claims.¹³⁵ The majority view is that plaintiffs may not recover from both an insurance asset and another PRP in a contribution action.¹³⁶ The first case to consider the effect of insurance on CERCLA's double recovery provision was *Vine Street, LLC v. Keeling*.¹³⁷ In *Vine Street*, prior site owners paid their insurance proceeds to the plaintiff in order to finance cleanup costs while the CERCLA action was pending.¹³⁸ The district court permitted the insurance proceeds to offset the defendant's liability.¹³⁹ The court cited CERCLA § 113(f)(2) to assert that a non-settling PRP's liability for response costs is reduced by the dollar amount of previous settlements with the government,¹⁴⁰ and thus expanded this concept to include all settlements between all parties.¹⁴¹ The court further reasoned that insurance proceeds combined with CERCLA contributions from other liable PRPs would allow plaintiffs like *Vine Street* to make a profit on the contamination, which would be impermissible under

¹³³ Seley & Fletcher, *supra* note 25, at 1284–85.

¹³⁴ See *supra* notes 128–29 and accompanying text.

¹³⁵ Seley & Fletcher, *supra* note 25, at 1284–85.

¹³⁶ *Id.* Courts considering insurance payments in CERCLA cases have largely ignored plaintiffs' arguments for application of the collateral source rule. *Id.* at 1285; see *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 526 (N.D.N.Y. 2011), *aff'd in part, vacated in part*, 766 F.3d 212 (2d Cir. 2014); *Basic Mgmt. Inc. v. United States*, 569 F. Supp. 2d 1106, 1125 (D. Nev. 2008).

¹³⁷ Seley & Fletcher, *supra* note 25, at 1283. See generally *Vine St., LLC v. Keeling ex rel. Estate of Keeling*, 460 F. Supp. 2d 728 (E.D. Tex. 2006) (holding that insurance proceeds for hazardous cleanup must be considered when allocating equitable response costs under CERCLA), *rev'd on other grounds sub nom. Vine St. LLC v. Borg Warner Corp.*, 776 F.3d 312 (5th Cir. 2015).

¹³⁸ *Vine St., LLC*, 460 F. Supp. 2d at 762. The former site owners' insurance agreed to pay for past, present, and future costs incurred for remedial investigation, cleanup costs, and response costs up to the policy limit; the owners then reimbursed *Vine Street* with the insurance proceeds. *Id.*

¹³⁹ *Id.* at 762–66.

¹⁴⁰ *Id.* at 755–56. Because there had been no previous cases involving double recovery from insurance proceeds, the court looked to cases addressing the issue of double recovery generally for guidance. *Id.* at 764–66.

¹⁴¹ Seley & Fletcher, *supra* note 25, at 1282.

CERCLA.¹⁴² Although *Vine Street* argued that the collateral source doctrine should apply, the court rejected application of the tort rule and found that courts may consider any double recovery as an equitable factor.¹⁴³

After *Vine Street*, a series of courts addressed the insurance double recovery issue, with a host of defendant PRPs claiming that insurance proceeds reduced or extinguished a plaintiff's CERCLA contribution claim.¹⁴⁴ In a subsequent insurance case, *Basic Management v. United States*, the Nevada District Court found that an insurance payment does not shift liability to the insurance company and absolve a plaintiff's liability.¹⁴⁵ The plaintiffs in *Basic Management* had recovered most of their response costs from insurance payouts, but still sought recovery from the government.¹⁴⁶ The district court reasoned that a plaintiff must have "incurred" costs, not just liability, to receive contribution in a CERCLA claim, and found that the specific costs were actually incurred by the insurance company, not the plaintiff.¹⁴⁷ The court rejected the plaintiffs' argument that they should not be precluded from receiving contribution because they had the foresight to purchase insurance.¹⁴⁸ Again, the court declined to apply the collateral source rule, and, relying largely on *Vine Street*, held that the plaintiffs could not recover remediation costs paid for by their insurance policy.¹⁴⁹

After *Basic Management*, the Tenth Circuit weighed in on the debate about insurance recovery in *Friedland v. TIC-The Industrial Co.*¹⁵⁰ The court followed the lead of *Vine Street* and *Basic Management*, again refusing to apply the collateral source rule in the context of insurance.¹⁵¹ The Tenth Circuit, however, noted in dicta that in determining equitable response costs, "[w]hat matters is that the contribution plaintiff has recovered some or all of its

¹⁴² *Vine St., LLC*, 460 F. Supp. 2d at 765. "This is consistent with the fact that private CERCLA claimants cannot recover damages resulting from contamination, but can only be reimbursed for some or all of their incurred response costs." *Id.*

¹⁴³ *Id.*

¹⁴⁴ Seley & Fletcher, *supra* note 25, at 1282–84; see also *Friedland v. TIC-The Indus. Co.*, 566 F.3d 1203, 1208 n.4 (10th Cir. 2009); *Basic Mgmt. Inc. v. United States*, 569 F. Supp. 2d 1106, 1119–20 (D. Nev. 2008).

¹⁴⁵ 569 F. Supp. 2d at 1120.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* The term "incurred" should "include the requirement that a Responsible Party has or will actually incur the specific cost for which it seeks contribution. Otherwise, they are only obtaining a contribution windfall for a cost which they will never incur or have to pay." *Id.*

¹⁴⁸ *Id.* at 1123–25.

¹⁴⁹ *Id.* at 1125.

¹⁵⁰ 566 F.3d 1203, 1207 (10th Cir. 2009).

¹⁵¹ *Id.* at 1207–09. The facts in this case were "indistinguishable" from the facts of *Basic Management*. *Id.* at 1207.

response costs; the identity of the entity providing the recovery is irrelevant.”¹⁵² Ultimately, the court expanded CERCLA’s double recovery provision to apply to recovery outside of the scope of insurance payouts, and the court determined that *any* prior recovery for cleanup costs may eliminate a plaintiff PRP’s right to CERCLA recovery.¹⁵³

Vine Street, Basic Management, and Friedland collectively represent the expansive majority interpretation of CERCLA’s double recovery provision.¹⁵⁴ This view lacks foundation in the statutory language and obstructs CERCLA’s objective of expeditious cleanup.¹⁵⁵ Preventing plaintiffs’ recovery from both insurance payouts and other PRPs discourages responsible parties from undertaking the outrageous cleanup costs and allows defendant PRPs to skirt liability.¹⁵⁶

3. *Judicial Expansion of Double Recovery to Encompass Property Value*

Although not specifically classified as a double recovery issue, the financial benefit that a PRP may gain from remediation of a site may be considered as an equitable factor in allocating response costs.¹⁵⁷ Because CERCLA affords courts broad discretion to allocate response costs,¹⁵⁸ the judiciary may reduce or increase response costs based on an analysis of whether the parties paid a reduced price for the property and if the remediation of the land will increase its value beyond expected appreciation.¹⁵⁹ Thus, courts may consider the economic benefit to the plaintiff in allocating costs.¹⁶⁰

¹⁵² *Id.* at 1208 n.4.

¹⁵³ *Seley & Fletcher, supra* note 25, at 1284.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1286. In 2009, the average cost of remediating a site with unacceptable human exposure was around three million dollars. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 37, at 17. Insurance companies have broadened their insurance products to consider environmental risk. Michael L. Stokes, *Valuing Contaminated Property in Eminent Domain: A Critical Look at Some Recent Developments*, 19 TUL. ENVTL. L.J. 221, 266 (2006). For example, pollution legal liability insurance provides coverage for costs incurred due to remediation of a contaminated site. *Id.*

¹⁵⁷ *Litgo N.J., Inc. v. Martin*, No. 06-2891, 2011 WL 65933, at *9 (D.N.J. Jan. 7, 2011).

¹⁵⁸ *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 122 (D.D.C. 2014) (mem.).

¹⁵⁹ *Hatco Corp v. W.R. Grace & Co.-Conn.*, 836 F. Supp. 1049, 1091 (D.N.J. 1993), *vacated by* 59 F.3d 400 (3d Cir. 1995). Courts allocate a larger portion of response costs to parties that benefit financially from remediation. *City of Wichita v. Trs. of the Apco Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1101–02 (D. Kan. 2003).

¹⁶⁰ *Litgo*, 2011 WL 65933, at *9.

For example, in *Farmland Industries v. Colorado & Eastern Railroad*, the court considered the fact that the contaminated property had increased in value by more than \$600,000 in allocating the PRP owners 85% to 90% of the response costs.¹⁶¹ Likewise, in *Bethlehem Iron Works, Inc. v. Lewis Industries, Inc.*, the court allocated 65% of the response costs to the plaintiff owners, noting that they had purchased the property at a discount and stood to benefit from the increase in value post remediation.¹⁶²

These cases, albeit indirectly, further illustrate the judicial expansion of CERCLA's double recovery prohibition in that plaintiff PRPs are prevented from recovering more than their response costs.¹⁶³ By considering increases in property value due to remediation as an equitable factor, courts preclude plaintiffs from receiving full contribution for fear that plaintiffs will receive a windfall, or double recovery.¹⁶⁴ Just as the judiciary has barred plaintiffs from invoking the collateral source rule in CERCLA cases involving insurance claims, courts have also expanded double recovery to encompass financial benefits derived from property values.¹⁶⁵ This expansion further deters PRPs from initiating cleanup and incentivizes defendants to avoid responsibility.

4. Courts Decline to Expand Double Recovery to Rate Recovery

Although plaintiff PRPs have unsuccessfully contended that insurance payouts and increases in property value do not constitute a windfall to a plaintiff, a majority of federal courts have accepted the argument that rate recovery does not amount to a double recovery under CERCLA.¹⁶⁶ These cases represent a stop to the more expansive view of double recovery taken in the

¹⁶¹ 944 F. Supp. 1492, 1500–01 (D. Colo. 1996). *But see City of Wichita*, 306 F. Supp. 2d at 1101–02 (declining to consider the financial benefit to the non-PRP plaintiff seeking contribution). The court in *City of Wichita* did not consider the plaintiff's sizeable financial benefit because the plaintiff was not a responsible party and had previously suffered financial detriment due to the contamination; the court determined that the benefit was merely a restoration of the status quo. *Id.* at 1102; *see also Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1118, 1181–82 (C.D. Cal. 2003) (holding that rent increases in a mobile home park did not preclude the plaintiff from seeking recovery because the increases were not specifically designed to compensate for response costs), *aff'd*, 433 F.3d 1260 (9th Cir. 2006).

¹⁶² No. 94-0752, 1996 U.S. Dist. LEXIS 14446, at *213–15 (E.D. Pa. Sept. 19, 1996).

¹⁶³ *See id.*; *Farmland*, 944 F. Supp. at 1500–01 (holding that the PRP site owners were responsible for additional remediation costs because the site's value had increased by more than \$600,000 as a result of cleanup).

¹⁶⁴ *See Farmland*, 944 F. Supp. at 1500–01.

¹⁶⁵ *See id.*

¹⁶⁶ *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 254–56 (D. Conn. 2012); *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 528–29 (N.D.N.Y. 2011), *aff'd in part, vacated in part*, 766 F.3d 212 (2d Cir. 2014).

string of cases discussed above.¹⁶⁷ The issue of rate recovery was first explored in 2011 in *N.Y. State Electric & Gas Corp. v. FirstEnergy Corp.*¹⁶⁸ New York State Electric and Gas Corp. (NYSEG) sought CERCLA recovery for response costs from defendant FirstEnergy for coal-tar contamination from 1922 to 1940 around a number of manufactured-gas plants in New York.¹⁶⁹ FirstEnergy argued that in allocating response costs, the court should consider the fact that NYSEG had passed its response costs on to its ratepayers.¹⁷⁰ FirstEnergy contended that because NYSEG had fully recovered its response costs from ratepayers, NYSEG should not receive the benefit of a windfall double recovery by also recovering in a CERCLA contribution action.¹⁷¹ Based on every federal court's prior refusal to apply the collateral source rule, one might imagine that FirstEnergy's argument would prevail.¹⁷² The court, however, distinguished rate recovery from insurance payouts and determined that rate recovery, though a collateral source of reimbursement, did not pose a risk of double recovery.¹⁷³

In holding that rate recovery posed no danger of double recovery, the court relied on its finding that money collected from NYSEG customers in the form of increased rates actually belonged to the ratepayers.¹⁷⁴ NYSEG had placed increased rate payments collected to defray the expense of cleanup in a rate deferral fund.¹⁷⁵ The court assumed that any recovery NYSEG obtained under CERCLA would eventually benefit NYSEG customers in the form of lower rates.¹⁷⁶ Considering NYSEG's rate recovery as an equitable factor in allocating response costs would "work an injustice to NSYEG's customers

¹⁶⁷ See *Friedland v. TIC-The Indus. Co.*, 566 F.3d 1203, 1207 (10th Cir. 2009) (finding that any prior recovery may eliminate the plaintiff's recovery in a contribution action); *Basic Mgmt. Inc. v. United States*, 569 F. Supp. 2d 1106, 1120 (D. Nev. 2008) (concluding that plaintiff was prohibited from recovering remediation costs paid for by the plaintiff's insurance); *Vine St., LLC v. Keeling ex rel. Estate of Keeling*, 460 F. Supp. 2d 728, 765–66 (E.D. Tex. 2006) (declining to apply the collateral source rule to contribution actions involving insurance assets); *Farmland Indus., Inc. v. Colo. & E. R.R.*, 944 F. Supp. 1492, 1500–01 (D. Colo. 1996) (increasing the plaintiff's equitable share because of the financial benefit from remediation); *Bethlehem Iron Works*, 1996 U.S. Dist. LEXIS 14446, at *213–15 (considering the financial benefit to the plaintiff in allocating response costs).

¹⁶⁸ 808 F. Supp. 2d at 528.

¹⁶⁹ *Id.* at 427, 465.

¹⁷⁰ *Id.* at 525.

¹⁷¹ *Id.* at 528.

¹⁷² See *supra* Part II.A.

¹⁷³ *N.Y. State Elec. & Gas Corp.*, 808 F. Supp. 2d at 528–29.

¹⁷⁴ *Id.* at 529.

¹⁷⁵ *Id.* The court found that the rate increases represented payments "over and above payments for actual products and services received." *Id.*

¹⁷⁶ *Id.*

who would be required to bear a higher proportion of liability merely because they were subject to the higher rates required to fund the rate deferral plan in the past.¹⁷⁷ The court rejected FirstEnergy's argument and declined to consider NYSEG's recovery from increased rates as an equitable allocation factor.¹⁷⁸

Similarly, in *Yankee Gas Services Co. v. UGI Utilities Inc.*, defendant UGI argued that \$2,216,000 per year in rate recovery should be considered by the presiding court to reduce UGI's CERCLA liability costs.¹⁷⁹ However, Yankee Gas Services argued that the rate recovery monies should be subject to the collateral source rule.¹⁸⁰ Relying on the court's determination in *N.Y. State Electric & Gas Corp.* that the risk of double recovery in rate recovery cases is dissimilar from the insurance context, the court allowed Yankee Gas to recover from both the collateral source and UGI.¹⁸¹ The court reasoned that money recovered from UGI would allow the Connecticut Department of Public Utility Control to reduce the amount it permitted Yankee Gas to collect from utility customers.¹⁸² Thus, the ratepayer, not Yankee Gas, would receive the windfall.¹⁸³ The court held that this resolution furthered CERCLA's objective that responsible parties pay; taxpayers should not be forced to shoulder the burden of environmental cleanup costs.¹⁸⁴

Both *N.Y. State Electric & Gas Corp.* and *Yankee Gas* illustrate the judicial unwillingness to allow non-responsible parties to pay for hazardous waste site cleanups under CERCLA.¹⁸⁵ Federal courts have precluded PRPs from recovering full response costs if a PRP has previously recovered through an insurance payout or a post-remediation increase in property value.¹⁸⁶ Courts have, however, allowed PRPs to recover response costs when a PRP has received money from rate increases specifically allocated to environmental cleanup costs.¹⁸⁷

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ 852 F. Supp. 2d 229, 254 (D. Conn. 2012).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 255.

¹⁸² *Id.* at 256.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See supra* Part II.B.2–3.

¹⁸⁷ *See supra* Part II.B.4. In *City of Wichita v. Trustees of the Apco Oil Corp. Liquidating Trust*, the plaintiff was allowed to recover because it was a non-responsible party, which demonstrates the CERCLA objective that responsible parties pay. 306 F. Supp. 2d 1040, 1101–02 (D. Kan. 2003).

The rate recovery decisions raise several questions about the courts' reasoning and interpretation of CERCLA. First, does CERCLA's objective to relieve taxpayers of responsibility for cleanup costs override CERCLA's goals of encouraging voluntary clean up and settlement?¹⁸⁸ How can courts be sure that PRPs who receive response cost contribution in rate recovery cases will return the monies received to ratepayers in the form of reduced charges for future services? Should the concerns courts have about the burden to taxpayers extend to insurance companies?

Unfortunately, none of these questions have been answered by federal courts to date, and defendants continue to assert a double recovery defense to avoid cleanup liability costs.¹⁸⁹ More questions have also arisen with the most recent PRP defense of contract pricing offsets.¹⁹⁰ The following Part turns to a discussion of the newest issue in CERCLA double recovery cases: double recovery in contracts.¹⁹¹ Part III analyzes the D.C. District Court's expansion of double recovery under the guise of an economic benefit analysis in *Lockheed Martin Corp. v. United States*. Section A outlines how the court used traditional allocation factors to determine liability. Section B analyzes the court's determination that contract pricing offset did not constitute a double recovery under CERCLA. Section C focuses on how the court used the economic benefit factor as a mere guise for double recovery, which allowed the government to escape liability.

III. DOUBLE RECOVERY IN CONTRACTS: *LOCKHEED MARTIN CORP. V. UNITED STATES*

In April 2014, the D.C. District Court decided an "issue of first impression" for the court: whether contract pricing offsets should be considered as an equitable factor in allocating CERCLA response costs.¹⁹² This Part examines the *Lockheed* decision in depth. The contract pricing offset defense will likely

¹⁸⁸ See Seley & Fletcher, *supra* note 25, at 1284.

¹⁸⁹ *Id.* at 1285–86.

¹⁹⁰ See *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 110 (D.D.C. 2014) (mem.); *Raytheon Aircraft Co. v. United States*, No. 05-2328, 2007 U.S. Dist. LEXIS 89671, at *3 (D. Kan. Dec. 5, 2007).

¹⁹¹ *Lockheed*, 35 F. Supp. 3d at 153.

¹⁹² *Id.* at 110. The contract pricing offset defense was first raised in *Raytheon Aircraft Co. v. United States*. The United States presented an affirmative defense that sought to preclude Raytheon from recovering as costs those amounts received through government contracts that included a percentage of site environmental costs as an overhead charge. *Raytheon Aircraft Co.*, 2007 U.S. Dist. LEXIS 89671, at *3. *Raytheon Aircraft* settled before trial. *Lockheed*, 35 F. Supp. 3d at 110 n.21.

be asserted in future CERCLA double recovery cases,¹⁹³ and although the court rejected this defense, it prevented the plaintiff from recovering its full response costs by placing undue weight on the economic benefit factor.¹⁹⁴ This factor merely serves as a guise for further double recovery expansion and allows defendants to escape liability for hazardous waste site cleanup costs.

A. The Lockheed Court's Allocation of Response Costs

Lockheed Martin brought a CERCLA recovery action against the United States for remediation of environmental contamination caused by the operation of three rocket motor production facilities in California from 1954 to 1975.¹⁹⁵ Lockheed researched and developed solid propellant rocket technologies under government contracts in support of military and scientific programs that were critical to U.S. Cold War efforts.¹⁹⁶ Waste from these operations was “voluminous,”¹⁹⁷ resulting in soil and groundwater contamination, which in one site created a plume from down gradient traveling Trichloroethylene approximately four miles away from the rocket production site.¹⁹⁸ Lockheed undertook environmental cleanup of the three sites in the early 1990s,¹⁹⁹ incurring nearly \$287 million in environmental response costs, with an estimated \$124 million in future response costs.²⁰⁰

Lockheed had recovered its response costs for the sites from its customers by allocating its cleanup expenses to its contracts as indirect costs.²⁰¹ Specifically, Lockheed had indirectly recovered \$208 million through indirect costs charged to its largest customer, the U.S. government.²⁰² This cost recovery system was formalized by an agreement called the Discontinued

¹⁹³ *Lockheed*, 35 F. Supp. 3d at 110 n.21.

¹⁹⁴ *See id.* at 158–59.

¹⁹⁵ *Id.* at 97.

¹⁹⁶ *Id.* at 98.

¹⁹⁷ *Id.* at 104.

¹⁹⁸ *Id.* at 105–06.

¹⁹⁹ *Id.* at 107–09. The California Department of Health Services issued a consent order requiring cleanup of the contaminated sites. *Id.* at 108. The *Lockheed* court noted that Lockheed’s cooperation in cleanup efforts, however, could “hardly be considered voluntary.” *Id.* at 133. Prior to accepting responsibility, Lockheed denied liability for the contamination and “initiated cleanup efforts *only* after it was ordered to do so by the Santa Ana Regional Water Quality Control Board.” *Id.*

²⁰⁰ *Id.* at 105.

²⁰¹ *Id.* at 109.

²⁰² *Id.* The recovery—\$208 million—amounts to over 72% of Lockheed’s past response costs. *Id.* Most of Lockheed’s government contracts were Department of Defense contracts. *Id.* Lockheed admitted that “its ‘underlying tenet in pricing [its] contracts with the US government’ [was] its ‘ability to recover [its] costs.’” *Id.* at 113.

Operations Settlement Agreement (DOSA) signed by the U.S. Defense Contract Management Agency and Lockheed in 2000.²⁰³

Under the DOSA, Lockheed collected its environmental response costs in an accounting pool: the Settled Discontinued Operation Pool (DiscOps Pool).²⁰⁴ The costs for a given year were then amortized over five years and charged as increased fees to government contracts.²⁰⁵ The DOSA also provided, however, that any direct payments Lockheed received for environmental remediation would eventually be credited back to the DiscOps Pool, amortized, and passed on to the government in the form of reduced price contracts.²⁰⁶

The parties stipulated to liability, and the court invoked the per capita approach of a fifty–fifty split between Lockheed and the government which would then be subsequently adjusted to reach an equitable allocation.²⁰⁷ The court began the traditional allocation analysis, and applied a mishmash of Gore factors, Torres factors, and other factors to determine equitable shares.²⁰⁸ Under traditional equitable allocation, the court concluded that Lockheed was liable for 70%, 75%, and 80% of the response costs for each of the three facilities; the government was found liable for 30%, 25%, and 20% shares.²⁰⁹

B. Contract Pricing Offset Poses No Danger of Double Recovery

The court then considered the “novel issue” of contract pricing double recovery: the effect Lockheed’s indirect recovery of its response costs through government contracts should have on equitable allocation of those same costs between Lockheed and the government.²¹⁰ Lockheed had indirectly recovered

²⁰³ *Id.* at 110. The cost recovery system is based on the Federal Acquisition Regulations (FAR), which require the government to pay contractors for their indirect costs. *Id.* Environmental costs are typically allowable indirect costs that may be reimbursed to a contractor by the government. *Id.*

²⁰⁴ *Id.* at 112–13.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 112.

²⁰⁷ *Id.* at 132. The court noted that mathematical precision in allocating liability is neither achievable nor desirable. *Id.*

²⁰⁸ *Id.* The court considered the waste attributable to each party; the parties’ benefits from waste disposal; the degree of cooperation in cleanup; the government’s ownership of waste and facilities; knowledge of risk of pollution; violation of California water quality laws; ability to pay; and indemnification provisions. *Id.* at 132–44. The court placed special emphasis on the following facts: Lockheed exercised more control over hazardous waste disposal; the government acquiesced in Lockheed’s disposal; and some of the disposal violated both internal Lockheed and government rules. *Id.* at 144–53.

²⁰⁹ *Id.* at 153.

²¹⁰ *Id.*

72% of its total response costs for the sites from the government through higher-priced contracts, a significantly larger portion than the equitable share determined by the court (only 20% to 30%).²¹¹ In fact, the government's actual or "effective share" was more than two times higher than its equitable share.²¹² The United States argued that this amounted to a double recovery for PRP Lockheed.²¹³

Lockheed contended that the double recovery issue here was most analogous to the rate recovery cases, which posed no threat of a windfall to the plaintiff, because recovery from the government would return to the government in the form of reduced rate contracts.²¹⁴ The United States argued that it would only receive the benefit of 87% of any CERCLA payment credited to the DiscOps Pool due to the government share of Lockheed's business; "Thus any allocation payment made by the [government] would cause [its] effective share to rise even further beyond [its] equitable share."²¹⁵ The court, however, rejected the government's position, opining that an increase in the government's effective share would not be tantamount to a double recovery.²¹⁶ The court reasoned that double recovery "focuses on the projected post-recovery economic position of the plaintiff, *not* the defendant."²¹⁷ Because Lockheed must allocate all of its CERCLA recovery to the DiscOps Pool and those credits would then be passed on to the government, the court determined that Lockheed could not recover more in response costs than it initially paid.²¹⁸

In determining that Lockheed's contract pricing posed no risk of impermissible CERCLA double recovery, the court also reasoned that the government had been "complicit in designing the very system about which it

²¹¹ *Id.* at 154.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 155. Just as the ratepayers in *N.Y. State Electric & Gas Corp.* and *Yankee Gas* would benefit from CERCLA recovery through reduced utility rates, the government would be credited any recovered funds in future government contracts. *See supra* Part II.B.4.

²¹⁵ 35 F. Supp. 3d at 154. Lockheed would be entitled to \$18 million from the government in prejudgment interest which could potentially have been allocated to the DiscOps Pool and thus credited in part (87%) to government contracts. *Id.* at 160. However, Lockheed declined to provide any assurance that the \$18 million would be credited to the DiscOps Pool, which influenced the court's decision to ultimately reduce the government's share. *Id.*

²¹⁶ *Id.* at 155.

²¹⁷ *Id.* at 156.

²¹⁸ *Id.* at 155.

so bitterly complains.”²¹⁹ The United States negotiated with Lockheed in signing the DOSA, which created the allocation and crediting scheme of the DiscOps Pool.²²⁰ The DOSA also explicitly stated that it did not settle any claims arising under CERCLA.²²¹ Therefore, the government could not fairly assert that it was “blindsided” by Lockheed’s CERCLA recovery claim, and could not be saved from the “natural and probable consequences of its own conduct.”²²² The court held that there was no double recovery in the case; the government’s effective share could be equitably increased for Lockheed to recover its response costs.²²³

Seemingly, this holding is fair and reasonable. The facts of the case, while complicated, strongly resemble the ratepayer cases.²²⁴ The government, like the ratepayers, will be credited any recovered CERCLA response costs, so there is no risk that Lockheed will receive a windfall double recovery if the government pays its effective share.²²⁵ The court’s equitable reasoning follows precedent²²⁶ and common sense.

C. The Economic Benefit Factor: A Guise for Double Recovery

The court, however, undermines its own principled decision, stating, “Double recovery aside, the Court is nonetheless concerned about the *economic benefit* to Lockheed and the economic detriment to the taxpayer from any CERCLA recovery of past costs in this case.”²²⁷ The court determined that if the government were allocated an equitable share of the response costs, Lockheed would receive three windfalls at the taxpayer’s expense.²²⁸ First, an award of mandatory prejudgment interest would result in an \$18 million windfall to Lockheed; Lockheed presented no evidence that the prejudgment

²¹⁹ *Id.* at 156.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ See generally *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 256 (D. Conn. 2012) (holding that rate recovery was not double recovery); *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 427 (N.D.N.Y. 2011), *aff’d in part, vacated in part*, 766 F.3d 212 (2d Cir. 2014). The *Lockheed* court distinguished this case from the rate recovery cases because the government acted as both the ratepayer and the defendant PRP. *Lockheed*, 35 F. Supp. 3d 92, 155.

²²⁵ See *Lockheed*, 35 F. Supp. 3d at 155.

²²⁶ See generally *Yankee Gas*, 852 F. Supp. 2d at 256 (holding that rate recovery was not double recovery); *N.Y. State Electric & Gas Corp.*, 808 F. Supp. 2d at 427.

²²⁷ *Lockheed*, 35 F. Supp. 3d at 156.

²²⁸ *Id.* at 159.

interest award would be allocated to the DiscOps Pool and thus credited back to the government.²²⁹ Second, because 40% to 50% of Lockheed's government contracts are fixed-price, any recovery credits flowing from the DiscOps Pool would not actually accrue to the government but would amount to additional profits for Lockheed.²³⁰ Third, taxpayers had indirectly paid more than 85% of Lockheed's \$10 million in expert and legal fees, which "flies in the face" of CERCLA's prohibition against the award of attorneys' fees in recovery actions.²³¹ Reasoning that it would be inequitable for Lockheed to receive these economic benefits at the taxpayer's expense, the court reduced the government's share for past response costs to 0%.²³²

The *Lockheed* court's decision placed undue weight on Lockheed's economic benefit. Like the property value cases discussed above, the court merely disguised the double recovery issue as an economic benefit allocation factor.²³³ Although the court held that indirect recovery through government contracts did not constitute a double recovery,²³⁴ considering Lockheed's economic benefit created a result equivalent to a finding of a double recovery windfall. The government's share of response costs was reduced to zero for fear that Lockheed would receive a windfall from the taxpayer,²³⁵ just as it would have been had the court technically determined a double recovery. This decision serves only to perplex federal courts in future contract pricing offset CERCLA cases. Based on the precedent of the rate recovery cases, the court

²²⁹ *Id.* at 159–60. "CERCLA § 107(a) mandates the award of prejudgment interest" for the purpose of providing compensation for the lost time value of the money spent on behalf of other liable PRPs. *Id.* at 159; see *Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc.*, 100 F.3d 792, 799–801 (10th Cir. 1996) (explaining that failure to grant prejudgment interest would be a disincentive for voluntary hazardous waste cleanup actions).

²³⁰ *Lockheed*, 35 F. Supp. 3d at 160. The court found that the record was insufficient to determine how much Lockheed would actually benefit from a CERCLA recovery from the government; however, the court noted that the evidence clearly showed that the benefits to Lockheed would be "substantial and at the expense of the taxpayer." *Id.* at 161.

²³¹ *Id.*; *Vine St., LLC v. Keeling ex rel. Estate of Keeling*, 460 F. Supp. 2d 728, 767–68 (E.D. Tex. 2006). Although FAR § 31.205-47 allowed Lockheed to recover its legal fees and costs through government contracts, the court determined that this outcome would be contrary to CERCLA and taxpayer interests. *Lockheed*, 35 F. Supp. 3d at 161. The court noted that it was beyond the scope of the case to disallow the legal fees that had already been paid to Lockheed, choosing instead to reduce the government's share of response costs. *Id.*

²³² *Id.* Although the court reduced the government's share of past response costs to zero, it only decreased the government's share for future environmental cleanup costs by 1%, holding that the government would be responsible for 29%, 24%, and 19% for each of the three respective hazardous waste sites. *Id.* at 162.

²³³ See *supra* Part II.B.3.

²³⁴ *Lockheed*, 35 F. Supp. 3d at 156.

²³⁵ *Id.* at 161.

should have determined that there was no double recovery, and thus no reduction of the government's effective share.²³⁶

IV. IMPLICATIONS OF THE PROPOSED NARROW DOUBLE RECOVERY INTERPRETATION

Federal courts have expanded the prohibition on double recovery from traditional areas—recovery under a comparable state or federal law and recovery through prior settlements with other PRPs—to encompass recovery from insurance payouts and increases in property value.²³⁷ Although every federal court that has considered this issue has declined to impose the collateral source rule in the context of CERCLA double recovery cases involving insurance payouts, the Act's double recovery provision should be read more narrowly to avoid precluding PRPs who use insurance assets to undertake cleanup efforts from also recovering from other responsible parties.²³⁸ In light of the overwhelming precedent declining to extend the collateral source rule to CERCLA cases, this Comment also suggests the milder proposition that double recovery expansion should not be hidden under the thin guise of an economic benefit allocation factor. This Part discusses the implications of a more narrow interpretation of CERCLA's double recovery provision. Section A examines how allowing collateral source recovery in CERCLA contribution actions will encourage voluntary cleanup. Section B investigates the dangers of using the economic benefit allocation factor as a guise for double recovery expansion.

²³⁶ *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 256 (D. Conn. 2012); *N.Y. State Elec. & Gas Corp. v. First Energy Corp.*, 808 F. Supp. 2d 417, 529 (N.D.N.Y. 2011), *aff'd in part, vacated in part*, 766 F.3d 212 (2d Cir. 2014). In *Lockheed*, the court reasoned that any CERCLA recovery would be returned to the government in the form of reduced contract pricing. 35 F. Supp. 3d at 155. Similarly, in *N.Y. State Electric & Gas Corp.*, the court determined that there was no risk of double recovery because any recovered response costs would be passed on to the customers in the form of reduced rates. *N.Y. State Elec. & Gas Corp.*, 808 F. Supp. 2d at 529.

²³⁷ *K.C. 1986 L.P. v. Reade Mfg.*, 472 F.3d 1009, 1017 (8th Cir. 2007) (holding that prior settlements with other PRPs constituted a double recovery windfall and precluded the plaintiff from recovering response costs in a contribution action); *Vine St., LLC v. Keeling ex rel. Estate of Keeling*, 460 F. Supp. 2d 728, 765 (E.D. Tex. 2006) (holding that insurance payouts constituted a double recovery and precluded the plaintiff from recovering from another PRP); *Farmland Indus., Inc. v. Colo. & E. R.R.*, 944 F. Supp. 1492, 1500–01 (D. Colo. 1996) (holding that an increase in property value should inflate the allocation of the plaintiff's response costs).

²³⁸ *Seley & Fletcher*, *supra* note 25, at 1284.

A. *Implications of Allowing Collateral Source Recovery*

CERCLA's twin objectives of expeditious cleanup and polluter payment have begun to conflict as less cooperative PRPs take advantage of the double recovery assets of those who undertake voluntary cleanup.²³⁹ For example, a PRP who assumes a CERCLA cleanup through collateral sources such as insurance payouts or settlements with other PRPs would be precluded from also recovering from a PRP in a contribution action.²⁴⁰ The PRP who can wait out the cleanup by frustrating regulators and protracting litigation will be rewarded by being able to avoid their cleanup responsibilities at the expense of more cooperative parties.²⁴¹ In turn, PRPs who pursue cleanup must forego collateral sources such as insurance payouts to exercise their statutory right to CERCLA contribution from other responsible parties.²⁴²

Federal courts should interpret the Act's double recovery provision to allow collateral source recovery. The plain language of the statute only precludes recovery of the same response costs under comparable state or federal law.²⁴³ The broader theory of equitable double recovery is a judicially created principle²⁴⁴ that usurps the paramount goal of voluntary and efficient cleanup.²⁴⁵ Double recovery has been judicially expanded to preclude plaintiff PRPs from using money recovered from settlements and insurance payouts to undertake the costs of hazardous waste site cleanup.²⁴⁶ Other PRPs may avoid cleanup costs when the plaintiff PRP takes advantage of settlement and insurance assets.²⁴⁷ This could not have been Congress's intent.

Double recovery expansion departs from both the language of the Act and the precedent of the proportionate share approach to allocating settlements.²⁴⁸ The proportionate share approach allows plaintiffs to reap a windfall by

²³⁹ *Id.* at 1283.

²⁴⁰ *See id.*

²⁴¹ *Id.* at 1286 (comparing CERCLA cleanups to "expensive games of 'chicken'").

²⁴² *Id.*

²⁴³ *See* 42 U.S.C. § 9614(b) (2012).

²⁴⁴ *See Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 154 (D.D.C. 2014) (mem.) (stating that courts have developed a broader equitable double recovery theory based on the principle that a PRP cannot recover more than he paid for response costs).

²⁴⁵ *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994) ("CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.").

²⁴⁶ *Seley & Fletcher*, *supra* note 25, 1284.

²⁴⁷ *Id.* at 1286.

²⁴⁸ *Id.* at 1284.

settling with a defendant for more than the equitable share while only reducing the other defendants' amounts by the effective share, not the actual settlement amount.²⁴⁹ The proportionate approach to CERCLA settlements represents a more flexible approach to the double recovery ban.²⁵⁰ This flexible approach should extend to allocating response costs in all CERCLA contribution actions involving settlements with other PRPs and insurance claims.

The judiciary's allowance of collateral settlement and insurance recovery would provide an advantage to the first PRP to undertake site remediation, which would promote the Act's primary objective of encouraging voluntary cleanup.²⁵¹ The PRP who remediates could then recover response costs from the cleanup through settlements, insurance payouts, and other PRPs in a CERCLA contribution action. PRPs who recover from collateral settlements and insurance assets may receive some windfall, but perhaps CERCLA's goal of "polluter pays" should give way to its goal of promoting cleanup.²⁵²

Few academic works specifically address the double recovery issue in CERCLA suits.²⁵³ Professors Peter E. Seley and Stacie B. Fletcher, proponents of applying the collateral source rule to CERCLA cases, have noted that a narrow reading of the double recovery provision considers the Congressional goals of encouraging voluntary cleanup and settling claims without resort to litigation.²⁵⁴ The counterargument is that providing greater net awards to plaintiff PRPs ignores the Congressional goal of making polluters pay.²⁵⁵ Seley and Fletcher contend—and this Comment agrees—that § 113(f), which grants the judiciary discretion to allocate response costs using equitable factors, is flexible enough to allow reviewing courts the power to prevent plaintiff profiteering.²⁵⁶

²⁴⁹ *American Cyanamid Co. v. King Indus., Inc.*, 814 F. Supp. 215, 218 (D.R.I. 1993); Seley & Fletcher, *supra* note 25, at 1285.

²⁵⁰ Seley & Fletcher, *supra* note 25, at 1284–85 (describing courts that have accepted the proportionate share approach as accepting a more narrow reading of double recovery).

²⁵¹ *Id.* at 1286.

²⁵² See Tolan, *supra* note 40, at 230 (describing CERCLA's twin objectives of site cleanup and "polluter pays").

²⁵³ There has, however, been some academic interest in the issue of CERCLA's preemption of state law claims and double recovery. For example, Kristi Weiner argues that allowing a party to bring both state and federal claims would promote corporations to undertake cleanup and prevent taxpayers from bearing the costs. Kristi Weiner, Note, *Does CERCLA Preempt New York State Law Claims for Cost Recovery and Contribution?*, 54 N.Y.U. L. REV. 811, 831 (2010).

²⁵⁴ Seley & Fletcher, *supra* note 25, at 1285.

²⁵⁵ *Id.* at 1286.

²⁵⁶ *Id.*

Over the last few decades, the EPA has used economic incentives as a principal method of solving environmental problems.²⁵⁷ Market-based incentives can operate at lower costs where traditional regulations would be ineffective;²⁵⁸ here, allowing collateral source double recovery would encourage responsible parties to clean up sites which may otherwise be orphaned, requiring cleanup through taxpayer funds. Although economic incentives are primarily used to prevent pollution,²⁵⁹ encouraging remediation in a similar way will produce equally efficient results. By allowing collateral source recovery, corporations who undertake expeditious remediation receive a windfall economic incentive while responsible parties who skirt liability pay a larger share.²⁶⁰ This allocation will promote the optimal policy-based goal of environmental cleanup.²⁶¹

The purpose of the collateral source rule—to compensate the injured party even if the compensation results in double recovery—can apply to compensate the injured party in CERCLA cases: the environment.²⁶² Although the PRP would receive the windfall, the environment would benefit in turn because of the incentive for expeditious cleanup.²⁶³ Federal courts would still have the power to use equitable allocation factors to curb PRP profiteering,²⁶⁴ but equity also requires the judiciary to invoke the collateral source rule in cases where the plaintiff has undertaken the cost of recovery.²⁶⁵ By allowing collateral source recovery, less weight would be given to double recovery and more emphasis placed on the principal objective of hazardous site cleanup.²⁶⁶

²⁵⁷ NAT'L CTR. FOR ENVTL. ECON., *supra* note 19, at i.

²⁵⁸ *Id.* at ii.

²⁵⁹ *Id.* at iii–iv (explaining that risks cannot be traded between Superfund sites, because doing so would require some people to live near unsafe sites while others would live near a site twice as safe as required under federal standards). This view only considers using economic incentives for pollution prevention, not remediation. Liability under CERCLA may also be viewed as an incentive for corporations to comply with traditional regulations, but it is unclear whether the incentive to avoid liability properly produces an optimal level of pollution control. *Id.* at 143.

²⁶⁰ Seley & Fletcher, *supra* note 25, at 1286.

²⁶¹ Tolan, *supra* note 40, at 230.

²⁶² *See* Friedland v. TIC-The Indus. Co., 566 F.3d 1203, 1206 (10th Cir. 2009) (explaining that plaintiff PRPs are not injured parties in CERCLA cases).

²⁶³ Seley & Fletcher, *supra* note 25, at 1286.

²⁶⁴ *Id.*

²⁶⁵ *Id.* Courts should place less weight on the double recovery provision, and should consider such factors as the rights given up by the plaintiff in settlement agreements, the benefit of voluntary cleanup and the detriment of recalcitrance, and the cost of procuring insurance. *Id.*

²⁶⁶ *Id.* at 1283.

B. *The Dangers of the Economic Benefit Factor*

Because of the overwhelming precedent declining to apply the collateral source rule to CERCLA cases,²⁶⁷ despite its benefits, courts are regrettably unlikely to adopt the proposal to invoke the collateral source rule. Although federal courts have technically determined that increases in property value and contract pricing offsets do not constitute a double recovery in contribution actions,²⁶⁸ these factors have been given undue weight in allocating response costs under the guise of considering the economic benefit to the plaintiff.²⁶⁹ As more defendants assert a double recovery defense,²⁷⁰ federal courts that do not find a double recovery will nevertheless offset the defendant's response costs by applying the economic benefit factor.²⁷¹ Courts following *Lockheed's* precedent will reward defendants who make an unsuccessful double recovery argument with a hard look at the plaintiff's economic benefits.²⁷² The plaintiff, of course, has reaped some economic benefit; otherwise the defendant would have no reason to assert a double recovery defense. The result is a catch-22 for the plaintiff. If a court finds a double recovery, a plaintiff will not be able to recover its response costs.²⁷³ If a court finds no double recovery, according to the precedent set in *Lockheed*, a plaintiff's economic benefits will be considered, and such a plaintiff will not be able to recover response costs.²⁷⁴ The courts' analyses will vary, but the result is synonymous.

²⁶⁷ K.C. 1986 L.P. v. Reade Mfg., 472 F.3d 1009, 1017 (8th Cir. 2007); Yankee Gas Servs. Co. v. UGI Utils., Inc., 852 F. Supp. 2d 229, 255 (D. Conn. 2012) (noting that every federal court has declined to apply the collateral source rule in CERCLA cases); Vine St. LLC v. Keeling *ex rel.* Estate of Keeling, 460 F. Supp. 2d 728, 765 (E.D. Tex. 2006).

²⁶⁸ Lockheed Martin Corp. v. United States, 35 F. Supp. 3d 92, 155 (D.D.C. 2014) (mem.) (holding that contract pricing offset posed no danger of double recovery); Litgo N.J., Inc. v. Martin, No. 06-2891, 2011 U.S. Dist. LEXIS 2033, at *32 (D.N.J. Jan. 7, 2011) (holding that the plaintiff's share could not be reduced despite a decrease in property value), *aff'd in part, vacated in part sub nom.* Litgo N.J., Inc. v. Comm'r N.J. Dep't of Env'tl. Prot., 725 F.3d 369 (3d Cir. 2013); Farmland Indus., Inc. v. Colo. & E. R.R., 944 F. Supp. 1492, 1500-01 (D. Colo. 1996) (considering increased property value as an equitable allocation factor).

²⁶⁹ See *Lockheed*, 35 F. Supp. 3d at 156 (explaining that "[d]ouble recovery aside, the Court is nonetheless concerned about the *economic benefit* to Lockheed"); *Farmland*, 944 F. Supp. at 1501 (considering the "benefits from cleanup" as an equitable allocation factor).

²⁷⁰ *Lockheed*, 35 F. Supp. 3d at 110 n.21 (noting that because environmental contamination at defense contracting facilities is pervasive, this issue will likely be litigated again). Counsel in *Lockheed* identified at least two other cases involving Lockheed and the government that concern the same issue. *Id.*

²⁷¹ See *id.* at 156.

²⁷² See *id.*

²⁷³ See *supra* Part II.

²⁷⁴ See *Lockheed*, 35 F. Supp. 3d at 156.

Consideration of a plaintiff's economic benefit will thus become a mandatory factor instead of an equitable factor in double recovery cases. Mandatory allocation factors conflict with CERCLA's intent that courts consider the circumstances in each case to determine an equitable division of cleanup costs.²⁷⁵ If the judiciary increases cost allocation whenever a plaintiff has reaped some financial benefit, plaintiffs will be less likely to undertake cleanup since they may fare better as the PRP defendant in a contribution action. The economic benefit factor may extend to encompass plaintiffs who have made any corporate profit, which will discourage PRPs with the most resources from assuming voluntary cleanup.

Placing less weight on the economic benefit factor would remove the moral stigma associated with pollution²⁷⁶ and create a practical financial incentive for PRPs.²⁷⁷ Marketing environmental values creates an economic incentive for entrepreneurs.²⁷⁸ Allowing PRPs some profit as a reward for undertaking initial cleanup costs puts a market value on remediation.²⁷⁹ This market value basically places remediation on the free market; remediation could be bought by a PRP who hopes to obtain a future economic benefit from subsequent recovery in a contribution action.²⁸⁰ When federal courts examine a plaintiff PRP's economic benefit, the free market incentive to remediate disappears. Many commentators have argued that PRPs should be prohibited from reaping any windfall because polluters should pay for their actions.²⁸¹ However, this

²⁷⁵ See 42 U.S.C. § 9613(f)(1) (2012) (allowing reviewing courts to "allocate response costs . . . using such equitable factors as the court determines are appropriate").

²⁷⁶ Murry Weidenbaum, *Making the Marketplace Work for the Environment*, in ENVIRONMENTAL PROTECTION: REGULATING FOR RESULTS 149, 160–61 (Kenneth Chilton & Melinda Warren eds., 1991) (arguing that pollution should not be looked at as a "sinful act" but as a costly activity "amenable to reduction by means of proper incentives").

²⁷⁷ See Seley & Fletcher, *supra* note 25 (arguing that providing PRPs with a financial incentive would promote expeditious cleanup).

²⁷⁸ TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 21 (1991).

²⁷⁹ See *id.* (explaining that a property rights approach to natural resources provides an incentive to entrepreneurs).

²⁸⁰ See *id.* (explaining that a stream owner who charges fisherman gains an incentive to maintain and improve his resource).

²⁸¹ *E.g., id.* at 25 (arguing that making contaminated site owners liable creates an incentive to take precautions against environmental damage); see, e.g., DAVE B. KOPEL, PRIVILEGED POLLUTERS: THE CASE AGAINST EXEMPTING MUNICIPALITIES FROM SUPERFUND 14 (1998), <http://www.davekopel.com/env/privileged-polluters.pdf> (noting a New Jersey mayor's view that polluting corporations should pay because their profits have been "inflated by decades of cheap and inappropriate waste disposal"); Carol M. Browner, Opinion, *Polluters Should Have to Pay*, N.Y. TIMES (Mar. 1, 2002), <http://www.nytimes.com/2002/03/01/opinion/polluters-should-have-to-pay.html> (arguing that oil and chemical companies should be taxed to pay for Superfund cleanup).

approach has allowed defendant PRPs to escape liability when a plaintiff has already recovered from a collateral source or has incurred some economic benefit.²⁸² Not all polluters pay under the current regime.²⁸³ Some PRPs skirt payment, while the PRP who initiates cleanup cannot fully recover the costs.²⁸⁴

When federal courts place more emphasis on the economic benefit to a plaintiff than the policy-based goal of expeditious cleanup, remediation is delayed and discouraged. One of the Superfund's primary problems since its enactment has been slow cleanup due to high costs and prolonged litigation.²⁸⁵ Designation as a Superfund site causes property values to fall, and banks often refuse to lend money for development.²⁸⁶ Incentivizing a PRP to take on cleanup will expedite remediation and discourage avoiding responsibility.

As the Superfund runs dry,²⁸⁷ it will also become especially important to provide some incentive to PRPs to shoulder the astronomical cleanup costs.²⁸⁸ The once \$5 billion fund decreased to just \$137 million in 2009, and taxpayer dollars have been funding the cleanup for sites where no one has accepted responsibility for contamination.²⁸⁹ Cleanup of these "orphaned sites" has slowed dramatically, with just nineteen sites remediated in 2009, compared to eighty-nine sites in 1999.²⁹⁰ Incentivizing plaintiff PRPs to remediate would not only promote voluntary cleanup, but would further CERCLA's goal of preventing the taxpayer from shouldering remediation costs.²⁹¹ If a plaintiff were allowed full response cost recovery in contribution actions, without fear that the courts will apply the economic benefit factor, more PRPs may take responsibility for orphaned sites now being funded by taxpayers.²⁹² A plaintiff

²⁸² Seley & Fletcher, *supra* note 25, at 1283.

²⁸³ *Id.* at 1286.

²⁸⁴ *Id.*

²⁸⁵ Shaw & Stroup, *supra* note 47.

²⁸⁶ *Id.*

²⁸⁷ Juliet Eilperin, *Obama, EPA to Push for Restoration of Superfund Tax on Oil, Chemical Companies*, WASH. POST (June 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/20/AR2010062001789.html>. The Superfund has been facing a budget crunch since Congress refused to renew government imposed taxes on oil and chemical corporations in 1995. *Id.*

²⁸⁸ See *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 105 (D.D.C. 2014) (mem.). Lockheed incurred \$287 million in environmental response costs, with an estimated \$124 million in future response costs. *Id.*

²⁸⁹ Eilperin, *supra* note 287; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 37, at 3.

²⁹⁰ Eilperin, *supra* note 287.

²⁹¹ See *Lockheed*, 35 F. Supp. 3d at 124; *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 852 F. Supp. 2d 229, 256 (D. Conn. 2012) (explaining that PRPs, not taxpayers, should bear response costs).

²⁹² See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 37, at 1, 11. The EPA has spent more than \$3 billion on seventy-five sites that have "unacceptable human exposure" since 2009. *Id.*

PRPs ability to recover contribution will prove essential to future hazardous site cleanup funding.

CONCLUSION

Hazardous waste sites like the Love Canal area are not uncommon.²⁹³ One in four Americans lives within three miles of a contaminated site.²⁹⁴ Despite CERCLA's intentions, the Act's provisions have created protracted litigation.²⁹⁵ Courts have interpreted CERCLA's double recovery provision²⁹⁶ to prevent plaintiffs from recovering contribution as well as settlements with other PRPs, insurance monies, and economic benefits from remediation.²⁹⁷ As CERCLA's cleanup funds decrease, providing incentives to PRPs to voluntarily undertake cleanup will prove especially important to lift the burden of remediation costs off the public's shoulders.²⁹⁸

PRPs should be incentivized by the potential receipt of some windfall in the form of a double recovery. Although federal courts should use equitable allocation factors to curb profiteering, allowing PRPs to recover from collateral sources like settlements and insurance payouts will promote efficient cleanup efforts. The traditional purpose of the collateral source rule—to punish the tortfeasor defendant²⁹⁹—should apply to CERCLA actions to punish uncooperative and litigious PRPs and reward plaintiffs who initiate cleanup.

Because every federal court to consider the issue has declined to apply the collateral source rule,³⁰⁰ federal courts should, at the very least, refrain from using the economic benefit factor as another means of achieving double recovery expansion. Placing undue emphasis on the plaintiff's economic benefits discourages PRPs from shouldering the initial burdens of cleanup, and rewards defendants for asserting a double recovery defense. Plaintiffs should be rewarded for their cleanup efforts, not punished for making a profit. Judicial expansion of double recovery only thwarts CERCLA's primary objective of

²⁹³ *Id.* at 1. Since CERCLA's enactment, the EPA has identified 47,000 contaminated sites. *Id.*

²⁹⁴ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 38, at 1.

²⁹⁵ 3 GRAD, *supra* note 23, at § 4A.02(1)(a).

²⁹⁶ See 42 U.S.C. § 9614(b) (2012).

²⁹⁷ See *supra* Part II.B.

²⁹⁸ See Eilperin, *supra* note 287.

²⁹⁹ Green v. Denver & Rio Grande W. R.R., 59 F.3d 1029, 1032 (10th Cir. 1995).

³⁰⁰ Yankee Gas Servs. Co. v. UGI Utils., Inc., 852 F. Supp. 2d 229, 255 (D. Conn. 2012).

hazardous waste site cleanup,³⁰¹ and courts must narrow their interpretation of the Act to give way to future environmental protection.

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³⁰¹ Tolan. *supra* note 40. at 230.

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