The Contribution Bar in CERCLA Settlements and Its Effect on the Liability of Nonsettlers

J. Whitney Pesnell
The Contribution Bar in CERCLA Settlements and Its Effect on the Liability of Nonsettlers

J. Whitney Pesnell*

TABLE OF CONTENTS

I. Introduction .......................................................... 168
II. Current Jurisprudence ............................................. 175
   A. UCATA Approach .............................................. 175
   B. UCFA Approach ............................................... 180
III. Why the UCFA Approach Continues to be Valid and Should Prevail .............................................. 184
   A. The Other Provisions of CERCLA and SARA Indicate That the UCFA Approach is the Approach Contemplated by CERCLA and SARA .............................................. 186
   B. The UCFA Approach is the Approach That is Most Consistent With the Objectives and Policies of CERCLA and SARA .............................................. 196
   C. The Language and History of Section 113(f)(2) Do Not Support the Conclusion That Congress Intended to Adopt the UCATA Approach in Section 113(f)(2) ......................... 205
   D. The Other Provisions of SARA Do Not Support the Conclusion That Congress Intended to Adopt the UCATA Approach in Section 113(f)(2) ............................................ 215
   E. The Legislative History of SARA as a Whole Does Not Support the Conclusion that Congress Intended to Adopt the UCATA Approach in Section 113(f)(2) ......................... 217
   F. The Objectives of CERCLA and SARA and Sound Public Policy Do Not Support the Conclusion That Congress Intended to Adopt the UCATA Approach or a Disproportionate Liability Scheme in Section 113(f)(2) ............................................. 220
IV. Why the UCATA Approach Should be Rejected ..................... 228
   A. The Disadvantages of the UCATA Approach and How Its Disincentives to Settlement Outweigh Its Advantages ............................................. 228
   B. The Application of the UCATA Approach has Resulted in Procedural and Constitutional Problems—Problems Which Will Not Exist Under the UCFA Approach ................. 233

Copyright 1997, by LOUISIANA LAW REVIEW.

* The author is a member of the Louisiana, Texas, and District of Columbia Bars. He received a J.D. from Louisiana State University in 1984, and an L.L.M. in environmental law from the Northwestern School of Law of Lewis and Clark College in 1996. The author wishes to thank Professors Kenneth M. Murchison and John M. Church of Louisiana State University for their suggestions, comments, and assistance.
I. INTRODUCTION

The "Comprehensive Environmental Response, Compensation and Liability Act" ("CERCLA")¹ was passed as a compromise bill in the closing days of a lame-duck session of Congress in 1980. CERCLA imposes strict liability for the costs of responding to releases of hazardous substances on certain groups of persons.² It also imposes joint and several liability for the costs of responding to releases of hazardous substances on those groups of persons, in the absence of a showing that the harm resulting from the releases of hazardous substances is divisible³ or that a reasonable basis for determining the contributions of those persons to the harm exists.⁴ CERCLA, however, did not indicate whether persons who were liable for the costs of responding to releases of hazardous substances ("potentially responsible parties" or "PRPs") might have any claims for contribution against other PRPs in connection with those releases. The statute was silent with respect to the rights of PRPs to seek contribution from other PRPs.

The courts, however, held that PRPs who were held liable for response costs did have the right to seek contribution from other PRPs under CERCLA.⁵ The courts also held that PRPs had the right to seek contribution from other PRPs as a matter of federal common law, and that the existence of that right under CERCLA was consistent with and furthered the policies and objectives of CERCLA. The courts concluded the principles of the Uniform Comparative Fault Act⁶ should be applied to determine each PRP's equitable share of the response costs and the effect of partial settlements on the liability of the nonsettling PRPs, whether those settlements were between the government and PRPs or between PRPs themselves.⁷

² See 42 U.S.C. § 9607(a) (1995) (CERCLA § 107(a)).
⁴ See, e.g., In re Bell Petroleum Servs., Inc., 3 F.3d 889, 894-95, 901-04 (5th Cir. 1993); Restatement (Second) of Torts § 433A (1995).
⁷ See, e.g., United States v. Conservation Chem. Co., 628 F. Supp. 391, 401-02 (W.D. Mo. 1985) ("Accordingly, the Court advises the parties of its view that the effect of settlements upon nonsettling parties should be determined in accordance with the 1977 Uniform Comparative Fault Act...")
In 1986, Congress passed the "Superfund Amendments and Reauthorization Act of 1986" ("SARA"). SARA made a number of changes in CERCLA. Among other things, SARA expressly recognized the right of PRPs to seek contribution from other PRPs for response costs under CERCLA. SARA also adopted a number of new provisions concerning the settlement of claims for response costs with PRPs. One of those provisions was Section 113(f)(2) of CERCLA, the focal point of this article. Section 113(f)(2) provides:

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

for the reason that the principles of that model act are the most consistent with, and do the most to implement, the Congressional intent which is the foundation for CERCLA.

11. See 42 U.S.C. § 9613(f)(2) (1995). Language almost identical to 42 U.S.C. § 9613(f)(2) is also found in 42 U.S.C. § 9622, the section of CERCLA, as amended by SARA, which deals with settlements between the United States and PRPs. See id. § 9622(h)(4) ("A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement shall 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.

In addition, 42 U.S.C. § 9622(g), which deals with de minimis settlements, contains language that is almost identical to that of 42 U.S.C. § 9622(h)(4), making it clear that the same scheme that applies to major party settlements with the United States under 42 U.S.C. § 9622(h) also applies to de minimis settlements under 42 U.S.C. § 9622(g). See id. § 9622(g)(5). The only difference between 42 U.S.C. § 9622(h)(4) and 42 U.S.C. § 9622(g)(5) is that 42 U.S.C. § 9622(h)(4) refers to "persons" who have resolved their liability to the United States, while 42 U.S.C. § 9622(g)(5) refers to "parties" who have resolved their liability to the United States. This distinction appears to be insignificant.

The only real difference between 42 U.S.C. § 9613(f)(2) and 42 U.S.C. § 9622(h)(4) and 42 U.S.C. § 9622(g)(5) is that 42 U.S.C. § 9613(f)(2) applies to settlements between the "United States or a state" and PRPs, whereas 42 U.S.C. § 9622(h)(4) and 42 U.S.C. § 9622(g)(5) only apply to settlements between the United States and PRPs. There are other variations in the language of these provisions which do not suggest any distinction was intended. 42 U.S.C. § 9613(f)(2) indicates that it only applies where persons have resolved their liability to the United States or the state in "administrative or judicially approved" settlements, whereas 42 U.S.C. § 9622(h)(4) and 42 U.S.C. § 9622(g)(5) indicate that they apply only where persons have resolved their liability to the United States "under this subsection." Those distinctions in language, however, are distinctions without a difference. Settlements under the provisions of 42 U.S.C. § 9622(h) must be judicially or administratively approved by incorporation into a consent decree or administrative order, and de minimis settlements under 42 U.S.C. § 9622(g) must be judicially or administratively approved by incorporation into a consent decree or administrative order. See id. §§ 9622(d), (i), 9622(g)(4), (l) (1995).
It is clear, under the provisions of Section 113(f)(2), that contribution claims against persons who have resolved their liability to the United States or a state (i.e., the "government") in an administrative or judicially-approved settlement are barred, if they arise out of matters addressed in the settlement. What is not clear, however, is the effect of that contribution bar on the liability of nonsettling PRPs for response costs and other matters addressed in a settlement. Section 113(f)(2) provides that such a settlement "reduces the potential liability of the [nonsettlers] by the amount of the settlement," but it is not at all clear:

1. whether § 113(f)(2) sets out the only mechanism or method by which the liability of nonsettlers can be reduced in connection with such a settlement;
2. whether § 113(f)(2) is inconsistent with the application of the Uniform Comparative Fault Act approach to determining the effect of partial settlements on the liability of nonsettlers, in light of the other provisions of SARA and the objectives and legislative history of CERCLA and SARA;
3. whether the purpose of § 113(f)(2) is to prevent the government from receiving or obtaining a "windfall" or "double recovery" by settling its claims against the settling PRPs for amounts which exceed the total of the settlors' equitable shares of the response costs at the site and then pursuing the nonsettlers for their full equitable shares of the response costs at the site;

12. Claims for contribution arising out of matters which are not addressed in or covered by a settlement are not barred by that settlement. See 42 U.S.C. § 9613(f)(2) (1995) (CERCLA § 113(f)(2)). Consequently, what contribution claims are barred by Section 113(f)(2) of CERCLA as the result of a settlement between the government and PRPs depends, in the first instance, upon the scope or reach of the settlement agreement.

This discussion of the effect of the contribution bar on the liability of nonsettling PRPs assumes that the contribution claims under discussion arise out of matters addressed in settlement agreements between the government and PRPs.

13. Such a conclusion is consistent with other provisions of CERCLA and SARA and the intentions of Congress in passing SARA. Congress was concerned about the harshness of the scheme that it had created under CERCLA and wanted to ensure that that scheme permitted the government to take only those steps necessary to recover the costs of responding to and remedying releases of hazardous substances. Congress did not want the government to receive any sort of "windfall" as a result of that scheme or to recover more than the costs of responding to and remedying the releases in question. See, e.g., 42 U.S.C. § 9614(b) (1995) ("Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter."); 42 U.S.C. § 9601(21) (1995) ("The term "person" means . . . [the] United States Government [or a] state . . . .").

The provisions of Section 113(f)(2) which declare that a settlement with the government reduces the potential liability of nonsettlers by the amount of that settlement may simply be another manifestation of that concern. Indeed, as shown infra, that was the most likely purpose of that
(4) whether \$ 113(f)(2) constitutes an adoption of the Uniform Contribution Among Tortfeasors Act\textsuperscript{14} approach to determining the effect of partial settlements on the liability of nonsettlers; or

(5) whether the purpose of \$ 113(f)(2) is to ensure that the government can recover any shortfall between the total of the settlors' equitable shares of the response costs at the site and the amounts which the settlors pay to the government in the settlement from the nonsettlers.

The answers to these questions depend upon the interpretation of Section 113(f)(2) and the role it was intended to play within the scheme of CERCLA, as amended by SARA. The resolution of these questions is not just a matter of academic interest. The answers to these questions have had, and will continue to have, an intensely practical effect upon the manner in which claims for response costs are handled by the government, the manner in which those claims are settled, and the manner in which response costs are ultimately distributed among the PRPs at a site.

Because Section 113(f)(2) addresses the effect of government settlements upon the liability of nonsettling PRPs, the questions concerning its interpretation and effect have frequently prompted references to, and analysis of, the provisions of the Uniform Contribution Among Tortfeasors Act ("UCATA")\textsuperscript{15} and the Uniform Comparative Fault Act ("UCFA").\textsuperscript{16} The references to the UCATA and the UCFA in connection with those questions are both natural and inevitable. The UCATA and the UCFA, which were promulgated by the National Conference of Commissioners on Uniform State Laws in 1955 and 1977, respectively,\textsuperscript{17} set out the two basic approaches to contribution that are followed in American jurisdictions.\textsuperscript{18} The UCATA and the UCFA also set out, as
integral parts of their approaches to contribution, the two basic settlement reduction rules—i.e., the rules for determining the effect of partial settlements upon the liability of nonsettlers—that are used in American jurisdictions. 19

Under the UCATA approach, a jointly and severally liable tortfeasor’s pro rata share of the common liability does not depend upon that tortfeasor’s degree of fault or the extent to which that tortfeasor’s fault caused or contributed to the claimant’s damages. 20 A tortfeasor’s pro rata share of the common liability depends upon the number of jointly and severally liable tortfeasors, because the


The Uniform Comparative Fault Act (1977) has been adopted, at least in part, in two jurisdictions. See Iowa Code Ann. §§ 668.1 to .16 (West 1987 and Supp. 1997); Wash. Rev. Code Ann. §§ 4.22.005 to .925 (West 1988 and Supp. 1997). In addition, several states have adopted proportionate or equitable share approaches to determining the effect of settlements upon the liability of nonsettlers similar to the approach followed in the UCFA without expressly adverting to or adopting provisions of the UCFA. See Colo. Rev. Stat. §§ 13-50.5-103, 13-50.5-105 (1989); La. Civ. Code arts. 2323, 2324; La. Code Civ. P. art. 1812(c); Cavalier v. Cain’s Hydrostatic Testing, Inc., 657 So. 2d 975, 980-81 (La. 1995); Garrett v. Safeco Ins. Co., 433 So. 2d 209, 210 (La. App. 2d Cir. 1983). See also N.J. Stat. Ann. § 2A:53A-1 to -5 (West 1987). Finally, with the advent of comparative fault and its emphasis on the equitable apportionment or allocation of liability, a number of states have moved toward the UCFA or proportionate share approach to contribution by requiring that each party’s equitable share of an obligation be determined in accordance with its fault and by permitting nonsettlers to seek contribution from settlors unless their settlements provide for a reduction in the liability of the nonsettlers equal to the settlors’ equitable shares of the obligation. See infra the cases and authorities cited in note 40.

This movement towards the UCFA or proportionate share approach to contribution in states adopting comparative fault principles was predicted by the National Conference of Commissioners on Uniform State Laws when it promulgated the UCFA in 1977. It declared:

The NCCUSL has promulgated two Uniform Contribution Acts—the first in 1939, superseded by a revised act in 1955. Both of these Acts provide for pro rata contribution, which may be suitable in a state not applying the principle of comparative fault, but is inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved.

It has therefore been decided not to amend the separate Uniform Contribution Among Tortfeasors Act, 1955, but to leave that Act for possible use by states not adopting the principle of comparative fault . . . . The 1955 Act should be replaced in any state that adopts the comparative fault principle, and would be eventually replaced.


20. See UCATA § 2, 12 U.L.A. 246 (1996) (“In determining the pro rata shares of tortfeasors in the entire liability . . . their relative degrees of fault shall not be considered . . . “).
tortfeasors share equally in the liability. A jointly and severally liable tortfeasor who settles with the claimant in good faith is discharged from all liability for contribution to the other tortfeasors, and can not seek contribution from another tortfeasor unless the settlement extinguishes the liability of the other tortfeasor to the claimant, the amounts paid in the settlement are reasonable, and the amounts paid in the settlement exceed the settling tortfeasor's pro rata share of the common liability. Furthermore, a settling tortfeasor who is entitled to seek contribution from another tortfeasor can not recover more than the other tortfeasor's pro rata share of the liability from that tortfeasor.

Finally, under the UCATA approach, a settlement in good faith between the claimant and the settling tortfeasor reduces the liability of the other tortfeasors to the claimant on a pro tanto or dollar-for-dollar basis—i.e., "to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater." Consequently, the UCATA or pro tanto approach places the risk that the claimant may settle with a tortfeasor for less than that tortfeasor's pro rata share of the liability on the nonsettling tortfeasors. If the claimant and the settling tortfeasor agree in good faith to settle for an amount that is less than the settling tortfeasor's pro rata share of the liability, the other tortfeasors will be stuck with the tab for the remainder of the settling tortfeasor's share of the liability. Under the UCATA approach, they remain jointly and severally liable to the claimant for the difference between the full amount of the common liability and the amount of the settlement.

21. Id.
22. See id. § 4(b), at 264 ("When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death .... (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.").
23. See id. § 1(d), at 195 ("A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.").
24. Id. A settling tortfeasor can recover contribution from another tortfeasor only to the extent that the amounts paid in the settlement were reasonable.
25. See id. § 1(b), at 194 ("The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share.").
26. See id. § 1(b), at 194 ("No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.").
27. See id. § 4, at 264 ("When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater .... ").
28. Id. If, on the other hand, the claimant and the settling tortfeasor agree to settle for an amount that is greater than the settling tortfeasor's pro rata share of the liability, the other tortfeasors will receive a reduction in their liability to the claimant which exceeds the settling tortfeasor's pro
Under the UCFA approach, a jointly and severally liable tortfeasor’s share of the common liability depends upon that tortfeasor’s degree of fault and the extent to which that tortfeasor’s fault caused or contributed to the claimant’s damages.29 A jointly and severally liable tortfeasor who settles with the claimant is discharged from all liability for contribution to the other tortfeasors,30 and can not seek contribution from another tortfeasor unless the settlement extinguishes the liability of the other tortfeasor to the claimant,31 the amounts paid in the settlement are reasonable,32 and the amounts paid in the settlement exceed the settling tortfeasor’s equitable share of the common liability.33 Furthermore, a settling rata share of the liability—i.e., a reduction equal to the amount specified in the settlement or the amount paid for it—and will be liable to the claimant for an amount that is less than the total of their pro rata shares of the liability. Consequently, the claimant can never recover more than the total amount of the common liability, even if he settles with a tortfeasor for an amount which exceeds that tortfeasor’s pro rata share of the liability. Whether the difference between the amount of the settlement and the settling tortfeasor’s pro rata share reduces the other tortfeasors’ ultimate liability, however, depends upon whether the settling tortfeasor can pursue the other tortfeasors for that difference in a contribution action.

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating: (1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and (2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party. (b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed. (c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of the rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party’s equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

See also UCFA § 4(a), 12 U.L.A. 142 (1996) (“The basis for contribution is each person’s equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.”).

30. See id. § 6, at 147 (“A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person for all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides.”).

31. See id. § 4(b), at 142 (“Contribution is available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable.”).

32. Id.

33. See id. § 2(c), at 136, quoted in supra note 29; id. § 4(a), at 142, quoted in supra note 29; id. § 5(a), (b), at 145 (“(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by Section 2, a party paying more than his equitable share of the obligation, upon motion, may recover judgment for contribution. (b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may
tortfeasor who is entitled to seek contribution from another tortfeasor can not recover more than the other tortfeasor’s equitable or proportionate share of the liability from that tortfeasor. 34

Finally, under the UCFA approach, a settlement between the claimant and the settling tortfeasor reduces the liability of the other tortfeasors to the claimant by the amount of the settling tortfeasor’s equitable or proportionate share of the common liability. 35 Consequently, the UCFA or equitable share approach places the risk that the claimant may settle with a tortfeasor for less than that tortfeasor’s equitable share of the liability on the claimant. If the claimant and the settling tortfeasor agree to settle for an amount that is less than the settling tortfeasor’s equitable share of the liability, the claimant will be out the difference between the settling tortfeasor’s equitable share of the liability and the amount of the settlement. Under the UCFA approach, the liability of other tortfeasors is reduced by the settlor’s equitable share of common liability, regardless of the amount of the settlement, and the other tortfeasors remain jointly and severally liable to the claimant only for the total of their equitable shares of the liability. 36

As noted above, the questions concerning the interpretation and effect of Section 113(f)(2) have prompted frequent references to the UCATA and the UCFA. The UCATA and UCFA and their settlement reduction rules provide the background against which the courts have approached Section 113(f)(2), as well as much of the framework for the courts’ analysis of Section 113(f)(2). Consequently, a basic understanding of the UCATA and UCFA approaches helps one understand the jurisprudence.

II. CURRENT JURISPRUDENCE

A. UCATA Approach

To date, the interpretation of Section 113(f)(2) and its effect on the liability of nonsettlers has been considered by only a few district courts, 37 and only one

be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.”). 34

35. See id. § 6, at 147 (“A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person’s equitable share of the obligation, determined in accordance with the provisions of Section 2.”). 35

36. Id. Under the UCFA approach, however, the claimant also receives the benefit of any settlement between the claimant and a tortfeasor for more than that tortfeasor’s equitable share of the liability. The liability of the nonsettling tortfeasors is reduced by the settling tortfeasor’s equitable share of the liability, regardless of the amount of the settlement, and the nonsettling tortfeasors remain jointly and severally liable to the claimant for the total of their equitable shares of the liability. Consequently, if the claimant settles with a tortfeasor for more than that tortfeasor’s equitable share of the liability, the claimant can recover more than the total amount of the liability. 36

Court of Appeals—the Court of Appeals for the First Circuit. Most of the


38. See Cannons Eng’g, 899 F.2d at 91-92. The United States Court of Appeals for the First Circuit is the only circuit that has squarely addressed and decided the proper interpretation and effect of Section 113(f)(2).

The United States Court of Appeals for the Second and Third Circuits have recently stated that Section 113(f)(2) creates a disproportionate liability scheme. See B. F. Goodrich v. Betkoski, 99 F.3d 505, 527 (2d Cir. 1996); United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1184-85 (3d Cir. 1994). In each of those cases, however, the court’s statements to that effect were obiter dicta—the statements had nothing to do with the questions before the court, were unnecessary to the court’s decision, played no part in its ratio decidendi. See Betkoski, 99 F.3d at 511-13, 527-30; Alcan, 25 F.3d at 1178-79, 1186-87. Consequently, neither the Second Circuit nor the Third Circuit can be listed as one of the circuits that has squarely addressed or decided the proper interpretation and effect of Section 113(f)(2).

In Cannons Eng’g, the First Circuit cites Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3d Cir. 1988), and asserts that the Third Circuit’s opinion in Smith Land indicates that Section 113(f)(2) only permits nonsettlers to receive credit for the amount of the settlement. The First Circuit’s uncritical acceptance of the Smith Land dictum illustrates how bad law develops. In Smith Land, the Third Circuit was not confronted with and did not decide any issue concerning the interpretation or effect of Section 113(f)(2). The questions before the Third Circuit in Smith Land were whether the doctrine of caveat emptor was available as a defense in a contribution action under CERCLA and whether liability for response costs under CERCLA could be imposed upon the corporate successors of the seller of property.

The Smith Land court simply mentioned § 113(f)(2) in passing, and observed that the settlements with the government appeared to give rise to a pro tanto reduction in the contribution claims of the nonsettlers. Section 113(f)(2) had absolutely no bearing on the questions before the Third Circuit in Smith Land. The Third Circuit’s observations with respect to Section 113(f)(2) are nothing but obiter dicta, and do not provide any support for the propositions for which Smith Land was cited by the First Circuit. Accordingly, the Third Circuit still can not be listed as one of the courts which has addressed or decided the proper interpretation and effect of Section 113(f)(2).

The First Circuit’s decision in Cannons Eng’g suffers from a number of other analytical deficiencies. First, the court focuses upon the language of Section 113(f)(2) and Congress’ goal in SARA of promoting or encouraging settlements to the exclusion of all else. The court does not consider other provisions of SARA, such as Section 104(a)(1), Section 113(f)(1) and (3), and Section 122(e)(3)(E), the scheme which those provisions establish for settlements between the government and PRPs, or Congress’ other goals in SARA in arriving at its conclusions. These provisions are too pervasive to be coincidental and too conspicuous to be ignored.

In addition, the Cannons Eng’g court asserts that the pro tanto reduction rule contained in Section 113(f)(2) precludes any conclusion that the liability of nonsettling PRPs can be reduced by any other amounts, such as the total of the settling PRPs’ equitable shares of the response costs at a site. See Cannons Eng’g, 899 F.2d at 92. There is absolutely no support for this assertion in Section 113(f)(2) or any of the other provisions of CERCLA or SARA, and it does not logically follow from the language of Section 113(f)(2) or any of the other provisions of CERCLA or SARA. Section 113(f)(2) does not state that it is the only mechanism or means by which the liability of nonsettling PRPs can be reduced, or that nonsettling PRPs can not receive a reduction in their liability which exceeds the amount of such a settlement. It merely declares that the nonsettling PRPs shall receive a reduction in their liability equal to the amount of the settlement. That declaration does not preclude a conclusion that the liability of the nonsettling PRPs can also be reduced by other means or other
courts which have interpreted and applied Section 113(f)(2) have held that Section 113(f)(2) bars claims for contribution by nonsettlers against settlers with respect to matters addressed in the settlement—a proposition compelled by the language of the statute itself. They have also held, however, that, under Section 113(f)(2), the liability of nonsettlers for response costs at the site is reduced only by the amount of the settlement. Some of those courts have gone so far as to suggest that the adoption of a "pro tanto" rule in Section 113(f)(2), similar to the one found in UCATA for use in determining the effect of partial settlements on the liability of nonsettlers, indicates that Congress made "a conscious choice in 1986 not to adopt UCFA principles for CERCLA purposes," but to adopt "the approach . . . of the [UCATA]."

amounts, such as the total of the settling PRPs' equitable shares of the response costs at a site. See, e.g., In re Masters Mates & Pilots Pension Plan, 957 F.2d 1020, 1030-32 (2d Cir. 1992). See also Ark. Code Ann. §§ 16-61-202(4), 16-61-204, 16-61-205 (Michie 1987); Del. Code Ann. tit. 10, §§ 6302(d), 6304 (1975); Haw. Rev. Stat. §§ 663-12, -14, -15, -17 (1995); Md. Code Ann., Gen. Prov. art. 50, §§ 19-20 (1994); N.M. Stat. Ann. §§ 41-3-2(D), 41-3-4, 41-3-5 (Michie 1996 Repl.); 42 Pa. Cons. Stat. Ann. §§ 8326-8327 (West 1982); R.I. Gen. Laws §§ 10-6-3, -7, -8 (1983). (These state statutes all contain provisions that declare, in unqualified terms, that settlements reduce the liability of the nonsettling defendants by "the amount stipulated in the [settlement] . . . or the amount of the consideration paid for it, whichever is the greater." Each of these provisions, however, is tempered by another provision which declares that settlements do not bar claims for contribution against the settling defendants, unless the settlements provide that the liability of the nonsettling defendants will also be reduced by the settling defendants' equitable shares of the liability. Consequently, the settling defendants cannot, by negotiating a favorable settlement, avoid ultimate responsibility for the full amount of their equitable shares of the liability. Thus, these state statutes demonstrate that language like that found in Section 113(f)(2) does not mean that the ultimate liability of nonsettling parties can not be reduced by other means or other amounts.)


40. See Cannons Eng'g, 720 F. Supp. at 1048. The court's assertion that Congress intended to adopt the approach of the UCATA in Section 113(f)(2) still does not answer all of the questions that exist with respect to the meaning of Section 113(f)(2) and its effect upon the liability of nonsettlers.

Under the 1955 Revised Act, a "good faith settlement" bars all claims for contribution against the settling parties and reduces the liability of the nonsettling parties by "the amount stipulated [in the settlement] . . . or . . . the amount of the consideration paid for it, whichever is the greater." See UCATA § 4(b), 12 U.L.A. 264 (1996). However, with the advent of comparative fault and its emphasis on the equitable apportionment or allocation of liability, a number of states either rejected the UCATA or pro tanto approach to determining the effect of settlements upon the liability of nonsettlers altogether, or limited the operation of the UCATA or pro tanto approach to ensure that liability would be allocated or apportioned among defendants in a fair and equitable manner. See Alaska Stat. §§ 09.16.010-09.16.060 (Michie 1983), repealed by Initiative 87-2, effective March 5, 1989; Miss. Code Ann. § 85-5-5 (1972), repealed by L. 1989, c. 311, § 6, effective from July 1, 1989; Wyo. Stat. Ann. §§ 1-1-110 to 1-1-113 (Michie 1977), repealed by L. 1986, c. 24, § 2, effective June 11, 1986. (These states expressly repealed statutes utilizing the UCATA or pro tanto approach.) See N.D. Cent. Code § 9-10-7 (1987 and Supp. 1995); Bartels v. Williston, 276 N.W.2d 113, 121-22 (N.D. 1979) (In Bartels, the North Dakota Supreme Court held that North Dakota's
These decisions, however, have been based solely upon the courts' consideration of the language of Section 113(f)(2), which declares that settlements between the government and PRPs "[reduce] the potential liability of [other PRPs] by the amount of the settlement," and the fact that one of Congress' goals

comparative negligence statute [N.D. Cent. Code § 9-10-7] implicitly repealed the pro tanto approach set out in that state's version of the UCATA [N.D. Cent. Code §§ 32-38-01 to 32-38-04] and established a proportionate or equitable share approach.). See Colo. Rev. Stat. §§ 13-50.5-103, -50.5-105 (1989) (Although Colorado did not repeal its version of the UCATA in its entirety, it expressly rejected the UCATA or pro tanto approach to determining the effect of settlements on the liability of nonsettlers in favor of the UCFA approach. It did so by providing that settlements reduce the liability of nonsettlers by the settlors' percentages of fault or equitable shares of the liability.). See Ark. Code Ann. §§ 16-61-202(4), -61-205 (Michie 1987); Del. Code Ann. tit. 10, §§ 6302(d), 6304 (1975); Haw. Rev. Stat. §§ 663.12, .14, .15, .17 (1995); Md. Code Ann., Gen. Prov. art. 50, §§ 19-20 (1994); N.M. Stat. Ann. §§ 41-3-2(D), 41-3-4, 41-3-5 (Michie 1996 Repl.); 42 Pa. Cons. Stat. Ann. §§ 8326, 8327 (West 1982); R.I. Gen. Laws §§ 10-6-3, 10-6-7, 10-6-8 (1985); S.D. Codified Laws § 15-8-18 (Michie 1984 and Supp. 1997). (These states modified or limited the operation of the contribution bar and the pro tanto credit rule contained in UCATA to ensure that disproportionate liability would not fall on nonsettling defendants as a result of those provisions. These states did so by adopting statutes which provide that settlements will not bar claims for contribution against settlors unless the settlements provide for a reduction in the liability of the nonsettlers equal to the settlors' percentages of fault or equitable shares of the liability.).

The modifications to the UCATA or pro tanto approach which began with the advent of comparative fault were well under way by the time Congress considered and passed SARA, and raise additional questions as to just what Congress intended in Section 113(f)(2). For example, even if one concludes that Congress intended to adopt the UCATA approach to determining the effect of settlements on the liability of nonsettlers in Section 113(f)(2), which UCATA approach did Congress intend to adopt—the approach of the 1955 Revised Act, or the modified UCATA approach that was being followed by the states which were using comparative fault to allocate or apportion responsibility among defendants? The fact that SARA adopted a comparative fault approach to allocating or apportioning responsibility for response costs among defendants, and the fact that Section 104(a)(1) of SARA appears to impose limitations upon the settlements to which Section 113(f)(2) can be applied—limitations designed to ensure that each PRP, including those settling with the government, will bear, at a minimum, the full costs of cleaning up or remediating the pollution caused by its activities—suggest that it was the modified UCATA approach, or one similar to it, that Congress intended to adopt in Section 113(f)(2), if it intended to adopt a UCATA approach at all. Like the UCFA approach, a modified UCATA approach is much more consonant with the equitable allocation or apportionment of response costs among defendants than the UCATA approach. See McDermott, Inc. v. AmClyde, 511 U.S. 202, 207-13, 217, 114 S. Ct. 1461, 1465-67, 1470 (1994). It eliminates the possibility of disproportionate liability and ensures that each defendant bears the costs of remediating the harm caused by its activities.

In addition, the structure of the provisions in SARA is very similar to the structure of the statutes setting out the modified UCATA approach—i.e., the adoption of a pro tanto credit rule in one provision, Section 113(f)(2), and the adoption of a limitation upon the operation of that rule in another provision, Section 104(a)(1). The only difference between the schemes is that instead of denying the benefits of the contribution bar to settlors in connection with settlements which do not provide that the liability of the nonsettlers will be reduced by the settlors' equitable shares of the liability, Congress prohibited settlements between the government and PRPs for less than the total of the settlors' equitable shares of the liability.
in SARA was to promote or encourage settlements. None of those courts considered or cited any of the other provisions of SARA in arriving at their conclusions as to the meaning of Section 113(f)(2) and its effect on the liability of nonsettlors. Moreover, none of those courts considered or cited any of the relevant legislative history or materials in arriving at those conclusions. The courts' analysis in these cases is clearly incomplete; the cases do not take sufficient account of the complexities of the issues or the statutes.

In addition, most of those courts have recognized that their interpretation of Section 113(f)(2) might compel the nonsettlors to "absorb any shortfall" between the settlors' equitable shares of the response costs and the amounts paid by the settlors under the settlement. In fact, some of those courts have asserted, based upon the language of Section 113(f)(2) alone, that Congress explicitly intended to create a disproportionate liability scheme that would allow the government and the PRPs settling with it to unilaterally shift much of the settlors' equitable shares of the response costs at a site to the nonsettlors.

Those assertions are troubling for several reasons. SARA, the source of Section 113(f)(2), was intended to ameliorate the harshness of the statutory scheme under CERCLA, not to exacerbate it. In addition, although SARA was intended to promote or encourage settlements, that was not its only goal. Congress was also concerned with preventing "sweetheart deals"—i.e., settlements in which the government let PRPs out cheaply by settling with them for less than the total of their equitable shares of the response costs—in SARA. Furthermore, the legislative history of SARA does not contain any mention of, or reference to, any desire on the part of Congress to create such a disproportion-

---

41. See the cases cited in supra note 39.
42. See, e.g., Cannons Eng'g, 899 F.2d at 91 ("The statute immunizes settling parties from liability for contribution and provides that only the amount of the settlement—not the pro rata share attributable to the settling party—shall be subtracted from the liability of the nonsettlors. This can prove to be a substantial benefit to settling PRP's—and a corresponding detriment to their more recalcitrant counterparts."); Thomas Solvent, 790 F. Supp. at 736 ("[T]he amici's argument that the consent decree should contain a provision that would reduce their liability by the amount of the settlors' [sic] equitable shares, not by the amount of the settlement judgment is without statutory support and inconsistent with [C]ongress' intent to promote early settlement. According to the express terms of the statute, a settlement 'reduces the potential liability of the others by the amount of the settlement.' (emphasis added); Rohm & Haas, 721 F. Supp. at 675-76; Cannons Eng'g, 720 F. Supp. at 1048; In re Acushnet River, 712 F. Supp. at 1027 ("[I]f the settlor pays less than its proportionate share of liability, the nonsettlers, being jointly and severally liable, must make good the difference. In this respect, the words of the statute are clear: the potential liability of the others is reduced 'by the amount of the settlement,' not by the settlor's proportionate share of any damages ultimately determined to have been caused.'"); Exxon, 697 F. Supp. at 681, 681 n.5, 683.
43. See Cannons Eng'g, 899 F.2d at 91-92 ("Congress purposed that all who choose not to settle confront the same sticky wicket of which appellants complain."); In re Acushnet River, 712 F. Supp. at 1026-27.
44. See supra note 9 and infra notes 140-144 and accompanying texts.
45. See infra notes 125-129 and accompanying text.
ate liability scheme. Finally, those assertions are troubling because the disproportionate liability scheme embraced by those courts is a punitive or in terrorem policy that invites collusion, "sweetheart deals," and arbitrary and capricious government action.

B. UCFA Approach

Under the UCFA approach, a settlement between the government and PRPs reduces the potential liability of the nonsettlers by the settlers' equitable shares of the response costs at a site, whatever those equitable shares may be.

46. See infra note 124 and accompanying text.

47. The disproportionate liability scheme which those courts have read into Section 113(0(2) is much harsher than the UCATA, and contains none of the procedural safeguards or mechanisms designed to assure fairness to nonsettlors which are contained in the UCATA. For example, the UCATA does not permit settlors to pursue claims for contribution against nonsettlers unless the settlement that was negotiated extinguishes the liability of the nonsettlers to the claimant. See UCATA § 1(d), 12 U.L.A. 194-95 (1996) ("A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement . . . ."). In addition, under the modified UCATA approach that has been adopted in a number of states, a settlement does not bar contribution actions by the nonsettlers against the settlors unless the settlement provides that it reduces the liability of the nonsettlers by the settlors' equitable shares of the liability. See the authorities cited supra in notes 38 and 40. Finally, under the UCATA approach, a court must hold a fairness hearing and determine that the settlement was entered into in good faith. If the court is not satisfied at the conclusion of the fairness hearing that the settlement is fair and was entered into in good faith by the claimant and the settling parties, the settlement will not bar contribution actions by the nonsettling parties against the settling parties.

Under CERCLA, as amended by SARA, however, settlors can pursue claims for contribution against nonsettlers, even though the settlement does not extinguish the liability of the nonsettlers to the government. See 42 U.S.C. § 9613(f)(3)(B) (1995). Furthermore, the settlement bars all claims for contribution by the nonsettlers against the settlors, whether the settlement reduces the liability of the nonsettlers by the settlors' equitable shares of the response costs or not. See 42 U.S.C. § 9613(f)(2) (1995). Finally, under the scheme established by CERCLA, as amended by SARA, the courts are required to consider the fairness of proposed settlements to nonsettlers before they can enter consent decrees approving those settlements. In practice, however, the courts do nothing more than pay lip service to the idea that such settlements should be fair to nonsettlers. See infra text accompanying notes 175-177 and 186-190.

Section 113(f)(2) declares that settlements between the government and PRPs "reduce the potential liability of the others by the amount of the settlement." The language of that provision of Section 113(f)(2) is not necessarily inconsistent with the UCFA approach, if the purpose of that provision is to ensure that the government does not receive a "windfall" when the amount of a settlement exceeds the settlors' equitable shares of the response costs at a site. If no provision of CERCLA limited the operation of the UCFA approach in situations where the amount of a settlement exceeds the settlors' equitable shares of the response costs at a site, the government could recover more than the total costs of responding to the releases of hazardous substances at a site. It could do so by settling with some of the PRPs for amounts which exceed their equitable shares of the response costs, and proceeding against the remaining PRPs for the full amounts of their equitable shares of the response costs. The UCFA approach would only reduce the liability of the nonsettlers by the settlors' equitable shares of the response costs at the site, even though the settlors had paid more than the sum of their equitable shares of the response costs in order to settle the claims against them. Section 113(f)(2) may have been intended to ensure that CERCLA operated in the manner intended—i.e., as a cost recovery statute—by preventing windfalls or double recoveries under the UCFA approach when the amount which the government receives in a settlement exceeds the sum of the settlors' equitable shares of the response costs at a site. It does so by ensuring that a settlement between the government and PRPs reduces the liability of the nonsettling PRPs, at a minimum, by the amount of the settlement.

At least one district court has found those views persuasive and has embraced the UCFA approach. In United States v. Alvin Laskin, the court held that settlements between the government and PRPs always reduce the liability of nonsettlers by the settlors' equitable shares of the response costs, and reduce the liability of the nonsettlers by the amount of the settlement, if that amount exceeds the settlors' equitable shares of the response costs.

In Laskin, the government filed a motion for the entry of a consent decree approving a settlement that had been negotiated between the government and certain PRPs in connection with a site in Ashtabula, Ohio. A number of nonsettling PRPs opposed the entry of the consent decree approving the settlement on the grounds that the approval of that settlement might leave them potentially liable for significantly more than their equitable shares of the response costs at the site. The nonsettling PRPs emphasized the fact that they believed they had valid and substantial defenses to liability for the response costs at the site, and asked the court to either: (a) postpone the entry of any consent decree until discovery on the issues of allocation and contribution at the site had been completed and those issues had been tried and decided, so that the court could determine whether or not the settlors were paying their equitable shares of the

response costs under the terms of the settlement; or (b) enter an order preserving all of the nonsettling parties' rights, including their rights to seek contribution against the settling parties.

The Laskin court rejected both of the nonsettling PRPs' requests. The court held that it could not enter an order preserving the nonsettling parties' rights to seek contribution against the settling parties because such an order would be directly contrary to the express provisions of Section 113(f)(2) and Section 113(f)(3), which bar contribution claims against settling parties. The court also held that it was not required to hold an evidentiary hearing on the issues of contribution, allocation, and apportionment of liability or determine whether each of the settling parties was paying its equitable share of the response costs at the site in the settlement before it could enter a consent decree approving the settlement.50 The court found that such a hearing was not desirable at that point in the litigation. The court concluded that the issues of apportionment and allocation of liability would more properly be addressed at a later time in the context of the claims for recovery of response costs against the nonsettling parties.

The Laskin court was concerned, however, with the objections of the nonsettling parties and the fact that they might be exposed to potential liability far in excess of their equitable shares of the response costs at the site. The court was aware of the provision in Section 113(f)(2) which declares that a settlement between the government and PRPs "reduces the potential liability of the [other PRPs] by the amount of the settlement." Indeed, the court quoted that language in its opinion. Unlike the other courts that have considered the question, however, the Laskin court recognized that that provision of Section 113(f)(2) could not be read in isolation or interpreted in a vacuum. Rather, it had to be considered in the context of the other provisions of SARA and the overall scheme which SARA establishes for settlements between the government and PRPs. Thus, the court stated:

CERCLA, despite the foregoing provisions, does grant the Court discretion in apportioning costs among the parties. CERCLA specifically provides that the Court apportion responsibility under CERCLA among parties in a fair and equitable manner by stating:

50. The Laskin court concluded that it was not necessary for it to hold an evidentiary hearing or determine whether the settlors were paying their equitable shares of the response costs in the settlement before approving the settlement because it was going to use the UCFA approach to determine the effect of the settlement on the liability of the nonsettlers. The UCFA approach obviates the need for such hearings or determinations, because it contains built-in assurances of fairness to nonsettlers. See infra notes 78-79 and accompanying text.

The court's holding on this point may be incorrect, however, if Section 113(f)(2) constitutes an adoption of the UCATA approach to determine the effect of partial settlements on the liability of nonsettlers and creates a disproportionate liability scheme. See infra notes 183-192 and accompanying text.
In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. 42 U.S.C. section 9613(f)(2).51

The court concluded that it simply did not make sense for Congress to grant the courts the authority to apportion response costs among parties in a fair and equitable manner in the first paragraph of Section 113(f), and then rob the courts of that authority in the very next paragraph of Section 113(f) by establishing a "disproportionate liability scheme" which would render equitable apportionment impossible and place PRPs at the mercy of the government.52 Consequently, the court held that the UCFA approach should control the effect of settlements on the liability of nonsettlers because the principles of the UCFA continued to be the most consistent with, and to do the most to implement, the Congressional intent in CERCLA, notwithstanding the provisions of Section 113(f)(2). The court also indicated that the provision of Section 113(f)(2) which declares that settlements "reduce the potential liability of [nonsettlers] by the amount of the settlement" should be read as a statutory minimum designed to prevent "windfalls" or double recoveries in situations where the government settled with parties for more than their equitable shares of the response costs.53

52. If Section 113(f)(2) creates a "disproportionate liability scheme," the government can unilaterally adjust or reallocate liability among PRPs by deciding which of the PRPs it wishes to settle with on favorable terms and which of the PRPs it does not wish to settle with on favorable terms.
53. Under the UCFA approach, "windfalls" or double recoveries by the government would be possible, absent a provision like Section 113(f)(2) establishing that nonsettlers are entitled, at a minimum, to a reduction in liability equal to the amount of the settlement. Under the UCFA approach, a settlement, release, or covenant not to sue between a claimant and a PRP discharges the settling PRP from all liability for contribution and reduces the potential liability of the nonsettling PRPs by the settling PRPs' equitable shares of the obligation. See UCFA § 6, 12 U.L.A. 147 (1996). Because a settlement with a PRP only discharges the settling PRPs' equitable shares of the obligation and only reduces the potential liability of the nonsettling PRPs by the settling PRPs' equitable shares of the obligation, regardless of the amount of the settlement, the claimant is free to pursue the other PRPs for their full equitable shares of the obligation. Hence, if the claimant is able to settle his claims against the settling PRPs for more than the settling PRPs' equitable shares of the obligation, the claimant will receive a windfall—he will receive more than the total amount of the obligation owed, if he is able to recover the nonsettling PRPs' full equitable shares of the obligation from the nonsettling PRPs.

The only way to prevent such windfalls under the UCFA approach is to modify that approach by adopting a provision which provides nonsettlers with, at a minimum, a reduction in liability equal to the amount of the settlement. The nonsettlers will then receive a credit equal to the settling party's equitable share of the obligation or the amount of the settlement, whichever is greater. That is what Section 113(f)(2) was arguably intended to do.

Under such a modified scheme, settlors will receive full contribution protection, nonsettlers will not be prejudiced by the extinction of their contribution rights against the settlors because they will not be forced to bear any portion of the settlors' equitable shares of the response costs, and the claimants can still recover the total of the nonsettlers' full equitable shares of the response costs from
The *Laskin* court then spelled out exactly how it intended to apply the UCFA approach in determining the effect of the settlements on the liability of the nonsettlers. It declared:

This Court intends to apply similar factors in determining relative fault of the parties and will also utilize the theories underlying the provisions of the 1977 Uniform Comparative Fault Act. . . . Special attention is called to Section 6 of the Uniform Comparative Fault Act as to the effect of a settlement:

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with provisions of Section 2. (Emphasis added).

In applying this provision of the Comparative Fault Act and other equitable concepts of contribution, the government's claim against any non-settling defendant shall be reduced by the greater of the amount of the settling defendants' combined equitable share of the obligation or the amount of the settlement. In applying this provision, if the government accepts a settlement of less than the combined equitable share of the settling defendants, the government may not recover the remaining portion of the settling defendant's equitable share from the non-settling defendants. Accordingly, non-settling defendants will not, through the effect of joint and several liability, be required to pay the government any share of the costs properly attributable to acts of the settling defendants. This Court will use its equitable powers to prevent any grossly unfair allocation of liability and will utilize the concepts of comparative fault of the parties where such application is reasonable.\(^{54}\)

III. WHY THE UCFA APPROACH CONTINUES TO BE VALID AND SHOULD PREVAIL

Despite the fact that the provision of Section 113(f)(2) which declares that settlements “reduce the potential liability of the others by the amount of the

---

the nonsettlers under a joint and several liability scheme. To the extent that a nonsettlor is forced to pay more than its own equitable share of the response costs at the site after a settlement because of the joint and several nature of nonsettlers' obligation to the claimants for the balance of the response costs at the site, the nonsettlor can pursue the recovery of those amounts from the other nonsettlers in contribution actions.

settlement" is very similar to the pro tanto or dollar-for-dollar approach that the UCATA employs in determining the effect of settlements on the potential liability of nonsettlers, that provision should not be interpreted as a rejection of the UCFA approach to determining the effect of settlements on the liability of nonsettlers or an adoption of the UCATA approach. The UCFA approach to determining the effect of settlements on the potential liability of nonsettlers continues to be valid and should prevail over the UCATA approach for a number of reasons.

The courts which have concluded that the language of Section 113(f)(2) precludes the application of the UCFA approach in determining the effect of settlements on the potential liability of nonsettlers have focused on and considered only a single clause in Section 113(f)(2).\textsuperscript{55} It is not appropriate, however, to analyze or interpret that provision of Section 113(f)(2) in a vacuum. It must be considered and interpreted in light of the other provisions of SARA and the scheme that SARA establishes for settlements. Section 113(f)(2) is, after all, only a part of that scheme. Consequently, it is only by considering the scheme as a whole that the courts can properly interpret and apply Section 113(f)(2).

When that scheme is considered, it is apparent that Section 113(f)(2) is not inconsistent with the UCFA approach to determining the effect of settlements between the government and PRPs on nonsettlers. In fact, the other provisions of CERCLA, and the scheme which they establish, indicate that the UCFA approach to determining the effect of settlements on the liability of the nonsettlers is the approach that was contemplated by CERCLA and SARA. The pro tanto credit rule of Section 113(f)(2) was simply intended to establish the minimum amount by which the potential liability of the nonsettlers was to be reduced, in order to promote fairness and equity in the allocation of liability among PRPs and prevent windfalls or double recoveries by the government.\textsuperscript{56} In addition, the objectives


\textsuperscript{56} CERCLA is, after all, a cost recovery statute. It was intended to permit the government to recover the costs incurred in responding to releases of hazardous substances. It was not intended to allow the government to recover amounts in excess of the costs actually incurred in responding to those releases.

CERCLA does authorize the recovery of natural resource damages by natural resources trustees in circumstances where the recovery of such damages is appropriate. See 42 U.S.C. § 9607(a)(4)(C) (1995). This article, however, does not address the recovery of such damages, and the fact that those damages may also be recoverable is not relevant to the point under discussion here. The government should not be able to recover more for the costs of responding to releases of hazardous substances than the costs that actually have been and will be incurred in responding to those releases.
and policies of CERCLA and SARA establish that the UCFA approach, rather than the UCATA approach, is the most consistent with the objectives and policies of CERCLA and SARA, and should be followed under CERCLA and SARA.

Furthermore, notwithstanding judicial assertions to the contrary, the language and history of Section 113(f)(2) do not support the conclusion that Congress intended to adopt the UCATA approach. In addition, the other provisions of SARA and the legislative history of SARA as a whole do not support the conclusion that Congress intended to adopt the UCATA approach in Section 113(f)(2). Finally, the objectives and policies of CERCLA and SARA as a whole do not support the conclusion that Congress intended to adopt the UCATA approach to determining the effect of settlements on the liability of nonsettlers in Section 113(f)(2) or to establish a disproportionate liability scheme. For purposes of convenience, each of these points is discussed separately below.

A. The Other Provisions of CERCLA and SARA Indicate That the UCFA Approach is the Approach Contemplated by CERCLA and SARA

The provision of Section 113(f)(2) which declares that settlements "reduce the potential liability of others by the amount of the settlement" cannot be analyzed in isolation or interpreted in a vacuum. It must be read and interpreted in light of the other provisions of CERCLA and SARA and the scheme which they establish for the recovery of response costs by the government. Several of the other provisions of CERCLA have a bearing on the manner in which Section 113(f)(2) should be interpreted and applied, and indicate that Section 113(f)(2) was not intended to bar the application of the UCFA approach to determine the effect of settlements between the government and PRPs on the liability of nonsettlers. Rather, Section 113(f)(2) was intended to complement the UCFA approach and prevent windfalls or double recoveries of response costs by the government under the UCFA approach in situations where the amount of the settlement exceeds the settlors' equitable shares of the response costs at the site.

The first of those provisions is Section 104(a)(1) of CERCLA. It provides, in pertinent part:

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of
104 of CERCLA is entitled “Response authorities.” It is the first and most basic provision of CERCLA. It addresses and defines the measures that can be taken by the President (or EPA)²⁹ in responding to releases of hazardous substances. Section 104(a)(1) permits the EPA to authorize or allow owners, operators, or other responsible persons to implement the response actions or measures which the EPA deems necessary at the site of a release, pursuant to settlement agreements with those persons under Section 122 of CERCLA.³⁰ Section

release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. . . . In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question.

(emphasis added).


59. An executive order authorizes the Environmental Protection Agency (“EPA”) to take all steps or actions which the President is authorized to take under CERCLA for and on behalf of the President. See 42 U.S.C. § 9615 (1995); Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (1987), as amended by Exec. Order No. 12,777, § 1(a), 56 Fed. Reg. 54,757 (1991) (delegating President’s authority under CERCLA, as amended by SARA).

60. See 42 U.S.C. §§ 9604(a)(1), 9622 (1995). Section 122 of CERCLA sets out the terms and conditions under which the EPA may enter into settlement agreements with PRPs. Section 122(a) of CERCLA confirms the provisions of Section 104(a)(1) which authorize the EPA to allow owners, operators, or other responsible persons to implement or carry out response measures pursuant to settlement agreements under Section 122 of CERCLA. It provides as follows:

The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of a release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 9604(b) of this title) if the President determines that such action will be done properly by such person.

See id. § 9522(a).
104(a)(1) also expressly provides, however, that no PRP who agrees to implement or perform any such response measures or actions in a settlement agreement under Section 122 shall “be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor . . . with respect to the release or facility in question.” Hence, the EPA is not entitled

61. See 42 U.S.C. § 9604(a)(1) (1995). The term “response action contractor” is not defined in Section 104 of CERCLA, nor is that term defined for purposes of CERCLA generally. See 42 U.S.C. §§ 9604, 9601 (1995 and Supp. 1997). Consequently, that term or phrase must be given its ordinary or commonly understood meaning in interpreting Section 104(a)(1). If the term or phrase “response action contractor” is given its normal or commonly understood meaning in the context in which it is used in Section 104(a)(1), it must be interpreted as referring to and including any owner, operator, or other responsible person who undertakes or agrees to perform, provide, or pay for any response measures or actions in a settlement agreement with the United States under Section 122 of CERCLA.

It is true that the term “response action contractor” is defined in Section 119(c)(2) of CERCLA, but that term is defined in Section 119(e)(2) of CERCLA for purposes of Section 119 of CERCLA only. See 42 U.S.C. § 9619(e)(2) (1995) (“For purposes of this section— . . . [the] term ‘response action contractor’ means . . . any person who enters into a response action contract with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a facility . . . .”) (emphasis added). It is also clear, from the provisions of Section 119 of CERCLA that deal with the liability of “response action contractors,” as that term is defined in that section, that Section 119 of CERCLA is not intended to limit and does not limit the liability of PRPs who undertake or agree to perform response measures or actions in settlement agreements with the government under Section 122 of CERCLA. Section 119 appears to be addressed to and to provide limitations of liability for contractors who are hired by the government, PRPs, or others to perform response measures or actions at a site, but who are not PRPs themselves and do not otherwise have any liability with respect to the site. See 42 U.S.C. §§ 9619(b)(1), 9619(c)(1), (2), (5)(A), (5)(C), 9619(d) (1995). See also 132 Cong. Rec. H9591-9592 (Oct. 8, 1986) (statement of Rep. Kindness), reprinted in 2 SARA Notebook, supra note 58, at H9591:

In so doing, Mr. Speaker, I believe it absolutely critical that, for purposes of legislative history, the language of the statement of managers be viewed as the best and most accurate expression of the intent of the House and Senate on this matter. There can be no doubt that the language of the conference report is the best evidence as to what it is the Congress decided. Mr. Speaker, I single out the issue of response action contractor liability for attention . . . . [T]he statement of managers does reflect a strong realization that response action contractors are differently situated than responsible parties in the Superfund process . . . . Because they are in a fundamentally different position than responsible parties and because responsible parties will always remain liable for the injuries and damages their wastes create, it makes little sense to ask those who clean up the sites to "bet the store" every time they clean up a site . . . . Superfund has always been based on the principal [sic] that the "polluter pays." A negligence standard for cleanup contractors in no way undermines that concept.

(emphasis added); 131 Cong. Rec. S11860 (Sept. 20, 1985) (statement of Sen. Bentzen) reprinted in 2 SARA Notebook, supra note 58, at S11860:

Last of all, I have clarified the definition of what constitutes a “response action contractor” and excluded them from the parties that would otherwise be liable under this law . . . . Similarly, a person who is already a potentially responsible party would not be relieved of its liability by becoming a response action contractor. These provisions will protect contractors from unusual financial exposure due to the unavailability of
to enter into settlement agreements that would allow PRPs to pay less than the total of their equitable shares of the response costs that have been and will be incurred at the site. Any settlement agreement between the government and PRPs for less than the total of the PRPs' equitable shares of the response costs that have been and will be incurred at the site would clearly constitute preferential treatment of those PRPs.

Similarly, the EPA is not entitled to offer PRPs discounts on their equitable shares of the response costs at the site as an inducement to get them to come forward and settle or as a reward for their cooperation. PRPs are expected, at a minimum, to pay their equitable shares of the response costs at a site and to cooperate in the cleanup, whether they do so through settlement or not. 62


62. See 42 U.S.C. §§ 9604(a)(1), 9607(d)(1), (3) (1995) ("Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person... This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.") (emphasis added).

The Gore Amendment would have permitted PRPs to receive reductions in their liability for the response costs at a site or a credit for coming forward and settling or cooperating in the cleanup. For a more thorough discussion of the Gore Amendment, see infra note 75. In addition, several courts have also suggested that EPA can appropriately grant PRPs reductions in their equitable shares of the response costs at a site or give those PRPs credit for coming forward and entering into settlements or cooperating in the cleanup. See, e.g., United States v. DiBiase, 45 F.3d 541, 546 (1st Cir. 1995) ("In most instances, settlement requires compromise. Thus it makes sense for the government, when negotiating, to give a PRP a discount on its maximum potential liability as an incentive to settle. Indeed, the statutory scheme contemplates that those who are slow to settle ought to bear the risk of paying more if they are eventually found liable."); United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1087 (1st Cir. 1994) ("With this in mind, the proper way to gauge the adequacy of settlement amounts to be paid by settling PRPs is to compare the proportion of total projected costs to be paid by the settlers with the proportion of liability attributable to them, and then to factor into the equation any reasonable discounts for litigation risks, time savings, and the like that may be justified."); United States v. Cannons Eng’g Corp., 899 F.2d 79 at 88 (1st Cir. 1990); In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1032 (D.Mass. 1989).

The problem with these assertions is that they are contrary to the express mandate of Section 104(a)(1), the “polluter pays” principle, and Congress’ goal of eliminating “sweetheart deals.” The Gore Amendment does not provide any support for a conclusion that the EPA or the government can give settling PRPs discounts on their equitable shares of the response costs at a site. It was rejected by Congress, and can not possibly supersede or contradict the express language of Section 104(a)(1), which was adopted by Congress. The courts’ assertions that the EPA or the government can grant settling PRPs discounts on their equitable shares of the response costs at a site are similarly unavailing—those assertions simply can not stand in light of the express language of Section 104(a)(1).
Section 104(a)(1) therefore recognizes and ensures that one of the central objectives or goals of CERCLA—the "polluter pays" principle—will be vindicated. It ensures that the persons who are responsible for releases of hazardous substances will, at the very least, be required to pay their equitable shares of the costs incurred in responding to those releases. They are not entitled to a discount or to avoid paying their full equitable shares of the response costs by simply coming forward and cooperating.

In addition, Section 113(f)(3) of CERCLA also supports the conclusion that neither the United States nor the states are supposed to enter into settlements with PRPs which require those persons to pay less than their full equitable shares of the response costs at the site. Section 113(f)(3)(B) expressly reserves the rights of settling parties to seek contribution from nonsettlers. It provides:

A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in paragraph (2).

This provision assumes that the settling parties have paid more than their equitable shares of the response costs. Obviously, there is no need to preserve the rights of settling parties to seek contribution from nonsettlers, unless the settlors pay more than their full equitable shares of the response costs at the site to the government. The settlors are not entitled to seek contribution from the nonsettlers under either the UCFA approach or the UCATA approach, unless the amounts they pay to the government in the settlement exceed their full equitable shares of the response costs.63 Under the scheme of CERCLA, as amended by SARA, the government is not supposed to settle with PRPs for less than their equitable shares of the response costs at a site. The government is expected to enter into settlements with PRPs for amounts which exceed their equitable shares of the response costs at the site, and the threat of joint and several liability and the other enforcement tools available to the government under CERCLA are designed to produce that result. That is why Congress deemed it necessary to

63. See UCFA § 4, 12 U.L.A. 142 (1996) ("A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2."); id. § 5, at 145-46 ("(a) If the proportionate fault of the parties to a claim for contribution has been established . . . , a party paying more than his equitable share of the obligation . . . may recover judgment for contribution."); UCATA § 1(b), 12 U.L.A. 194-95 (1996) ("(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.").
preserve the contribution rights of settling parties against nonsettlers—so that a fair allocation or apportionment of response costs could be obtained through subsequent actions by the PRPs for contribution. Consequently, Section 113(f) itself supports the conclusion that the government cannot settle with PRPs for less than their equitable shares of the response costs at a site, and will usually settle with PRPs for amounts which exceed their equitable shares of the response cost at a site.

Furthermore, Section 122(e) of CERCLA reinforces the conclusion that the government should not settle with PRPs for less than their equitable shares of the response costs at a site. Section 122(e)(3)(E) provides, in pertinent part:

Where the President, in his discretion, has provided a nonbinding preliminary allocation of responsibility and the potentially responsible parties have made a substantial offer providing for response to the President which he rejects, the reasons for the rejection shall be provided in a written explanation.64

Section 122 of CERCLA does not specify what constitutes a "substantial offer providing for response" for purposes of that provision. The Conference Report on SARA does elaborate on the meaning of that phrase, as used in the scheme for nonbinding preliminary allocations of responsibility, however. The Conference Report declares:

Section 122(e)(3)(E) provides that when the President has issued a non-binding preliminary allocation of responsibility, and a potentially responsible party has made a substantial offer for a response action which the president rejects, the President shall provide a written explanation of such rejection.

In implementing this provision, the President will establish threshold-percentage criteria governing situations when the explanation needs to be provided. A substantial offer is one which represents a commitment by the potentially responsible parties to undertake or finance a predominant portion of the total remedial action. Any substantial offer must provide for response or costs of response for an amount equal to or greater than the cumulative total, under the [non-binding preliminary allocation of responsibility], of the potentially responsible parties making the offer. For a substantial offer to exist, all other terms must be agreed to.65

This language demonstrates that Congress contemplated in CERCLA, as amended by SARA, that the government would not enter into any settlements

with PRPs for amounts less than the total of those persons' equitable shares of the response costs at a site. That is why the government is not required to explain its decision to reject offers of settlement for less than those amounts under Section 122(e)(3)(E). The government is not authorized to enter into settlements with PRPs for less than those amounts, and would be violating the mandates of the statute if it did so. The government is only required to explain its decisions to reject offers of settlement for amounts which equal or exceed the cumulative total of the settlors' equitable shares of the response costs at the site and which represent a commitment by those parties to undertake or finance a predominant portion of the total response measures that will be required at the site—i.e., substantial offers providing for response.

In addition, the EPA has expressly rejected suggestions that it should negotiate or enter into "fair share" settlements with major PRPs, and has consistently taken the position, under both CERCLA and CERCLA as amended by SARA, that it will only enter into settlements with PRPs when the amounts to be paid pursuant to those settlements exceed the total of the settlors' equitable shares of the response costs at a site and which constitute a "substantial proportion" of the response costs at the site. Thus, the EPA's own approach and policy with respect to settlements supports the conclusion that it does not believe that it can or should enter into settlements with major PRPs under CERCLA unless the amounts to be paid pursuant to those settlements equal or exceed the settlors' equitable shares of the response costs at a site.

When considered against the backdrop of this scheme, the provision of Section 113(f)(2) which declares that a settlement between the government and PRPs "reduces the potential liability of the others by the amount of the settlement" is not inconsistent with the UCFA approach to determining the effect of settlements upon the potential liability of the nonsettlors, and cannot possibly be viewed as the linchpin of any "disproportionate liability scheme." The reason is quite simple. The amounts of the settlements should equal or exceed the equitable shares of the settling parties. If they do not, the government is not authorized to enter into those settlements by the statute.

That fact also strongly suggests that the purpose of that provision in Section 113(f)(2) was not to embrace or adopt the UCATA approach, but to prevent windfalls or double recoveries by the government in situations where the amount of the settlement exceeds the settlors' equitable shares of the response costs at the site. The provision accomplishes that purpose by reducing the potential liability of the nonsettlors by the full amount of the settlement, rather than the settlors' equitable shares of the response costs, when the amount of the settlement exceeds the settlors' equitable shares of the response costs—a result that would not otherwise follow under the UCFA approach. By doing so, that provision of Section 113(f)(2) limits the government's claims against the nonsettlors to that portion of the response costs at the site which have not yet been paid, rather than the nonsettlors' equitable shares of the response costs at the site. Additional support for that view of Section 113(f)(2) can be found in the other provisions
of CERCLA which prohibit windfalls or double recoveries by any persons, including the government.\textsuperscript{66}

Finally, the other provisions of CERCLA and SARA establish that the government will seldom, if ever, be liable for any shortfalls if it settles with PRPs for less than their equitable shares of the liability. Consequently, the government's interests and enforcement authority should not be significantly limited or impaired as a result of the fact that it may occasionally be forced to bear the risks of its own settlements—i.e., the risks that the amounts for which it settles with PRPs may be less than the equitable shares of those PRPs—under the UCFA approach. This conclusion is buttressed by several considerations.

Generally speaking, the government does not have any difficulty in negotiating settlements with PRPs for more than the total of the settlers' equitable shares of the response costs at a site. The tools granted the government under CERCLA and the threat of joint and several liability for all of the response costs at the site ensure that it will have no trouble doing so.\textsuperscript{67} The government routinely negotiates settlements with major parties (as opposed to de minimis parties) which require those parties to pay more than their equitable shares of the response costs. In fact, the government usually will not even consider entering into a settlement with a major party or group of major parties that only requires that party or group of parties to pay their equitable shares of the response costs at a site; it is not worth the government's time or trouble to do so.\textsuperscript{68} The

\textsuperscript{66} See 42 U.S.C. §§ 9614(b), 9601(21) (1995). The pertinent portions of these provisions are quoted in supra note 13.

\textsuperscript{67} See 42 U.S.C. §§ 9606(a), (b)(1), 9607(c)(3), 9604(a)(1), 9607(a) (1995). These provisions are discussed in greater detail in infra note 131.

\textsuperscript{68} See, e.g., Letter from Courtney Price and Lee Thomas, Assistant Administrators, EPA, to EPA Regional Personnel (Dec. 12, 1983) [hereinafter referred to as the "1983 Guidance"] (outlining EPA's Hazardous Waste Case Settlement Policy), reprinted in Hazardous Waste Litigation 1984, at 94-103 (Practicing Law Institute, Litigation Course Handbook No. 251, 1984) (In the 1983 Guidance, EPA indicated that it would allow mixed funding settlements only in extremely narrow circumstances, and that it would accept settlement offers from PRPs only if those offers were for 80% or more of the total response costs at a site); EPA Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5036, 5038 (1985) [hereinafter referred to as the "1985 Policy"] (In the 1985 Policy, EPA stated that it would only be willing to negotiate with PRPs if their initial offer was adequate to cover "a substantial portion of the costs of cleanup at a site or a substantial portion of the needed remedial action." EPA also affirmed the fact that it would only be willing to enter into settlements with PRPs which required them to pay more than their allocable shares of the response costs at a site where it appeared that collection of all of the response costs at the site would otherwise be impossible).

See also 42 U.S.C. § 9622(c)(3)(E) (1995). ("Where the President, in his discretion, has provided a nonbinding preliminary allocation of responsibility and the potentially responsible parties have made a substantial offer providing for response to the President which he rejects, the reasons for the rejection shall be provided in a written explanation."). Under 42 U.S.C. § 9622(c)(3)(E) (1995), the EPA need only provide a written explanation of the rejection of a settlement offer if that offer was a "substantial" one. An offer is considered to be "substantial" under Section 9622(c)(3)(E) only if:

1. it provides for "response or costs of response equal to or greater than the cumulative total (liability), under the NBAR, of the . . . parties making the offer;"
2. it is for a "predominant portion of the total remedial action"; and


government is usually willing to enter into settlements with major parties at a site only if those settlements will provide for or cover a major portion of the overall remedial actions that are needed or the response costs that will be incurred at the site.

Consequently, such settlements almost always require the settling parties to pay more than their equitable shares of the response costs at the site. That is why Section 113(f)(3) expressly preserves the settlors' rights to seek contribution against nonsettlers. Therefore, there is very little risk that the government will settle with PRPs for less than their equitable shares of the response costs at a site, and very little risk that there will be any shortfalls between the settling PRPs' equitable shares of the response costs and the amounts of their settlements with the government. Accordingly, the government should be able to recover all of the costs it incurs in responding to releases of hazardous substances in almost all cases, even if the UCFA approach is followed.

Furthermore, settlements between the government and major PRPs under CERCLA are materially different from the types of settlements that can give rise to problems with shortfalls under the UCFA approach. Section 122 of CERCLA authorizes the government to include provisions allowing future enforcement actions against the settling PRPs in connection with known conditions or problems in such settlements, and requires the government to include an exception to any covenants not to sue contained in settlements with PRPs for unknown or unanticipated conditions or problems at the site, unless extraordinary circumstances exist. As a result, settlements between the government and
major parties under CERCLA, unlike ordinary settlements, do not usually preclude further action by the government against the settlors for response actions or costs in connection with the known conditions or problems at a site (although such settlements may limit or specify the parameters of such action), and almost never preclude further action by the government against the settlors for response actions or costs in connection with unknown or unanticipated conditions or problems at a site. Those “reopener” provisions of the settlements eliminate, for the most part, the danger that the government might be forced to absorb any significant shortfalls between the settling PRPs’ equitable shares of the response costs and the amounts of the settlements—especially where unknown or unanticipated conditions and problems are concerned.

Thus, the only cases in which the government might not be able to recover all of its response costs under the UCFA approach are those in which the government underestimates the settlors’ equitable shares of the response costs in connection with the known conditions or problems at a site, agrees to settle for less than the settlors’ equitable shares of those response costs, and is able to demonstrate, to the satisfaction of the court which approves the settlement, that the available evidence supports the conclusion that the equitable shares of the settlors are smaller than those shares subsequently prove to be. Situations of that type may sometimes arise when the government has received inaccurate, incomplete, or misleading information or evidence. In those cases, which should not occur often, it is not unfair to require the government to bear the risks of its settlement and absorb any shortfalls, rather than the nonsettlers. The government usually has better and more extensive information than the PRPs, has superior bargaining power, and negotiates and agrees to the settlement. The nonsettling PRPs may not be involved in the settlement negotiations at all, do not consent or agree to the settlement, and usually are not afforded a meaningful opportunity to challenge the settlement, even though it will, by operation of law, bar their claims for contribution. Consequently, the government’s interests and enforcement authority should not be significantly limited or impaired by the use of the UCFA approach.

---

72. Given the requirements of Section 104(a)(1), the government should not even attempt to enter into any settlements with PRPs until it has sufficient information to determine, with a reasonable degree of certainty, the response costs which have been and will be incurred in connection with a site and the settling PRPs’ equitable shares of those costs.

73. See infra notes 174-191 and accompanying text.

74. It is also unlikely that the use of the UCFA approach will have any adverse effect upon the negotiation and approval of de minimis settlements under Section 122(g) of CERCLA (i.e., 42 U.S.C. § 9622(g) (1995)). The reason, again, is simple. The use of the UCFA approach, rather than the UCATA approach, to determine the effect of de minimis settlements upon the liability of nonsettlers will not, as a practical matter, alter the effect of de minimis settlements upon the liability of nonsettlers.
B. The UCFA Approach is the Approach That is Most Consistent With the Objectives and Policies of CERCLA and SARA

The objectives and policies of CERCLA and SARA also indicate that the UCFA approach is the approach that is most consistent with CERCLA and SARA, and should be followed in determining the effect of settlements between the government and PRPs on the liability of nonsettling PRPs. In fact, the overwhelming weight of authority under CERCLA and SARA establishes that this is the case.

In order to fully and finally resolve their liability for the problems at a site, de minimis parties must usually agree to pay an amount equal to the past and projected response costs at the site attributable to their volumetric shares of the waste at the site, plus a substantial premium to cover any uncertainty that may exist with respect to their volumetric shares of the waste at the site, their shares of any cost overruns that may occur, and their shares of any additional response actions that may be necessary at the site. See "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA," 52 Fed. Reg. 24,333, 24,338 (1987). See also United States v. Cannons Eng'g Corp., 899 F.2d 79, 85, 88-89 (1st Cir. 1990). Because the amounts which de minimis parties must pay in order to fully and finally resolve their liability for the problems at a site will usually equal or exceed the total of their equitable shares of the liability, de minimis settlements will almost always reduce the liability of the nonsettlers by the amounts of those settlements under the UCFA approach, as modified by Section 113(f)(2). Thus, nonsettlers will not receive a greater reduction in their liability under the UCFA approach, as modified by Section 113(f)(2), than they will under the UCATA approach in connection with de minimis settlements. In fact, nonsettlers will receive the same reduction in liability under the UCFA approach, as modified by Section 113(f)(2), that they would receive under the UCATA approach where de minimis settlements are concerned. Accordingly, it does not appear that the use of the UCFA approach to determine the effect of de minimis settlements upon the liability of the nonsettlers will have any adverse impact or effect upon de minimis settlements—it will not alter any of the considerations which apply to such settlements or the effect of such settlements on the liability of the nonsettlers.

The EPA expressly recognized that any premium payments which de minimis settlors might be required to make would reduce the liability of the nonsettlers in its "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA," 52 Fed. Reg. 24,333, 24,338 (1987). That guidance provides in pertinent part:

In addition to the volumetric share of past and projected response costs, the Agency generally will require payment of a premium from each settling de minimis party in exchange for granting a covenant not to sue which does not include reopeners for cost overruns and future response action . . . . [I]f the major PRPs are assuming the responsibility for conducting the cleanup, then the premium amounts may be made available to those PRPs rather than to the Agency. In this situation, the premium amounts may be negotiated between the major PRPs and the de minimis settlors . . . . The premium payment reduces the liability of the nonsettling PRPs in the amount of the premium, unless otherwise provided in the settlement agreement.

Id. at 24,338, 24,338 n.9. It should be noted, however, that the last portion of the statement from the guidance is incorrect. Under Section 113(f)(2), the premium payment will reduce the liability of the nonsettling PRPs by the amount of that premium payment, whether the settlement agreement provides otherwise or not. The erroneous statement in the guidance is simply another reflection of the EPA's attempts to incorporate UCATA and the UCATA approach into CERCLA, as amended by SARA, even though Congress rejected the EPA's efforts to do so in Section 113(f)(2). See infra text accompanying notes 89-113.
Almost every court that has considered the effect that settlements between private parties should have on the liability of nonsettlers under CERCLA, both pre-SARA and post-SARA, has concluded that the UCFA approach is most consistent with the objectives and policies of CERCLA and should be followed in determining the effect of those settlements on the liability of the non-

---

75. Settlements between private parties and their effect on the potential liability of nonsettlers under CERCLA are not expressly addressed in CERCLA. Section 113(f)(2) of CERCLA only addresses and applies to settlements between "the United States or a state" and PRPs under Section 122 of CERCLA. See 42 U.S.C. § 9613(f)(2), (3) (1995).

Section 113(f)(1) and Section 113(g)(3) are the only sections of CERCLA that appear to apply to settlements between private parties. Section 113(f)(1) provides, in pertinent part:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law.

(emphasis added).


Consideration of the extent to which PRPs cooperated with government officials in preventing further harm in allocating costs among jointly and severally liable PRPs is not only inappropriate but contrary to the express terms of Section 104(a)(1). Section 104(a)(1) declares that no PRP "shall be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from" its cooperation in or conduct of any cleanup. See 42 U.S.C. § 9604(a)(1) (1995). A criterion from a rejected amendment can not possibly prevail over the express language of Section 104(a)(1).
settlers. Those courts have held that the UCFA approach is the approach that is most consistent with the objectives and policies of CERCLA because:

(1) the UCFA encourages settlements in complex multi-defendant CERCLA actions by relieving the settlors from any liability to nonsettlers (the UCFA approach allows a settlor to buy its peace from the claimant in the action and thereby free itself completely from claims for contribution or further involvement in the litigation);

(2) the UCFA approach offers the advantage of a built-in assurance of fairness to nonsettlers (the UCFA approach protects nonsettling defendants by ensuring that their liability will reflect only their responsibility for the cleanup costs—i.e., their equitable shares of the cleanup costs as finally determined at the close of the litiga-


A small minority of the courts that have considered the question have held that the UCATA approach is the approach that should be followed in determining the effect of private party settlements on the potential liability of nonsettlers. See Atlantic Richfield Co. v. American Airlines, Inc., 836 F. Supp. 763 (N.D. Okla. 1993); Denver v. Adolph Coors Co., 829 F. Supp. 340 (D. Colo. 1993); Allied Corp. v. Frola, 730 F. Supp. 626 (D.N.J. 1990). See also Frohman, supra, at 760, 760 n.211.

77. See UCFA § 6, 12 U.L.A. 126, 147 (1996) ("A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges the person liable from all liability for contribution . . . .")

Under the UCATA, settlers can still be sued for contribution, if it is subsequently found that the settlement was not negotiated and executed in "good faith" and is unfair to the nonsettlers—i.e., that the settlement was the product of collusion or was arrived at without due consideration or regard for the interests of the nonsettlers. See UCATA § 4(a), 12 U.L.A. 264 (1996) ("When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: . . . (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.").
tion—regardless of the amounts paid by the settling defendants to the claimant).  

(3) the UCFA approach relieves the courts of the need to conduct good faith or fairness hearings in connection with the settlements (there is no need for good faith or fairness hearings because the proportionate credit approach of the UCFA is not based upon the amount of the settlement);  

(4) settlements involving non-monetary consideration, such as agreements to implement or perform response actions which do not limit or specify the costs or value of those actions, are more easily handled under the UCFA approach, since the proportionate credit approach of the UCFA is not based upon the amount of the settlement;  

(5) complex partial settlements involving multiple parties, claims, or theories are more easily handled because the court does not have to allocate or divide the credit that will be received as the result of such a settlement among those parties, claims, or theories before trial, as it would under the UCATA approach; and  

(6) total settlement is encouraged after partial settlement because a culpable nonsettlor cannot escape responsibility for the full amount of his equitable share of the response costs when settlors pay more than their equitable shares of the response costs and cannot gamble on a jury verdict in view of a guaranteed credit.  

78. See UCFA § 6, 12 U.L.A. 147 (1996) ("The claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation . . . ."); UCFA § 2(c), 12 U.L.A. 135-36 (1996) ("The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of the rules of joint-and-several liability.").

Under the joint and several liability scheme of the UCFA, a nonsettling defendant may be held liable to a claimant who is not a PRP—i.e., a claimant who is pursuing a cost recovery action, rather than a contribution action—for more than his equitable share of the response costs at a site. In fact, he may be held liable to the claimant in a cost recovery action for all of the nonsettlors' equitable shares of the response costs at the site. The nonsettling defendant who is held liable for more than his equitable share of the response costs at the site in a cost recovery action, however, retains his contribution rights against the other nonsettlers, and can recover any amounts that he is forced to pay in order to satisfy the other nonsettlers' equitable shares of the response costs from those nonsettlers.

A claimant who is a PRP with respect to a site and is pursuing a contribution action, rather than a cost recovery action, cannot recover more than a nonsettlor's equitable share of the response costs at the site from that nonsettlor. See UCFA § 4(a), 12 U.L.A. 142 (1996) ("A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm . . . . The basis for contribution is each person's equitable share of the obligation . . . as determined in accordance with the provisions of Section 2.").

79. See, e.g., SCA Serv., 827 F. Supp. at 535-36 ("The UCFA will better promote CERCLA's policy of encouraging settlements, while securing equitable apportionment of liability for Nonsettlers. No good faith hearing to evaluate the settlement agreements is required under the UCFA because its comparative fault rule is not based upon the amount of the settlement. Since SCA bears the risk that the Settlers' share of the remediation costs could be greater than the settlement amount, it is in SCA's best interest to negotiate a settlement which closely proximates the Settlers' reasonable share of the cleanup costs."); King Indus., 814 F. Supp. at 218; Allied Corp. v. Acme Solvent
At first glance, Section 113(f)(2) appears to defeat one of the advantages of the UCFA approach to determining the effect of settlements on the liability of nonsettlers—the fact that total settlement is encouraged after partial settlement—where settlements between the government and PRPs are concerned. It appears to do so because Section 113(f)(2) provides that settlements between the government and PRPs reduce the liability of the nonsettling PRPs to the government by the amount of the settlement. Accordingly, if the settlors pay more than their equitable shares of the response costs in the settlement, the nonsettlers, who will receive a guaranteed reduction in their liability to the government equal to the amount of the settlement, may be tempted to gamble on a verdict, since they will avoid responsibility for at least a portion of their equitable shares of the response costs, even if they lose.

In reality, however, Section 113(f)(2) does not eliminate or defeat that advantage of the UCFA approach with respect to settlements between the government and PRPs. Under the UCFA approach, total settlement is still encouraged after partial settlement, despite the language of Section 113(f)(2), for several reasons. First of all, the mere fact that the nonsettlers will receive a guaranteed reduction in their potential liability to the government does not mean that they have an incentive to litigate the question of their liability for the remainder of the response costs at the site. It probably still will not make sense for them to do so, in light of the fact that they could be held jointly and severally liable for the remainder of the response costs and will, in all likelihood, be held so liable. In addition, the fact that nonsettlers receive a guaranteed

---

80. The courts which have suggested that nonsettlers may be tempted to litigate or gamble on a jury verdict in light of the fact that they will receive a guaranteed credit as a result of the settlement
reduction in their potential liability to the government equal to the amount of the settlement does not mean that their ultimate liability is limited to the difference between the response costs at the site and the amount of the settlement, or that they will be able to avoid responsibility for any portion of their equitable shares of the response costs. If the settlors pay more than the total of their equitable shares of the response costs in the settlement, the settlors can seek recovery of the difference between the amount of the settlement and their equitable shares of the response costs from the nonsettlers in contribution actions. Consequently, nonsettlers do not receive a guaranteed credit or a guaranteed reduction in their ultimate liability as the result of a settlement under Section 113(f) of CERCLA; they only receive a guaranteed reduction in their liability to the government. Finally, where litigation costs are high, the plaintiff has sufficient bargaining power, and the PRPs' equitable shares are sufficiently different—factors which are almost always present when the government seeks recovery of response costs from nonsettling PRPs—the UCFA approach does at least as much to encourage total settlement (permitting prompt remedial action) as the UCATA approach, and may do more to encourage total settlement than the UCATA approach.\textsuperscript{82}

under the UCATA approach are probably wrong. The assertions to that effect appear to be based upon an oversimplification of the factors affecting the nonsettlers' decisions to litigate or settle and a lack of appreciation for or understanding of the strategic situations of those parties. \textit{See, e.g.}, Lewis A. Kornhauser and Richard L. Revesz, \textit{Settlements Under Joint And Several Liability}, 68 N.Y.U. L. Rev. 427, 434, 487-88 (1993).

\textsuperscript{81} \textit{See} 42 U.S.C. § 9613(f)(3)(B) (1995) ("A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement . . . .").

Section 113(f)(3)(B) represents a marked departure from the UCATA. The UCATA does not permit settlers to pursue claims for contribution against nonsettlers who are released from any further liability to the claimant in the settlement. \textit{See UCATA} § 1(d), 12 U.L.A. 194-95 (1996) ("A tortfeasor who enters into settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement . . . ."). That is why nonsettlers are usually able to treat the amount of the settlement as a "guaranteed credit" under the UCATA approach—settlements do not usually release nonsettlers from any further liability to the claimant.

\textsuperscript{82} \textit{See} Kornhauser and Revesz, \textit{supra} note 80, at 434, 466-69, 485-87, 488-91, 492-93; McDermott, Inc. v. AmClyde, 511 U.S. 202, 214-16, 216 n.24, 114 S. Ct. 1461, 1468-69, 1469 n.24 (1994). In \textit{AmClyde}, the Supreme Court \textit{unanimously} adopted the UCFA approach to determining the effect of settlements upon the liability of nonsettlers in admiralty cases, rather than the UCATA approach. The Court declared that the UCFA or proportionate share approach was more consistent with the proportionate fault rule it had adopted for admiralty matters in United States v. Reliable Transfer Co., 421 U.S. 397, 409, 95 S. Ct. 1708, 1714 (1975); that the pro tanto approach had no clear advantage in promoting settlements; that it was not necessary to risk the inequitable apportionments of liability that might result from adoption of the pro tanto approach in order to promote settlements; and that any additional incentive to settle that might result from adoption of the pro tanto approach would come "at too high a price in unfairness." \textit{AmClyde}, 511 U.S. at 213-16, 114 S. Ct. at 1467-69. All of these considerations apply with equal force to settlements between the government and PRPs under CERCLA, and are relevant to the manner in which Section 113(f)(2) should be interpreted, given the goals of CERCLA and the statutory scheme for achieving those goals.
Consequently, Section 113(f)(2) will not prevent the realization of any of the advantages which the UCFA approach offers with respect to private party settlements in connection with settlements between the government and PRPs. However, Section 113(f)(2) will help eliminate most, if not all, of the disadvantages of the UCFA approach that have been identified in the context of private party settlements. The disadvantages of the UCFA approach which the courts have identified in the context of private party settlements are the following:

1. the fact that recovery of the exact amount of the damages or costs fixed by the trier of fact will be entirely fortuitous when there has been a partial settlement, as the nonsettlers will be required to pay only their fair share of those damages or costs, regardless of the amounts of the settlements;
2. the fact that the nonsettlers will only be required to pay their fair share of the damages or costs, regardless of the amounts of the settlements, may impair the claimant’s willingness to settle because of the uncertainty as to the amount of the credit that the nonsettlers will receive for the settlements; and
3. the fact that, at trial, the claimant must not only advocate its own freedom from fault or responsibility, but convince the trier of fact of the settlors’ minimal fault or responsibility.\(^3\)

CERCLA’s prohibition on settlements between the government and PRPs for less than their equitable shares of the response costs at a site, coupled with Section 113(f)(2)’s mandate that settlements between the government and PRPs reduce the potential liability of nonsettlers by the amounts of the settlement, eliminate each and every one of these disadvantages. First of all, the amounts by which such settlements will reduce the potential liability of the nonsettlers to the claimant is not uncertain—it should always be the amount of the settlement because the amount of the settlement should always equal or exceed the total of the settlors’ equitable shares of the response costs at the site.\(^4\) In addition, because the amounts of such settlements must always equal or exceed the total

---

83. See, e.g., SCA Serv., 827 F. Supp. at 534-35.
84. See supra text accompanying notes 58-66.
of the settlors' equitable shares of the response costs, the claimant need not worry about convincing the trier of fact of the settlors' minimal fault or responsibility at trial. Finally, because such settlements must always be for amounts which equal or exceed the cumulative total of the settlors' equitable shares of the response costs at the site, the recovery of the exact amount of the damages or costs which will be incurred at a site is not fortuitous. The nonsettlers will remain jointly and severally liable for the difference between the total costs that will be incurred in responding to the releases at the site and the aggregate amount of any such settlements. That difference will always be less than or equal to the cumulative total of the nonsettlor's equitable shares of the response costs at the site, and will always be the exact amount which the government needs to recover in order to receive the total costs incurred in responding to the releases at the site.

Furthermore, prior to the adoption of SARA, the EPA was willing, in some situations, to structure settlements between the United States and PRPs under CERCLA in such a manner as to make those settlements and their effect on the potential liability of nonsettlers consistent with the approach that would obtain under the UCFA. The EPA found it necessary to structure settlements with major parties in that manner in those situations in order to provide the parties with the assurances of finality necessary to induce them to enter into the settlements. The EPA's Interim CERCLA Settlement Policy provided, in pertinent part:

Contribution among responsible parties is based on the principle that a jointly and severally liable party who has paid all or a portion of a judgment or settlement may be entitled to reimbursement from other jointly or severally liable parties. When the Agency reaches a partial settlement with some parties, it will frequently pursue an enforcement action against non-settling responsible parties to recover the remaining costs of cleanup. If such an action is undertaken, there is a possibility that those nonsettlers would in turn sue settling parties. If this action by non-settling parties is successful, then the settling parties would end up paying a larger share of cleanup costs than was determined in the Agency's settlement. This is obviously a disincentive to settlement.

Contribution protection in a consent decree can prevent this outcome. In a contribution protection clause, the United States would agree to reduce its judgment against the non-settling parties, to the extent necessary to extinguish the settling party's liability to the non-settling third party. 85

Thus, the practice in settlements between the United States and PRPs under CERCLA, prior to the adoption of SARA, was to structure those settlements in

---

a manner that would yield the same results as the UCFA approach, where it was necessary to do so in order to obtain settlements.

Finally, both the courts and the commentators who addressed the effect of settlements between the government and PRPs on the liability of the nonsettlers prior to the adoption of SARA found that the UCFA approach was the approach most consistent with the objectives and policies of CERCLA and the approach that should be followed to determine the effect of those settlements on the liability of the nonsettlers. The court in United States v. Conservation Chemical Company, the first case to address the issue, expressly held that the effect of a settlement between the United States and PRPs on the liability of nonsettlers should be determined under the UCFA approach, because the principles of the UCFA "[were] the most consistent with, and [did] the most to implement, the Congressional intent which is the foundation for CERCLA." Furthermore, at least one commentator concluded, after an exhaustive analysis of the rights to contribution for response costs under CERCLA, as that statute existed prior to the adoption of SARA, that the UCFA approach should be followed in determining the effect of settlements between the government and PRPs on the potential liability of nonsettlers.


When the EPA published its Interim CERCLA Settlement Policy on February 5, 1985, and indicated that it would provide the contribution protection described above in settlements between the government and PRPs where it was necessary to do so in order to effect a settlement, the EPA noted that it believed the UCATA should apply to such settlements and provide contribution protection to the settling parties as a matter of law. The EPA expressly noted, however, that whether the approach of the UCATA would be adopted as the federal rule of decision with respect to such settlements was still an open question. See Interim CERCLA Settlement Policy, 50 Fed. Reg. 5034, 5043 (1985).

The decision in United States v. Conservation Chemical Co. on December 12, 1985, answered that question for settlements between the government and PRPs executed prior to the adoption of SARA. Conservation Chem., 628 F. Supp. at 391. It expressly rejected the EPA’s argument that the UCATA approach should be adopted as the federal rule for such settlements, and adopted the UCFA approach as the federal rule in determining the effect of such settlements on the potential liability of nonsettlers. See Anderson, supra note 5, at 361-63.
88. See Anderson, supra note 5, at 364-65 (“Once a court has decided that a right to contribution exists under CERCLA, it must then address the question of apportioning that contribution. Presently, there is no uniform American rule on how to equitably apportion contribution. Some states have used the rule that ‘equality is equity’ and require that each tortfeasor pay an equal pro rata share. Other states use comparative fault to determine the amount that each tortfeasor should pay. Under that approach, each person pays an amount based on his percentage of fault for a given result. The comparative fault approach represents the trend in the area of contribution. The legislative history and the aims of the Act indicate that courts should opt for the comparative fault approach in CERCLA cases. Court decisions and the recent proposed amendments to CERCLA adopted by the House support such an approach. These sources suggest that a court should use its broad equitable powers to determine the ‘fair share’ owed by each party.”) (emphasis added).
Accordingly, the great weight of authority indicates that the UCFA approach is the approach that is most consistent with the objectives and policies of CERCLA, and the approach that should be followed in determining the effect of private party settlements on the liability of nonsettlers, both pre-SARA and post-SARA. It was also the approach that was used to determine the effect of settlements between the government and PRPs on the liability of nonsettling PRPs under CERCLA prior to the adoption of SARA.

The only question that remains is whether the adoption of Section 113(f)(2) alters that result for settlements between the government and PRPs executed after SARA's effective date. Analysis of the history and language of Section 113(f)(2), the other provisions of SARA, the scheme which the other provisions of SARA establish for settlements between the government and PRPs, and congressional intent in SARA indicates that Section 113(f)(2) was not intended to and does not displace or prevent the use of the UCFA approach to determine the effect of settlements between the government and PRPs on the liability of nonsettlers.

C. The Language and History of Section 113(f)(2) Do Not Support the Conclusion That Congress Intended to Adopt the UCATA Approach in Section 113(f)(2)

The history and language of Section 113(f)(2) do not support the conclusion that Congress intended to adopt the UCATA approach in Section 113(f)(2). It is true, as all of the courts who have considered the question have observed, that Section 113(f)(2) adopts a pro tanto or dollar-for-dollar rule for use in determining the effect of settlements between the government and PRPs on the liability of the nonsettling PRPs—one with language that is similar to the pro tanto or dollar-for-dollar rule employed by the UCATA. Section 113(f)(2) declares, in pertinent part, that such a settlement “reduces the potential liability of the others by the amount of the settlement.” That Congress adopted a pro tanto or dollar-for-dollar rule in Section 113(f)(2) that is similar to the pro tanto or dollar-for-dollar rule used in the UCATA, however, does not mean that Congress meant to adopt the UCATA approach to determine the effect of settlements between the government and PRPs on the liability of nonsettling PRPs, or that Congress meant to preclude the use of the UCFA approach to determine the effect of those settlements on the liability of nonsettling PRPs. If Section 113(f)(2) had been intended to adopt the UCATA approach or to bar the UCFA approach which the courts were using prior to SARA, the “matter would not have been left so at large” by Congress, as Judge Hand observed in NLRB v. Universal Camera Corp. In fact, the language and the history of Section 113(f)(2) indicate that Congress did not intend to adopt the UCATA

90. 179 F.2d 749, 752 (2d Cir. 1950).
approach to determine the effect of settlements upon the liability of nonsettlers when it adopted the pro tanto rule found in Section 113(f)(2).

This conclusion rests primarily upon two considerations. First, and most important, the language of the pro tanto rule in Section 113(f)(2) differs in several significant respects from the language of Section 4(a) of UCATA, the provision which sets out the UCATA approach to determining the effect of settlements upon the liability of nonsettlers. Section 4(a) of UCATA provides, in pertinent part:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) . . . it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater . . . .

Section 113(f)(2), on the other hand, states that "[s]uch [a] settlement . . . reduces the potential liability of the others by the amount of the settlement." If Congress had intended to adopt the approach of the UCATA to determine the effect of government settlements upon the liability of nonsettlers in Section 113(f)(2), it is reasonable to believe that Congress would have pointed us in that direction. Congress might have referred to the UCATA in the text of the statute or in the debates and conference reports on Section 113(f)(2). Or it could have incorporated the language of the UCATA in Section 113(f)(2). In actuality, however, Congress did not do any of these things. The fact that Congress did not do so indicates that it did not intend to adopt the approach of UCATA to determine the effect of government settlements upon the liability of nonsettlers, or to reject the approach of the UCFA, when it enacted Section 113(f)(2).

Second, the legislative history of Section 113(f)(2) establishes that the differences in the language of the pro tanto rule found in Section 113(f)(2) and the language of Section 4(a) of UCATA—i.e., Section 113(f)(2)'s use of the term "potential liability," rather than the term "claim," and Section 113(f)(2)'s use of the phrase "amount of the settlement," rather than "any amount stipulated by the release or covenant or . . . the amount of the consideration paid for it whichever is the greater"—were intentional, and were designed to ensure that nonsettlers would not be forced to absorb any shortfalls between the settlors'
equitable shares of the response costs at a site and the amounts paid by the settlers to the government in a settlement. When Congress began considering the reauthorization of CERCLA, the EPA proposed legislation containing language almost identical to that found in Section 4(a) of UCATA for use in determining the effect of settlements between the government and PRPs upon the liability of nonsettlers. The legislation proposed by the EPA provided, in pertinent part:

[such a] settlement does not discharge any of the potentially liable persons unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the settlement.94

Following the introduction of the legislation proposed by the EPA in the Senate, it was referred to the Senate Committee on Environment and Public Works for consideration. After a hurried mark-up session, the Committee on Environment and Public Works approved the legislation proposed by EPA with only a few changes.95 It then amended the provisions of Senate Bill 51, another


When H.R. 2817 was introduced in the House it contained language that was similar, if not identical, to that of the legislation proposed by the EPA, and tracked the language of Section 4(a) of UCATA much more closely than Section 113(f)(2) does. H.R. 2817, 99th Cong. § 2 (June 20, 1985) (proposing a new CERCLA § 113(g)(2)), reprinted in 1 SARA Notebook, supra note 58, at 113-54. Consequently, most of the committees in the House which considered H.R. 2817 produced bills containing language that was very similar, if not identical, to the language quoted above, and which tracked the language of UCATA much more closely than Section 113(f)(2) does. H.R. Rep. No. 99-253, pt. 1, at 13 (1985) (H.R. 2817 as reported by the House Committee on Energy and Commerce (proposing a new CERCLA § 113(g)(2)), reprinted in 1 SARA Notebook, supra note 58, at 113-28; id., pt. 5, at 186 (1985) (as reported by the House Committee on Public Works and Transportation (proposing a new CERCLA § 113(g)(2)), reprinted in 1 SARA Notebook, supra note 58, at 113-30.

The lone exception was the House Committee on the Judiciary. Its version of Section 113 contained language that is almost identical to the language that was ultimately adopted. That is not surprising, in light of the fact that its version of Section 113 is the one that was contained in H.R. 3852 (i.e., H.R. 2817 as agreed upon by the House committees for purposes of floor consideration) and its version of Section 113 is the one that was adopted by the House in H.R. 2005 and by the Committee of Conference (with certain technical and clarifying changes). See H.R. Rep. No. 99-253, pt. 3, at 2 (1985) (H.R. 2817 as reported by the House Committee on the Judiciary (proposing a new CERCLA § 113(g)(2)), reprinted in 1 SARA Notebook, supra note 58, at 113-33; H.R. 3852, 99th Cong. (1985) (H.R. 2817 as agreed upon by the House Committees for purposes of floor consideration (proposing new CERCLA § 113(f)(2) and (3)), reprinted in 1 SARA Notebook, supra note 58, at 113-23; H.R. 2005, 99th Cong. § 2 (1985) (H.R. 2005 as passed by the House (proposing new CERCLA § 113(f)(2)), reprinted in 1 SARA Notebook, supra note 58, at 113-5; H.R. Conf. Rep. No. 99-962, at 42, 224-25 (Oct. 3, 1986) (Conference Report on H.R. 2005, Superfund Amendments and Reauthorization Act of 1986), reprinted in 1 SARA Notebook, supra note 58, at 113-2 to 113-3.
bill that had been introduced and was being considered by the Senate, by striking out everything in Senate Bill 51 following the enacting clause and replacing the former text of Senate Bill 51 with the Committee on Environment and Public Works' marked-up version of the legislation proposed by the EPA.96

Two of the changes that the Senate Committee on Environment And Public Works made in the legislation proposed by the EPA, however, involved the contribution provisions of that legislation.97 In the first of those changes, the Committee substituted the term "potential liability" for the term "claim" in the contribution provisions proposed by the EPA.98 In the second of those changes, the Committee added a clarification to the contribution provisions that was more consistent with the EPA's preferences. The clarification declared:

Where the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or State in a good faith settlement, the United States or a State may bring an action for the remainder of the relief sought against any person who has not so resolved its liability.99

Following the introduction of the legislation proposed by the EPA in the House, the House amended the contribution provisions of House of Representatives Bill 2817, a bill that had previously been introduced in the House and was already being considered by it, by substituting the term "potential liability" for the term "claim" in those provisions.100 Thus, both the House and the Senate

96. See S. 494, 99th Cong. (1985) (introduced in the Senate by Senator Stafford at the administration's request and referred to the Committee on Environment and Public Works on February 22, 1985 (legislative day of February 18, 1985)); S. 51, 99th Cong. (1985) (reported by Senator Stafford, with an amendment, on March 7, 1985 (legislative day of February 18, 1985)).
98. See S. 494, 99th Cong. § 202 (1985) (proposing new Section 107(k)(3)); S. 51, 99th Cong. § 126 (1985) (proposing new Section 107(l)(3)). See also S. 51, 99th Cong. (1985) (S. 51 as introduced on Jan. 3, 1985), reprinted in 1 SARA Notebook, supra note 58, at 113-64; S. 51, 99th Cong. § 126 (1985) (S. 51 as reported by the Senate Committee on Environment and Public Works on March 7, 1985 (proposing a new CERCLA § 107(l)(3)), reprinted in 1 SARA Notebook, supra note 58, at 113-57; H.R. 2817, 99th Cong. § 2 (1985) (H.R. 2817 as introduced on June 20, 1985 (proposing a new CERCLA § 113(g)(2)), reprinted in 1 SARA Notebook, supra note 58, at 113-54; id. (as reported by the House Committee on the Judiciary on Oct. 31, 1985), reprinted in 1 SARA Notebook, supra note 58, at 113-33; H.R. 3852 (H.R. 2817 as agreed upon by the House Committees for purposes of floor consideration on Dec. 4, 1985), 99th Cong. § 113(0)(2) (1985), reprinted in 1
J. WHITNEY PESNELL

expressly rejected the use of the term "claim"—the language from Section 4(a) of UCATA proposed by the EPA—in the contribution provisions of the bills that were passed by the House and the Senate and ultimately became Section 113(f)(2). Both the House and the Senate chose, instead, to use the term "potential liability" in the contribution provisions of those bills.

Consequently, the use of the term "potential liability" rather than the term "claim" in those contribution provisions cannot be dismissed or ignored. It was deliberate and purposeful. And its purpose was to eliminate the possibility that the size of the government's claims against nonsettlers would be governed solely by the terms of earlier settlement agreements.\(^{101}\) Congress sought to achieve that purpose by making it clear, through the use of the term "potential liability" rather than the term "claim," that the potential liability of the nonsettlers in connection with the site might be less than the total response costs at the site, and that settlements might operate to reduce the liability of the nonsettlers by more than the amounts stipulated in the settlements or the amounts of the settlements, precluding the government from recovering the difference between the total response costs at the site (i.e., the amount of the government's "claim") and the amounts stipulated in the settlements or the amounts of the settlements from the nonsettlers.\(^{102}\)

---


102. \textit{Id}. \textit{See also} 131 Cong. Rec. S11855 (1985) (statement of Sen. Stafford), \textit{reprinted in} 2 SARA Notebook, \textit{supra} note 58, at S11855. ("Also, where the United States or a State has secured a partial settlement, it may seek relief for any of the remaining response action or costs for which the nonsettlers are liable.") (emphasis added). That statement suggests that the Senate recognized, and the contribution provisions were intended to recognize, that the nonsettlers might not be liable for all of the response costs at a site, that the liability of the nonsettlers might be reduced by more than the amount of the settlement, or both.

The phrase "to the extent of any amount stipulated by the settlement" was not deleted from the EPA's proposed contribution provision by any of the amendments in question. It was carried forward in the amended contribution provisions of S. 51, and was adopted with those provisions in S. 51, the Superfund bill passed by the Senate. [After 7 days of debate, the Senate passed S. 51 on September 26, 1985. Because of the constitutional requirement that tax bills originate in the House, the text of S. 51, as amended during the debate, was inserted in a House-passed measure, H.R. 2005, a bill that originally proposed minor amendments to the Social Security Act.] See S. 51, 99th Cong. §126 (1985) (proposing a new CERCLA §107(f)(3)); H.R. 2005, 99th Cong. §135 (September 26, 1985)
Furthermore, in subsequent hearings, senators from the Senate Committee on the Judiciary criticized other aspects of the contribution provisions of Senate Bill 51, including the clarification that had been added by the Committee on Environment And Public Works, because those aspects of the contribution provisions appeared to be inequitable and inconsistent with the Federal Rules of Civil Procedure. Thereafter, members of the Senate Committee on the Judiciary sponsored a set of amendments on the Senate floor that changed the language of the proposed contribution provisions in two significant respects. First, language allowing defendants in cost recovery actions to seek contribution from other PRPs immediately was substituted for language prohibiting defendants in cost recovery actions from seeking contribution until the actions against them had been concluded by judgment or settlement in what is now Section 113(f)(1) of CERCLA. Second, the phrase “for the remainder of the relief sought”
that had been added to the EPA's proposed contribution provisions by the Senate Committee on Environment and Public Works was deleted. 106

The purpose of the amendments, which were negotiated with and agreed to by both the EPA and the Department of Justice, 107 was to: (a) ensure that the


Under the legislation proposed by the EPA, defendants in cost recovery actions would have been precluded from seeking contribution from other PRPs until the cost recovery actions had been concluded by judgment or settlement. See H.R. 1342, 99th Cong. § 202 (1985) (proposing new Section 107(k)(1), (2)), S. 494, 99th Cong. § 202 (1985) (proposing new Section 107(k)(1), (2)). The EPA wanted to prevent the PRPs it chose to target in cost recovery actions from complicating and delaying the progress of those actions by bringing in a number of other PRPs as third party defendants in those actions. The EPA felt that a provision delaying the assertion of contribution claims by the PRPs it chose to target until after it had obtained a judgment against those PRPs or settled its claims against those PRPs would enable it to obtain judgments against or settlements from the target PRPs much more quickly and force the target PRPs to clean up sites more quickly.

Both the Senate and the House rejected the provisions of the legislation proposed by the EPA that would have delayed the assertion of contribution claims by PRPs in cost recovery actions. Senate Committee on Environment and Public Works, Superfund Improvement Act of 1985, S. Rep. No. 99-11, at 43-45 (March 18, 1985; S. 51, 99th Cong. § 126 (1985) (S. 51 as reported by Senate Committees on May 24, 1985 (adding a proposed new Section 107(f)(1) to CERCLA)); H.R. 2005, 99th Cong. § 135 (1985) (H.R. 2005 as passed by the Senate (adding a proposed new Section 107(f)(1) to CERCLA)), reprinted in 1 SARA Notebook, supra note 58, at 113-16; H.R. 2817, 99th Cong. § 113(b) (1985) (proposing a new Section 113(g)(1) of CERCLA), reprinted in 1 SARA Notebook, supra note 58, at 13-54; H.R. 3852, 99th Cong. § 113(b) (1985) (proposing a new Section 113(f)(1) of CERCLA), reprinted in 1 SARA Notebook, supra note 58, at 113-23; H.R. 2005, 99th Cong. § 113(b) (1985) (H.R. 2005 as passed by the House (adding a proposed new Section 113(f)(1) to CERCLA)), reprinted in 1 SARA Notebook, supra note 58, at 113-5; H.R. Conf. Rep. No. 99-962, at 4-42, 224-25 (Oct. 3, 1986) (Conference Report H.R. 2005, Superfund Amendments and Reauthorization Act of 1986), reprinted in 1 SARA Notebook, at 113-2; 42 U.S.C. § 9613(f)(1) (1995). They recognized, as the Senate Committee on the Judiciary had, that delaying the assertion of contribution claims in such actions would require the PRPs who were identified as defendants in the cost recovery actions to shoulder or bear disproportionate liability for the response costs incurred at the sites, at least temporarily (i.e., until their contribution claims could be asserted and established), and believed that that result was both inequitable and inconsistent with the Federal Rules of Civil Procedure. See supra the authorities cited in note 103.


Mr. President, I thank the able Senator, the chairman of the Committee on Environment and Public Works for accepting these amendments. These amendments are not technical. They go to the merit[s]. . . . In the 18 days after the Committee on Judiciary had the bill, we held 2 days of hearings. The hearings explored many aspects of the Superfund Program . . . that had not previously been examined by the committee. Expert witnesses from the administration, as well as from the business and environmental communities, appeared before the committee to discuss S.51 and the Superfund Program. As a result of these hearing[sic], I met with officials from the Environmental Protection Agency and
defendants in cost recovery actions could seek contribution from other PRPs prior to the conclusion of those actions, thereby eliminating or minimizing the possibility that the defendants in those actions might be required to shoulder the burden of disproportionate liability for the response costs at a site for even a short period of time; and (b) eliminate the possibility that the size of the government's claims against nonsettlers would be governed exclusively by the terms of an earlier settlement agreement. The amendments accomplished the first purpose by allowing PRPs who are identified as defendants in cost recovery actions to seek contribution from other PRPs in the early stages of those actions, pursuant to and in accordance with the Federal Rules of Civil Procedure. The amendments attempted to further the second purpose—one which had arguably already been addressed and accomplished by the substitution of the term “potential liability” for the term “claim” in the mark-up session held by the Senate Committee on Environment and Public Works—by deleting the phrase “for the remainder of the relief sought” from the provision of Senate Bill 51 that ultimately became Section 113(f)(3). The deletion of that phrase from the contribution provisions, like the earlier substitution of the term “potential liability” for the term “claim,” was an attempt to make it clear that settlements might reduce the liability of the nonsettlers by more than the amounts stipulated in the settlements or the amounts of the settlements, and prevent the government from recovering “the remainder of the relief sought”—i.e., the difference between the response costs at the site and the amounts stipulated in the settlements or the amounts of the settlements—from the nonsettlers. Thus, the legislative history of Section 113(f)(2) shows that its

the Department of Justice to formulate an amendment package to address several of the key issues which had surfaced during the Judiciary Committee review of this bill. Once we were able to agree on the language for the amendments and the language to be used in the explanatory statement—and Mr. President, I can assure my colleagues that each word was painstakingly selected—I sought cosponsorship from the other members of the Judiciary Committee. Ten members of the committee—a majority of the committee—joined together to support what came to be known as the Thurmond-EPA-DOJ package.

(Emphasis added); Light, The Importance of “Being Taken,” supra note 101, at 10-11, 12-14; Light, Sweetheart, Goodnight?, supra note 101, at 659-60.

108. See supra authorities cited in notes 101-106.

109. See supra note 105 and accompanying text. Congress believed that the imposition of disproportionate liability on nonsettling PRPs for even short periods of time in order to simplify cost recovery actions and expedite settlements and cleanups was unfair and inequitable, and rejected a provision in Section 113(f)(1) that would have delayed the assertion of contribution claims by nonsettling PRPs in cost recovery actions (resulting in the imposition of disproportionate liability on those PRPs for short periods of time) for those reasons. It is highly unlikely that the same Congress that rejected the temporary imposition of disproportionate liability on nonsettling PRPs in Section 113(f)(1) intended to adopt an approach that might result in the permanent imposition of disproportionate liability on nonsettling PRPs in Section 113(f)(2).

110. See supra note 101 and accompanying text. But see 131 Cong. Rec. S11855 (1985) (statement of Sen. Stafford), reprinted in 2 SARA Notebook, supra note 58, at S11855. In his remarks, Senator Stafford stated that the phrase “for the remainder of the relief sought” was being deleted from the contribution provisions because those provisions expressly declared that the
language does not support the conclusion that Congress meant to adopt the UCATA approach to determining the effect of settlements between the government and PRPs on the liability of nonsettling PRPs.

It is true that the amendments to EPA's proposed contribution provisions are not models of draftsmanship or clarity, and that they may not adequately express Congress' intentions with respect to the pro tanto rule in that provision and the manner in which it was to operate. Indeed, it is the very language of the pro tanto rule in Section 113(f)(2), as amended, which the courts have seized upon to justify their conclusion that Congress meant to adopt UCATA's approach to determining the effect of settlements between the government and PRPs upon the liability of the nonsettling PRPs. The legislative history of that provision simply does not permit such a conclusion, however. The legislative history demonstrates that Congress started with the EPA's proposed rule, which closely

nonsettlers' liability would be reduced by the amount of the settlement, and the phrase "for the remainder of the relief sought" was therefore redundant and unnecessary. He also characterized the deletion of that phrase from the contribution provisions as a technical, rather than a substantive, amendment. \textit{id.}

However, Senator Stafford's remarks concerning the nature of that amendment are suspect for several reasons. First of all, Senator Stafford was not a member of the Committee on the Judiciary, the committee which proposed and developed the amendment deleting the phrase "for the remainder of the relief sought," and did not participate in the development of that amendment. He was a member of the Committee on Environment and Public Works, and simply presented the amendments to the Senate during the debate as a courtesy to Senator Thurmond, the Chairman of the Committee on the Judiciary. \textit{id.} at S11854 and 11856. Second, Senator Stafford's assertion that the deletion of the phrase "for the remainder of the relief sought" was a technical, rather than a substantive, amendment is directly contrary to the statements of Senator Thurmond, the chairman of the Committee on the Judiciary, who was personally involved in and oversaw the development of that amendment. Indeed, the amendment was part of a set of amendments that came to be known as the "Thurmond-EPA-DOJ package." \textit{id.} at S11857. Senator Thurmond expressly declared: "These amendments are not technical. They go to the merits." \textit{id.} at S11856.

The argument made here, based upon the history and changes in the language of the provision that ultimately became Section 113(f)(2), was rejected by the court in \textit{United States v. Rohm & Haas Co.}, 721 F. Supp. 666, 679 n.14 (D.N.J. 1989):

Rohm & Haas argues that by using the words "potential liability" rather than "judgment" in §113(f)(2), Congress did not limit a court's inherent power in adjudicating a CERCLA claim to award the Government less than the full amount of its claim minus the amount of the settlement." Rohm & Haas Supp. Brief at 12. This is suggested, Rohm & Haas says, by Section 113(f)(3) which states that the United States "may," as opposed to "shall," seek relief from other PRPs if it has obtained less than "complete relief" from a settlement with other parties. 42 U.S.C. § 9613(f)(3). "The fact that... § 113(f)(3) did not require EPA to recover 100% of its costs from nonsettlers suggests that Congress also did not intend to diminish the court's power to award less than 100% of the claim." Rohm & Haas Supp. Brief at 13 (emphasis in original). The problems with these assertions are numerous. Suffice to say that we are not persuaded that § 113(f)(2) is merely some congressionally mandated minimum benefit to nonsettlers, upon which courts may improve as they wish.

tracked Section 4(a) of UCATA, rejected that rule (and the UCATA approach) because it was unfair and inequitable, and amended it to produce the pro tanto rule currently found in Section 113(f)(2).

However, even if the legislative history of Section 113(f)(2) is rejected as inconclusive, as at least one commentator has done, the fact remains that there are significant differences between the language of the pro tanto rule in Section 113(f)(2) and Section 4(a) of UCATA. Those differences make it difficult to view the adoption of the pro tanto rule in Section 113(f)(2) as an adoption of the UCATA approach to determining the effect of settlements between the government and PRPs on the liability of nonsettling PRPs—especially where, as here, the statutory scheme requires the equitable allocation or apportionment of response costs among PRPs, the statutory scheme had, to that point, been interpreted as requiring application of the UCFA approach to determine the effect of both government and private party settlements on the liability of the nonsettlers, and neither SARA nor its legislative history contain any references to the adoption of the UCATA approach or the creation of any disproportionate liability scheme.

All of those considerations combine to make it far more likely that the pro tanto rule contained in Section 113(f)(2) was not intended as a rejection of the UCFA approach or an adoption of the UCATA approach. Instead, it was intended to limit the UCFA approach by providing that nonsettlers were entitled, at a minimum, to a reduction in their liability equal to the amount of the settlement, in order to prevent windfalls or double recoveries by the government in situations where the amount of the settlement exceeds the total of the settlor's equitable shares of the response costs at a site.

112. See Neuman, supra note 93, at 10,301, 10,301 nn.82 and 84.
113. Id. See also supra text accompanying notes 91-93.
114. See 42 U.S.C. § 9613(f)(1), Laskin, 1989 U.S. Dist. LEXIS 4900, at *16-20. Cf. McDermott, Inc. v. AmClyde, 511 U.S. 202, 207-17, 114 S. Ct. 1461, 1465-70 (1994). In AmClyde, the United States Supreme Court concluded that the proportionate share approach of the UCFA was the approach most consistent with the equitable allocation or apportionment required in admiralty cases where both parties to a collision are at fault, pursuant to the Court's decision in United States v. Reliable Transfer Co., 421 U.S. 397, 411, 95 S. Ct. 1708, 1715-16 (1975). The Court declared, "[W]e are persuaded that the proportionate share approach is superior, especially in its consistency with Reliable Transfer." See AmClyde, 511 U.S. at 217, 114 S. Ct. at 1470.
116. See infra note 124 and accompanying text.
117. After all, Section 113(f)(2) provides that a settlement between the government and PRPs "reduces the potential liability of the [other PRPs] by the amount of the settlement." See 42 U.S.C. § 9613(f)(2) (1995). It does not provide that such a settlement can only reduce the potential liability of the [other PRPs] by the amount of the settlement, or that Section 113(f)(2) is the exclusive mechanism through which, or means by which, the potential liability of other PRPs can be reduced as the result of a settlement. See supra discussion in note 38. See also Light, The Importance of "Being Taken," supra note 101, at 25; Light, Sweetheart, Goodnight?, supra note 101, at 660. Cf. In re Masters Mates & Pilots Pension Plan, 957 F.2d 1020, 1030-31 (2d Cir. 1992).
D. The Other Provisions of SARA Do Not Support the Conclusion That Congress Intended to Adopt the UCATA Approach in Section 113(f)(2)

Even if one ignores the differences between the language of Section 113(f)(2) and the language of Section 4(a) of UCATA, the language of Section 113(f)(2) still does not support the conclusion that Congress intended to adopt the UCATA approach to determining the effect of settlements between the government and PRPs on the liability of nonsettlers in Section 113(f)(2). It is possible to reach that conclusion if and only if the language of Section 113(f)(2) is the only thing considered.

The problem, of course, is that the language of Section 113(f)(2) cannot properly be considered standing alone and cannot be interpreted in a vacuum. It must be considered and interpreted in the context of the other provisions of CERCLA and SARA and the scheme which those provisions establish for settlements between the government and PRPs. When the language of Section 113(f)(2) is considered in the context of the other provisions of CERCLA and SARA and the scheme which those provisions establish for settlements between the government and PRPs, the conclusion that that language constitutes an adoption of the UCATA approach must be rejected. That conclusion simply does not make sense in the context of those provisions and the scheme which they establish for such settlements.

The other provisions of CERCLA and SARA establish that the government cannot enter into a settlement with PRPs for less than the cumulative total of the PRPs' equitable shares of the response costs which have been and will be incurred at a site.118 In addition, CERCLA and SARA clearly contemplate that the government will ordinarily settle with PRPs for much more than the total of those PRPs' equitable shares of response costs at a site, given the threat of joint and several liability and the powerful tools available to the government in responding to releases of hazardous substances.119 Accordingly, under the scheme of CERCLA, as amended by SARA, the government can only settle with PRPs for amounts which equal or exceed the total of their equitable shares of the response costs at a site.

When viewed against the backdrop of that scheme, the provision of Section 113(f)(2) which declares that settlements between the government and PRPs "reduce the potential liability of nonsettlers by the amounts of those settlements" cannot reasonably be construed as an adoption of the UCATA approach or as the linchpin of any "disproportionate liability scheme." The reason, again, is simple. The amounts of the settlements should equal or exceed the equitable shares of

119. See id. §§ 9606(a), (b)(1), 9607(c)(3), 9604(a)(1), 9607(a) (1995).
the settling parties. If they do not, the government is not authorized to enter into those settlements.

Furthermore, the pro tanto rule of Section 113(f)(2) is not inconsistent with the use of the UCFA approach to determine the effect of settlements between the government and PRPs on the liability of nonsettling PRPs. Under the UCFA approach, the potential liability of nonsettlers is reduced by the settlors' equitable shares of the response costs, regardless of the amount of the settlement. Consequently, if the government settles with PRPs for an amount which exceeds their equitable shares of the response costs, the government is still entitled to proceed against the nonsettlers for their full equitable shares of the response costs. Thus, under the UCFA approach, the government may be able to recover more than the total costs which are incurred in responding to the release of hazardous substances at a site.

Such windfalls or double recoveries of costs can be prevented, however, through the adoption of a provision establishing that the nonsettling parties are entitled, at a minimum, to a reduction in their liability equal to the amount of the settlement. Under such a modified UCFA approach, settlements between the government and PRPs would reduce the potential liability of the nonsettlers by the greater of: (a) the total of the settlors' equitable shares of the response costs; or (b) the amount of the settlement.

These considerations strongly suggest that the purpose of the pro tanto rule in Section 113(f)(2) was not to embrace or adopt the UCATA approach, but to prevent windfalls or double recoveries by the government under the UCFA approach in situations where the amount of the settlement exceeds the settlors' equitable shares of the response costs at the site. The provision accomplishes that purpose by reducing the potential liability of the nonsettlers by the full amount of the settlement, rather than the settlors' equitable shares of the response costs, when the amount of the settlement exceeds the settlors' equitable shares of the response costs. This view of Section 113(f)(2) is also supported by the other provisions of CERCLA, in which Congress expressly prohibited windfalls or double recovery of costs by any person, including the government.

120. See UCFA § 6, 12 U.L.A. 147 (1996). ("A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation . . . ") (emphasis added).

121. See, e.g., Komhauser and Revesz, supra note 80, at 467-68.

122. See Mason, supra note 93, at 124-26; Light, The Importance of "Being Taken," supra note 101, at 34-35; Neuman, supra note 93, at 10,300-10,302; Light, Sweetheart, Goodnight?, supra note 101, at 659-60; Light, SARA's Consequences, supra note 101, at 57, 65-67.

123. See 42 U.S.C. §§ 9614(b), 9601(21) (1995). In 42 U.S.C. § 9614(b), Congress prohibits persons who recover response costs under CERCLA from recovering for the same costs under any other state or federal law, and prohibits persons who recover response costs under other state or federal laws from recovering for the same response costs under CERCLA. 42 U.S.C. § 9601(21) makes it clear that the prohibitions of 42 U.S.C. § 9614(b) extend to the United States and states as
E. The Legislative History of SARA as a Whole Does Not Support the Conclusion That Congress Intended to Adopt the UCATA Approach in Section 113(f)(2)

The legislative history of SARA as a whole does not support the conclusion that Congress intended to adopt the UCATA approach in Section 113(f)(2) or to create a "disproportionate liability scheme" in Section 113(f)(2). The Conference Report on SARA, the bills which were considered by the House and Senate prior to the adoption of SARA, and the committee reports on those bills do not contain any references to the UCFA, the UCATA, or any "disproportionate liability scheme." The fact that the UCFA and the UCATA were not mentioned in any of these legislative background materials makes it highly unlikely that Congress intended to reject the UCFA approach with respect to settlements between the government and PRPs or to embrace the UCATA approach in Section 113(f)(2). If Congress meant to reject one of those approaches or adopt one of those approaches in lieu of the other in Section 113(f)(2), that fact would have surely been noted in the committee reports on the bills that led to the passage of SARA, the House and Senate debates on SARA, or the Conference Report on SARA. Moreover, it is difficult to believe that Congress intended to create a "disproportionate liability scheme" in Section 113(f)(2) when the bills, amendments, and committee reports leading to the passage of SARA, the House and Senate debates on SARA, and the Conference Report on SARA do not mention, much less discuss, any such scheme.

In addition, the bills, amendments, and committee reports leading to SARA, the House and Senate debates on SARA, and the Conference Report on SARA indicate that Congress was at least as concerned, if not more concerned, with preventing collusion and sweetheart deals, vindicating the "polluter pays" well as private parties.

The only measure necessary to complete the clear statement of policy against the double recovery of response costs is a measure which prohibits persons from recovering for the same response costs more than once under CERCLA. Section 113(f)(2) may be that measure.


principle by making certain that settlements between the government and PRPs required those persons to pay at least their equitable shares of the response costs at sites, requiring approval of such settlements by the courts to make certain

would be prevented, by requiring all voluntary agreements to be filed as consent decrees with a Federal District Court. Further, the court could review the agreement, with citizen participation, to insure that it is in the public interest.”); 131 Cong. Rec. H11079 (1985) (statement of Rep. Roe), reprinted in 2 SARA Notebook, supra note 58, at H11079 (“The EPA is given specific authority to enter into settlement agreements with potentially responsible parties . . . . To avoid the so-called sweetheart deals which may occur if the settlement process is abused, settlement agreements under the section must be entered as consent and decrees and must be open for public review and comment.”).


Section 122(e)(3)(E) provides that when the President has issued a non-binding preliminary allocation of responsibility, and a potentially responsible party has made a substantial offer for a response action which the President rejects, the President shall provide a written explanation of such rejection. In implementing this provision, the President will establish threshold percentage criteria governing situations where the explanation needs to be provided. A substantial offer is one which represents a commitment by the PRPs to undertake or finance a predominant portion of the total remedial action. Any substantial offer must provide for response or costs of response for an amount equal to or greater than the cumulative total, under the NBAR, of the potentially responsible parties making the offer. For a substantial offer to exist, all other terms must be agreed to.

(emphasis added).


The settlement provisions of the legislation are premised on the current Superfund Liability System, which imposes strict, joint and several liability on those found responsible under section 106 or 107 of the Comprehensive Environmental Response, Compensation and Liability Act [CERCLA]. The importance of placing the settlement procedures established under section 122 in the context of Superfund’s liability scheme cannot be underestimated. Settlements are an alternative to full prosecution of strictly, jointly and severally liable parties and must always be evaluated in relation to the relief the Government could have obtained by litigating the case. Because Superfund imposes liability without regard to fault, and holds that when the harm is indivisible, each party is jointly and severally liable for the full costs of cleanup, settlements for only a portion of cleanup costs must be measured against a high standard. When a liability scheme is as strong as the scheme contained in Superfund, recoveries of amounts less than full costs are disfavored and may only be justified by exceptional circumstances.

See also 132 Cong. Rec. H9624 (Oct. 8, 1986) (statement of Rep. Kolbe), reprinted in 2 SARA Notebook, supra note 58, at H9624 (“[I]t is not expected that the Agency will use mixed funding as a quid pro quo for settlement, nor is mixed funding authority a device for obtaining fair share settlements. The legislation maintains the strict, joint and several liability standards of current law, as enumerated in the leading case, United States versus Chemdyne Corporation, as the principal mechanism to obtain complete site cleanup by private parties.”) (emphasis added); H.R. 2005, 99th Cong. § 122, at 80-81 (H.R. 2005 as passed by the Senate on September 26, 1985 (proposing the addition of a new Section 104(-)(7)(B) to CERCLA)), reprinted in 1 SARA Notebook, supra note 58, at 122-25 to 122-26:
that they are adequate, and fairness in the allocation or apportionment of response costs among PRPs as it was with promoting or encouraging

Where potentially responsible parties offer to provide payment or the undertaking of remedial action exceeding 50 per centum of the total shares as estimated by the President in the Nonbinding Preliminary Allocation of Responsibility, and such offer provides for response or costs of response for an amount equal to or greater than the cumulative total, under the Nonbinding Preliminary Allocation of Responsibility, of the potentially responsible persons making the offer, such an offer will be considered to be in "good faith" and the Federal district court in the district in which the facility is located may order the President to accept the offer.


128. See 42 U.S.C. § 9613(f)(1) (1995); House Comm. on Energy and Commerce, Superfund Amendments of 1985, H.R. Rep. No. 99-253, pt. 1, at 79 (August 1, 1985), reprinted in 1 SARA Notebook, supra note 58, at 113-41 ("This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances."); House Comm. on Judiciary, Superfund Amendments of 1985, H.R. Rep. No. 99-253, pt. 3, at 19 (October 31, 1985, reprinted in 1 SARA Notebook, supra note 58, at 113-48:

The Judiciary Committee amendment to new subsection 113(g)(2) of CERCLA also clarifies that entry into a judicially approved settlement with the government protects a party only against the contribution claims of other potentially liable parties, and not against indemnification claims. Contribution is a statutory or common law right available to those who have paid more than their equitable share of an entire liability. Indemnity is a right arising from a contract or a special relationship between parties. Settlement with the government under CERCLA should not abrogate independently existing rights of persons to indemnity.


It is the belief of a majority of the Judiciary Committee that the [Thurmond-EPA-DOJ] package of amendments provides for significant improvement of S 51 by striking a fair and equitable balance between the need to quickly clean up toxic waste sites and the need to preserve due process and the integrity of our judicial system.

See also 131 Cong. Rec. S11857 (1985) (statement of Sen. DeConcini), reprinted in 2 SARA Notebook, supra note 58, at S11857 ("Mr. President, I am happy to co-sponsor the amendments to sections 126, 132, and 133 offered by the distinguished chairman of the Judiciary Committee. In my view, these amendments strike the right balance between the need for rapid clean up of hazardous waste sites across the Nation, and the need for potentially liable parties and the general public to receive a full and fair review of their concerns."); Neuman, supra note 93, at 10,305:

The "valid legislative purpose" that the court had in mind was Congress' intent to "encourage early settlement, particularly by de minimis parties. . . ." As noted, this was unquestionably a primary purpose behind SARA. However, Congress was concerned with the fairness of settlements. During the early years of Superfund implementation, Congress held oversight hearings on the settlements reached in United States v. Seymour Recycling Corp. and several other cases, which had been widely criticized as sweetheart deals. During consideration of the Superfund amendments, Senator Stafford, a primary sponsor of SARA, expressed concern that absent judicial review, the "pressure to produce settlements" could lead EPA to negotiate settlements that would be unfair to nonsettlers.
settlements at an early stage of the process. All of those concerns indicate that Congress did not contemplate and did not intend to create a disproportionate liability scheme.

F. The Objectives of CERCLA and SARA and Sound Public Policy Do Not Support the Conclusion That Congress Intended to Adopt the UCATA Approach or a Disproportionate Liability Scheme in Section 113(f)(2)

The objectives of CERCLA and SARA and sound public policy do not support the conclusion that Congress intended to adopt the UCATA approach or a disproportionate liability scheme in Section 113(f)(2). First, neither the UCATA approach nor any resulting disproportionate liability scheme are needed to promote or induce settlements. If the prospect of joint and several liability for all of the response costs which have been and will be incurred at a site and the tools that the EPA has been given to force PRPs to clean up sites are not enough to induce PRPs to enter into early settlements with the government, a disproportionate liability scheme which may require nonsettlers...
to pay more than their equitable shares of the response costs at the site will certainly not do so.

Second, as shown above, no such disproportionate liability scheme is possible under CERCLA. CERCLA prohibits settlements between the government and PRPs for less than the total of the PRPs' equitable shares of the response costs that have been and will be incurred at a site, and contemplates that settlements between the government and PRPs will usually be for significantly more than the PRPs' equitable shares of the response costs at the site. In fact, CERCLA contemplates that settlements between the government and PRPs will provide for a major portion of the response measures that are necessary at the site. Otherwise it is not advantageous to the government to enter into the settlements. Under that type of scheme, disproportionate liability can never be imposed upon nonsettlers as the result of a settlement. The liability of the nonsettlers will always be reduced by an amount which equals or exceeds the total of the settlors' equitable shares of the response costs at the site, because the amount of the settlement will always equal or exceed the total of the settlors' equitable shares of the response costs.

In addition, the "polluter pays" principle—a core principle of both CERCLA and SARA—does not support the application of the UCATA approach or any type of disproportionate liability scheme. According to the First Circuit and most of the other courts that have had occasion to consider the question, Section 113(f)(2) creates a disproportionate liability scheme which encourages or promotes early settlements between the government and PRPs by:

(1) allowing PRPs who come forward and settle with the government to receive a discount on their liability and settle with the government

---

132. See § 9604(a)(1) and supra text accompanying notes 58-62.

This requirement of the statute appears to be one which the courts have either been unaware of or have ignored in reviewing and evaluating settlements between the government and PRPs under CERCLA. It is submitted that the courts cannot determine whether a settlement between the government and PRPs is fair, reasonable, and consistent with the public interest and the requirements of the statute without first determining that the amounts being paid under the settlement represent, at the very least, the total of the settlors' equitable shares of all of the response costs that have been and will be incurred at the site. The statute expressly requires that settlements meet that test.

133. See supra text accompanying note 63.

134. See supra text accompanying notes 64-66.

135. This statement will be true except in those cases where the government underestimates the equitable shares of the settlors, agrees to settle for less than the equitable shares of the settlors, and is able to demonstrate, to the satisfaction of the court which approves the settlement, that the available evidence supports the conclusion that the equitable shares of the settlers are smaller than those shares ultimately prove to be. In those cases, which should not occur often, it is not unfair to require the government, which usually has better and more extensive information and superior bargaining power, and which negotiates and agrees to the settlement, to bear the risks of its settlement and absorb any shortfall, rather than the nonsettlers, who may not be involved in the negotiations, do not consent or agree to the settlement, and are not afforded a meaningful opportunity to challenge the settlement, even though it will, by operation of law, bar their claims for contribution.
for less than the total of their equitable shares of the response costs at a site; and

(2) requiring the PRPs who do not settle to shoulder or assume liability for the difference between the settlors' equitable shares of the response costs at a site and the amount which the settlors pay to the government in a settlement, in addition to their own equitable shares of the response costs at the site.136

One of the problems with this approach, however, is that it undermines the "polluter pays" principle. The persons who will have the greatest incentive to enter into settlements with the government at any site are the persons who were the greatest contributors to the problems at the site and who are clearly liable for the contamination at the site. Those persons have nothing to lose by entering into settlements with the government and may be able to secure significant advantages by doing so. The persons with the least incentive to enter into settlements at a site and who have the greatest amount to lose by entering into settlements with the government are the persons whose contributions to the problems with contamination at a site were small137 or who may have valid defenses to liability. The disproportionate liability scheme which the First Circuit and some other courts have read into Section 113(f)(2) would allow the largest polluters at a site to obtain discounts or avoid paying significant portions of the costs of cleaning up the pollution they caused, and shift the burden of paying for the clean up of that pollution to persons whose contributions to the problems were small or subject to dispute.138 The scheme creates the risk that the persons


137. This statement assumes that the parties in question are "major parties"—i.e., parties whose contributions to the site were not so small that they qualify as "de minimis" contributors. See 42 U.S.C. § 9622(g) (1995).

138. See, e.g., In re Sunrise Sec. Litig., 698 F. Supp. 1256, 1259, 1259 n.5 (E.D. Pa. 1988): The pro tanto rule promotes settlement by placing [the risk of a bad settlement] on the nonsettling defendant. But it also provides incentive for attempts by "guiltier defendants to get off cheaply by settling first . . .." Because their ultimate monetary recovery would be unaffected, plaintiffs have no incentive to ensure that a settlement approximates the defendant's share of liability. Indeed, it is arguable that the only settlements the pro tanto rule would promote would be bad settlements; i.e., those in which settling defendants pay less than their share of liability.

See also Donovan v. Robbins, 752 F.2d 1170, 1181 (7th Cir. 1985); Gomes v. Brodhurst, 394 F.2d 465, 468, 468 n.3 (3d Cir. 1968); Komhauser and Revesz, supra note 80, at 447-48, 455-56, 463-64, 469, 472, 480. The authors make several particular telling points: [If the plaintiff's chances of success against the defendants are sufficiently correlated, and] [if] the defendants' shares of the liability [are] sufficiently different, . . . the plaintiff [will] settle with the defendant that [has] the greater fault . . .., and litigate against the other. In summary, when the plaintiff's probabilities of success are [sufficiently] correlated, the problem is quite different than when the probabilities are independent.
most responsible for the pollution at the site will be allowed to escape their full burden and transfer at least a portion of that burden to those least responsible. Consequently, such a scheme could seriously jeopardize the "polluter pays" principle.

To be sure, one of SARA’s primary goals was to encourage settlements under CERCLA, but not at the expense of the "polluter pays" principle. The "polluter pays" principle—the idea that polluters should not be permitted to escape liability for the damage or harm caused by their activities—remains one of the fundamental tenets of CERCLA. 139 Indeed, one of SARA’s goals was

Whereas in the latter case, the plaintiff litigates against both defendants, in the former case it does not. Instead, the plaintiff settles with both defendants if their shares of the liability are sufficiently similar, and it settles with one defendant—the one with the larger share of the liability—and litigates against the other if the defendants’ shares of the liability are sufficiently different.

Id. at 455-56.

The preceding discussion assumed that the defendants’ shares of the fault are equal. Recall, however, that if these shares are sufficiently different, the pro tanto set-off rule leads to settlement with only one defendant and to litigation with the other.

Id. at 469.

Second, recall that under joint and several liability, where [the plaintiff’s chances of success against the defendants are sufficiently correlated and] the defendants’ shares of the liability are sufficiently different, the plaintiff settles with the defendant that is responsible for the larger share of the liability, and litigates against the other. The plaintiff’s expected recovery from this outcome is higher than its expected recovery from litigating against both defendants or settling with both defendants. Thus, joint and several liability has the effect of promoting settlements with the defendant responsible for the larger share of the liability and discouraging settlements with the defendant responsible for the smaller share of the liability.

Id. at 472. See also Mason, supra note 93, at 123:

In practical terms, the UCATA approach actually undercut CERCLA’s goal of promoting settlements, because it encourages partial settlements while discouraging “global” settlements. The approach allows the government to pursue non-settling PRPs for the remainder of the cleanup costs at a site, and reduces the amount that the government may seek from a nonsettler only by the amount it received from the settling PRPs. The UCATA approach thus enables and even invites the government strategically to “split its bets,” as one commentator has described it, by settling with one PRP for any amount it chooses, while continuing to seek the full amount of the remaining cleanup costs from the non-settling PRPs. It encourages the government to use the settling PRPs to insure that the government will recover a definite sum, while using the non-settling PRPs to try to get a complete recovery.

139. Congress expressly recognizes the “polluter pays” principle in 42 U.S.C. § 9604(a)(1) (1995), which provides, in pertinent part:

In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question.

See also 42 U.S.C. § 9607(d)(1)-(3) (1995); Cannons Eng’g, 899 F.2d at 90-91 (“We have recently described the two major policy concerns underlying CERCLA: First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to
to ensure that polluters would be required to pay for the damages or harm caused by their activities. It sought to achieve that goal through provisions expressly recognizing PRPs' rights to seek contribution and requiring the courts to allocate response costs among PRPs in an equitable manner. As one commentator has noted:

The burdensomeness of cost recovery litigation, together with other difficulties . . . ultimately led to the inclusion in SARA of several provisions specifically aimed at facilitating settlement . . . [One of] the primary goals of both SARA and the proposed amendment is increased settlement. However, although SARA and the proposed amendments increasingly emphasize settlement, CERCLA's original emphasis on the equitable notion that responsible parties should take responsibility for their conduct has not been abandoned. Indeed, Section 113(f)(1), which was added by SARA, reemphasized the importance of equitable results in its instruction to courts to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate."

Furthermore, the potential for collusion and sweetheart deals between the government and PRPs associated with the application of the UCATA approach and the operation of a disproportionate liability scheme cannot be ignored. The potential risk of these evils surely militate against a construction of Section 113(f)(2) that would permit a disproportionate liability scheme. Such a disproportionate liability scheme would allow the government to determine which persons it wished to settle with on favorable terms and which persons it did not wish to settle with on favorable terms, and arbitrarily allocate or apportion liability for the response costs at the site among those persons through its settlements. Accordingly, such a disproportionate liability scheme might resurrect the problems with sweetheart deals and scandals that Congress was seeking to eliminate when it passed SARA and prohibited settlements between

the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for poisons caused by the disposal of chemical pollution bear the costs and responsibility for remedying the harmful conditions they created."


141. See Frohman, supra note 76, at 734 (emphasis added). See also Mason, supra note 93, at 74-75, 77-78, 87-88, 103-04, 120-21 ("CERCLA's goal of compelling PRPs to pay for the harm that they have caused at a site means just that—PRPs should pay for the harm for which they themselves are responsible at the site. It does not follow, however, that PRPs should have to pay for more than that for which they are responsible. Because the UCATA approach forces nonsettlers to bear more than their burden, it strays from Congress' purposes in enacting CERCLA.").
the government and PRPs for less than the total of the PRPs’ equitable shares of the response costs at a site.¹⁴²

Finally, the use of the UCATA approach to determine the effect of settlements between the government and PRPs upon the liability of nonsettlers in securities cases, in light of nonsettlor.


In Singer v. Olympia Brewing Co., 878 F.2d 596, 600 (2d Cir. 1989), the Second Circuit employed a pro tanto approach to determine the effect of a partial settlement upon the liability of the nonsettlor in a securities case. The court employed a pro tanto approach in that case to make certain that the plaintiffs did not receive a windfall or double recovery as a result of the settlement. The court apparently felt that the amount of the settlement exceeded the settlor’s equitable shares of the common damages, although it never actually stated that fact. Id.

The Second Circuit has more recently stated, however, that it would not necessarily employ a pro tanto approach to determine the effect of partial settlements in securities cases in situations where the amount of the settlement is less than the sum of the settlor’s equitable shares of the common damages. See In re Masters Mates & Pilots Pension Plan, 957 F.2d 1020, 1030-32 (2d Cir. 1992). In fact, it indicated that, in cases of that nature, it might well hold that the settlement reduces the liability of the nonsettlor by the amount of the settlement or the sum of the settlor’s equitable shares of the liability, whichever is greater—an approach that would ensure fairness to nonsettlor by preventing disproportionate liability and preventing windfalls or double recoveries. Id.

In addition, in Bragger v. Trinity Capital Enter. Corp., 30 F.3d 14 (2d Cir. 1994), a securities case decided after the Supreme Court issued its opinion in McDermott, Inc. v. AmClyde, 511 U.S. 202, 114 S. Ct. 1461 (1994), the Second Circuit vacated a district court judgment declaring that the pro tanto approach would be used to determine the effect of a partial settlement upon the liability of a nonsettlor. Bragger, 30 F.3d at 17. The Second Circuit indicated that the proportionate share approach was probably the correct approach to follow in determining the effect of partial settlements upon the liability of nonsettlor in securities cases, in light of the Supreme Court’s decision in AmClyde. It declared:

Moreover, it would seem unwise in the present instance to leave standing the district court ruling that any judgment against appellant be reduced on a pro tanto basis. We think it imprudent in light of a recent unanimous decision of the Supreme Court holding, after thorough analysis of the pro tanto and proportional judgment reduction methods, that at least in admiralty suits for damages, the proportional reduction approach is best.

Id. at 17.


The courts have recognized that the disproportionate liability that can result under a pro tanto rule would be unfair and inequitable in contexts ranging from admiralty to securities. See McDermott, Inc. v. AmClyde, 511 U.S. 202, 212-16, 114 S. Ct. 1461, 1467-69 (1994) (admiralty proceeding); Eichenholz v. Brennan, 52 F.3d 478, 486-487 (3d Cir. 1995); TGB, Inc. v. Bendis, 36 F.3d 916, 923 (10th Cir. 1994); Employers Ins. of Wausau v. Musick, Peeler & Garrett, 954 F.2d 575, 578-79, 579 n.3 (9th Cir. 1992), aff'd 508 U.S. 286, 113 S. Ct. 2085 (1993); Franklin v. Kaypro Corp., 884 F.2d 1222, 1230-31 (9th Cir. 1989), cert. denied, 498 U.S. 890, 111 S. Ct. 232 (1990); Smith v. Mulvaney, 827 F.2d 558, 562 (9th Cir. 1987); Laventhal, Krekstein, Horwath & Horwath v. Horwich, 637 F.2d 672, 675 (9th Cir. 1980), cert. denied, 452 U.S. 963, 101 S. Ct. 3114 (1981); In re Sunrise Sec. Litig., 698 F. Supp. 1256, 1258-60 (E.D. Pa. 1988) (securities regulation proceedings).
are inherent in our legal system, or, at the very least, in our legal system as it exists outside the context of CERCLA. That is why, as a general rule, contracts are not binding on persons who are not parties to them. Similarly, that is why judgments, including consent decrees, do not bind and do not affect the rights and liabilities of persons who are not parties to the action in which the judgment is rendered. However, if Section 113(f)(2) creates a disproportionate liability scheme, CERCLA turns both of those propositions on their heads. If Congress created a disproportionate liability scheme in Section 113(f)(2), it created a statutory scheme that allows the government and persons settling with it to extinguish the contribution rights of nonsettlers and alter or increase their liabilities through agreements to which the nonsettlers are not parties and to which they may strenuously object. It also created a scheme that gives the courts the power to adjudicate the rights and liabilities of the nonsettlers in consent decree proceedings.

144. See Martin v. Wilks, 490 U.S. 755, 761-62, 109 S. Ct. 2180, 2184 (1989) ("All agree that "it is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."). In Wilks, the United States Supreme Court held that a group of white firefighters was not precluded from challenging employment decisions that were being made by the City of Birmingham, Alabama, and Jefferson County, Alabama, pursuant to consent decrees that had been entered in connection with an earlier suit against them under Title VII of the Civil Rights Act of 1964 and other federal laws. Id. at 758-59, 761-65, 109 S. Ct. at 2183, 2184-86. The court held that the white firefighters were not precluded from challenging the decisions that were being made pursuant to the consent decrees because they were not parties to the proceedings in which the consent decrees were entered. Id.

Congress has already attempted to limit the holding of Martin v. Wilks with respect to consent decrees in employment discrimination suits under the United States Constitution or the federal civil rights laws. See 42 U.S.C. § 2000e-2(n) (1994); Rafferty v. City of Youngstown, 54 F.3d 278, 281 n.2 (6th Cir. 1995); Aiken v. City of Memphis, 37 F.3d 1155, 1175-76 (6th Cir. 1994); Edwards v. City of Houston, 37 F.3d 1097, 1120-21 (5th Cir. 1994).

The holding of Martin v. Wilks—that a person can not be deprived of rights in consent decrees that are entered in proceedings to which that person is not a party—remains valid in other contexts, however, and casts real doubt upon the ability of judicially or administratively approved settlements to validly extinguish the contribution rights of nonsettlers, where the nonsettlers are not allowed to intervene in and are not made parties to the proceedings in which the approval of the settlements are obtained. See, e.g., Wilks, 490 U.S. 755, 109 S. Ct. 2180; Boomgaard and Breer, supra note 76, at 119; Neuman, supra note 93, at 10,304; Lorelei Joy Borland, Collateral Challenges To CERCLA Consent Decrees, 19 Chemical Waste Litig. Rep. 258, 260-61 (1990).

It is unlikely that CERCLA will fall within the exception to the rule of Wilks which the Supreme Court recognized for special remedial schemes that expressly foreclose further litigation by non-parties, such as bankruptcy and probate. See Wilks, 490 U.S. at 762 n.2, 109 S. Ct. at 2184 n.2; Boomgaard and Breer, supra note 76, at 119; Neuman, supra note 93, at 10,304. Although CERCLA is a remedial statute, it is not that kind of a remedial statute, and does not appear to foreclose further litigation in connection with consent decrees approving settlements. In fact, 42 U.S.C. § 9622(m) (1995) expressly provides as follows:

(m) Applicability of general principles of law

In the case of consent decrees and other settlements under this section (including covenants not to sue), no provision of this chapter shall be construed to preclude or otherwise affect the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements.
decrees approving those agreements, and gives the courts the power to do so without even holding an evidentiary hearing on the fairness of those settlements—i.e., without even giving the nonsettlers whose rights and liabilities are being adjudicated an opportunity to examine and present evidence in connection with those settlement agreements. Such a scheme is both unfair and inequitable, and may also be constitutionally infirm.

145. CERCLA requires that settlements between the government and PRPs be administratively or judicially approved. See 42 U.S.C. § 9622(d), (g)(4) (1995). The courts that have considered the question have almost uniformly held that they are not required to hold an evidentiary hearing on the fairness and reasonableness of the settlements that are presented to them for approval under CERCLA, absent unusual circumstances or a showing of particularized need. See, e.g., United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1085-86 (1st Cir. 1994); United States v. Cannons Eng'g Corp., 899 F.2d 79, 94 (1st Cir. 1990); Rohm & Haas, 721 F. Supp. at 686-87 (“In this case, Rohm & Haas does not urge us to hold an evidentiary hearing, it merely asks us to review the paper record . . . and determine whether its view of that evidence is more plausible than that of the United States. But even this we will not do . . . . [W]here a money settlement is shown to bear a reasonable relation to some plausible estimate, or range of estimates, of the settling party's volumetric contribution, CERCLA requires that such a settlement be accepted and entered as a consent decree. Any unfairness to a non-settlor such as Rohm & Haas is a by-product of the congressional scheme, about which a court may do nothing in the absence of harm rising to a constitutional level.”). The failure of CERCLA to require evidentiary hearings on the fairness and reasonableness of settlements between the government and PRPs under the UCATA approach may rise to the level of constitutional harm. It may be a violation of procedural due process. See Mathews v. Eldridge, 424 U.S. 319, 332-35, 341-50, 96 S. Ct. 893, 901-03, 906-10 (1976); Goldberg v. Kelly, 397 U.S. 254, 260, 267-70, 90 S. Ct. 1011, 1016, 1020-21 (1970). See also In re Zale Corp., 62 F.3d 746, 762-66 (5th Cir. 1995) (“CIGNA and Zale argue that NUFIC had a full opportunity to litigate the issues surrounding its contract claims. We disagree. Indeed, the court frequently prevented NUFIC and Feld from addressing the issues, calling them a 'sideshow,' a 'side issue,' and 'irrelevant.' Moreover, the settlement proponents themselves argued that NUFIC and Feld's claims were not before the court at the settlement hearing . . . . Also, the bankruptcy court refused to permit testimony such as an adversary proceeding would require . . . . Alternatively, CIGNA and Zale contend that the settlement hearing essentially was an adversary proceeding. Calling it an adversary proceeding, however, does not make it one . . . . When third parties are affected, we scrutinize carefully the fairness of the hearing afforded.”); In re Masters Mates & Pilots Pension Plan, 957 F.2d 1020, 1031 (2d Cir. 1992) (“We hold that contribution does not exist after a court approves a fair settlement bar. Otherwise, settlements among fewer than all the parties would be difficult to reach. However, third party participation in an evidentiary fairness hearing and court approval of the settlement bar are necessary to protect the due process rights of third parties.”); AmClyde, 511 U.S. at 213, 114 S. Ct. at 1467-68 (“Courts and legislatures have recognized this potential for unfairness and have required 'good-faith hearings' as a remedy. When such hearings are required, the settling defendant is protected against contribution actions only if it shows that the settlement is a fair forecast of its equitable share of the judgment . . . . [T]o serve their protective function effectively, such hearings would have to be minitrials on the merits . . . .”); Wilks, 490 U.S. at 761-63, 766-69, 109 S. Ct. at 2184-85, 2186-88; In re Masters Mates, 957 F.2d 1020, 1031 (2d Cir. 1992) (“[A] consent decree may not impose . . . obligations [on a nonparty] without affording the affected nonparty a meaningful opportunity to challenge the application of the decree to it.”) This language, which appears in the Second Circuit's opinion in In re Masters Mates, was taken by the Second Circuit from its original opinion in United States v. International Brotherhood of Teamsters, 948 F.2d 98 (2d Cir. 1991) [hereinafter referred to simply as “Yellow Freight”]. Prior to the publication of its original opinion in Yellow Freight, however, the Second Circuit revised that opinion and deleted
IV. WHY THE UCATA APPROACH SHOULD BE REJECTED

A. The Disadvantages of the UCATA Approach and How Its Disincentives to Settlement Outweigh Its Advantages

The courts which have held that Section 113(f)(2) adopts the UCATA approach have done so based upon the language of the pro tanto rule found in Section 113(f)(2) and their conclusion that the disproportionate liability that might result from settlements under the UCATA approach will further Congress' goal of promoting or encouraging settlements under CERCLA. None of those courts considered the other provisions of SARA, the scheme which those provisions establish for settlements between the government and PRPs under SARA, or Congress' other goals in SARA. Nor have any of those courts considered the advantages and disadvantages of the UCATA approach.

The courts which have addressed the effect of private party settlements on the liability of nonsettlers, however, have considered the advantages and disadvantages of the UCATA approach. Those courts have identified two advantages of the UCATA approach:

the language quoted in In re Masters Mates from that opinion. See Yellow Freight, 948 F.2d at 103, 108, and 108 n.1. In addition, the Second Circuit's decision in Yellow Freight was subsequently vacated on other grounds by the United States Supreme Court, which remanded the case to the Second Circuit with directions to dismiss it as moot. See Yellow Freight System, Inc. v. United States, 506 U.S. 802, 113 S. Ct. 31 (1992). Nevertheless, the proposition set out by the language quoted above—the language in the Second Circuit's original opinion in Yellow Freight that was reiterated by the Second Circuit in In re Masters Mates—still appears to be a sound one, particularly in the Second Circuit. See United States v. International Brotherhood of Teamsters, 3 F.3d 634, 638-39, 640, and 642 (2d Cir. 1993); United States v. International Brotherhood of Teamsters, 964 F.2d 180, 183-85 (2d Cir. 1992); In re Masters Mates, 957 F.2d at 1031; Yellow Freight, 948 F.2d at 102-03 and 104 n.2. vacated on other grounds, 506 U.S. 802, 113 S. Ct. 31; United States v. International Broth. of Teamsters, 931 F.2d 177, 180-87 (2d Cir. 1991)). Cf. 42 U.S.C. § 9657 (1995). In this provision of SARA, Congress itself recognized that the extinction of the contribution rights conferred on nonsettlers by SARA through the administrative approval of settlements might constitute a violation of the Fifth Amendment to the Constitution of the United States. 42 U.S.C. § 9657 provides, in pertinent part:

If an administrative settlement under Section 9622 of this title has the effect of limiting any person's rights to obtain contribution from any party to such settlement, and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States, such person shall not be entitled, under other laws of the United States, to recover compensation from the United States for such taking, but in any such case, such limitation on the right to obtain contribution shall be treated as having no force and effect.

The fact that no evidentiary hearings are held on settlements between the government and PRPs under CERCLA does not matter if the UCFA approach is followed. The UCFA approach contains built-in assurances of fairness to nonsettlers, and will not result in prejudice to the rights of the nonsettlers or a determination of their liabilities.

147. See supra the cases cited in note 39. See also Boomgaardan and Breer, supra note 76, at 107, 109.
(1) it promotes settlement because the settlors are discharged from all liability for contribution; and
(2) it preserves the claimant's incentive to settle because it allows the claimant to know the exact amount of the credit it is conveying and assures the claimant that it will recover the full amount of its damages or costs.\textsuperscript{148}

Neither of these advantages offers any real reason for preferring the UCATA approach over the UCFA approach in the context of settlements between the government and PRPs under SARA, however. The UCFA approach, like the UCATA approach, discharges settlors from all liability for contribution.\textsuperscript{149} Furthermore, the second advantage of the UCATA approach is not particularly important with respect to settlements between the government and PRPs, because SARA prohibits settlements between the government and PRPs for less than the total of the settling PRPs' full equitable shares of the response costs at a site.\textsuperscript{150} Consequently, the government is required to determine that the amount of the settlement equals or exceeds the total of the settling PRPs' full equitable shares of the response costs at the site before it can enter into the settlement. Accordingly, the government will know the amount of the credit it is conveying in its settlement. In addition, if the settlement is permissible under the statute, the government will still be able to recover the full amount of the response costs at the site, because the nonsettlors will remain jointly and severally liable for the balance of those costs.

The courts which have considered the UCATA approach in connection with private party settlements have also identified the disadvantages of that approach. As articulated by the courts, the disadvantages of the UCATA approach are that:

(1) it is inconsistent with the policy of equitably distributing losses among PRPs based upon proportionate fault, as the nonsettlors receive pro tanto credit rather than proportionate credit based upon the settlors' fault;\textsuperscript{151}

\textsuperscript{149} See UCFA § 6, 12 U.L.A. 147 (1996).
\textsuperscript{151} This disadvantage of the UCATA does not exist in connection with settlements between the United States and PRPs under CERCLA, if Section 104(a)(1) prohibits settlements between the United States and PRPs for less than the PRPs' equitable shares of the response costs. If Section 104(a)(1) prohibits settlements with PRPs for less than the total of the PRPs' equitable shares of the response costs, the pro tanto credit will always equal or exceed the total of the settling PRPs' equitable shares of the response costs. In addition, because the settlors' contribution rights against the nonsettlors are expressly preserved by 42 U.S.C. § 9613(f)(3)(B) (1995), the settlors can recover the difference between the amounts paid in the settlement and their equitable shares of the response costs from the nonsettlors, when the amounts paid in the settlement exceed the settlors' equitable shares of the response costs.
(2) it may act as an impediment to total settlement, since a nonsettlor may count on the guaranteed credit he is entitled to receive under the pro tanto rule and gamble on the verdict rather than settle;\textsuperscript{152}

(3) it may encourage collusion between settling parties; and

(4) it fails to eliminate problems inherent in complex cases involving multiple plaintiffs.\textsuperscript{153}

Most of the courts which have considered the advantages and disadvantages of the UCATA approach in the context of private party settlements under CERCLA have concluded that its disadvantages and disincentives to settlement outweigh its advantages, and have rejected the UCATA approach in favor of the UCFA approach.\textsuperscript{154}

In addition, the disproportionate liability scheme that will result from the use of the UCATA approach may actually prevent or delay settlements. The courts which concluded that the recognition of a disproportionate liability scheme would further Congress' goal of promoting or encouraging settlements apparently did not realize that such a scheme can easily result in the imposition of disproportionate liability upon settling PRPs as well as nonsettling PRPs.\textsuperscript{155}

Consider the problem of successive settlements. For purposes of analysis, assume that the government enters into a settlement with a group of PRPs for a substantial portion of the cleanup costs at a site—i.e., a portion which significantly exceeds the settlers' equitable shares of the response costs at the site. If the settlement is approved, the settlers will still be able to pursue the nonsettlers for contribution. The settlers' rights to seek contribution from the nonsettlers

\textsuperscript{152} This disadvantage of the UCATA does not exist in connection with settlements between the government and PRPs under CERCLA. The reason is simple. 42 U.S.C. § 9613(f)(3)(B) (1995) expressly preserves the settlers' rights to seek contribution from the nonsettlers. Consequently, the nonsettlers do not receive guaranteed reductions in their \textit{ultimate} liability for the response costs at a site as the result of settlements under CERCLA. The nonsettlers receive a guaranteed credit only insofar as their liability to the government for response costs is concerned. That credit, however, does not prevent settlers who have paid more than their equitable shares of the response costs from recovering the difference between the amount of the settlement and their equitable shares of the response costs from the nonsettlers.

Under UCATA, settlers can not maintain actions for contribution against nonsettlers unless they secure a release from further liability for the nonsettlers in the settlement. See UCATA § 1(d), 12 U.L.A. 194-95 (1996) ("A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement . . . "). Settlers do not ordinarily secure releases from further liability for nonsettlers in the settlements which they negotiate. Accordingly, it is this provision of UCATA that ordinarily allows nonsettlers to view the amounts paid by the settlers as guaranteed reductions in liability which they will receive.


\textsuperscript{154} See the cases cited in supra notes 76 and 79. See also Frohman, supra note 76, at 716.

\textsuperscript{155} If Section 104(a)(1) of CERCLA does not prohibit settlements between the government and PRPs for less than the total of the PRPs' equitable shares of the response costs at a site, the UCATA approach can easily lead to the imposition of disproportionate liability upon settlers as well as nonsettlers.
are preserved by Section 113(f)(3)(B).

Now further assume that, after approval of the first settlement, the government enters into a second settlement with the remainder of the PRPs (i.e., all of the PRPs who did not join in the first settlement) for the balance of the response costs that have been or will be incurred at the site. If the second settlement is approved, and it should be under the tests that the courts have employed for the approval of such settlements, despite the fact that the parties to the second settlement may be paying less than their equitable shares of the response costs at the site, it will bar any claims for contribution by the PRPs who joined in the first settlement against the PRPs who joined in the second settlement.

The reason is simple. The contribution bar found in Section 113(f)(2) is absolute. It does not insulate or exempt those who have previously entered into settlements from its operation or effect. It provides, in no uncertain terms, that parties who have resolved their liability to the government in a judicially approved settlement, such as the parties to the second settlement, shall not be liable for claims for contribution regarding matters addressed in the settlement. Indeed, Section 113(f)(3)(B) expressly provides that persons who have resolved their liability to the government, such as the parties to the first settlement, can only seek contribution “from any person who is not [a] party to a settlement referred to in paragraph (2).” Consequently, the PRPs who joined in the first settlement and agreed to pay more than their equitable shares of the response costs will be left holding the bag. They will not be able to recover the difference between the amount they agreed to pay in the first settlement and their equitable shares of the response costs from the other PRPs.

The fact that settlors may be required to bear more than their equitable shares of the response costs at a site, if they agree to pay more than their equitable shares of the response costs in a settlement and the government subsequently settles its claims for the balance of the response costs with the remaining PRPs, is an obvious disincentive to settlement, and, in particular, to settlements for more than the total of the settlors’ equitable shares of the response costs at a site. The reason, again, is simple. The PRPs who come

157. See id. § 9613(f)(3)(C).
158. See id. 9613(f)(3)(B). See also United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1185 n.15, 1186, 1186 nn.16, 17, 1187 n.19 (3d Cir. 1994) (“Under CERCLA, one of the benefits of settling with the government is that a party becomes immune from contribution claims ‘regarding matters addressed in the settlement . . . .’ It appears that the statute allows the government to immunize a late settlor from an early settlor’s contribution suit by settling with the government.”).
159. See Alcan Aluminum, 25 F.3d at 1186 n.17 (“If early settlors have no real opportunity to protect their contribution right (i.e., no opportunity to intervene) we expect that PRPs may discount the right to sue for contribution under Sec. 113(f)(1). This may have the unfortunate effect of removing an incentive to settle early.”).
forward and settle with the government have no assurance that the government, which may be perfectly willing to sell out the interests of the nonsettling PRPs in the first settlement, will not simply turn around and sell out the interests of the settling PRPs in a subsequent settlement. After all, the government's only interest is in recovering all of the response costs at the site while minimizing its transaction costs. It is not required to concern itself "with the relative culpability of [the] PRPs" or the manner in which response costs are apportioned among those PRPs under a disproportionate liability scheme. Fairness is relative and, for the most part, immaterial under such a scheme.

Furthermore, the scenario described above is not merely a theoretical one. The sequence of events described above actually took place in *United States v. Bay Area Battery*. The initial settlers' contribution rights against the subsequent settlors were extinguished when the subsequent settlement was approved, and they were left with no recourse except to pay the amounts they had agreed to pay. The initial settlers received only the credit toward those amounts which the government unilaterally decided they should receive as a result of the subsequent settlement—a credit which the initial settlers vociferously, and unsuccessfully, argued was inadequate.

Consequently, the disproportionate liability scheme which the courts have read into Section 113(f)(2) does not necessarily further Congress' goal of promoting or encouraging settlements, as those courts suggest. It can result in the imposition of disproportionate liability on parties who settle early, and can actually frustrate Congress' goal of promoting or encouraging settlements.

These problems demonstrate that the UCATA approach offers no real advantage over the UCFA approach with respect to settlements between the government and PRPs under SARA, and is not as consistent with the other provisions of SARA and the scheme which those provisions establish for

---


The problem of successive settlements also arose in *Alcan Aluminum*, 25 F.3d at 1178-79, 1186-87. The Court in *Alcan* could not determine whether or not the second settlement would extinguish or bar the contribution rights of the parties to the first settlement on the record before it, however, because it could not determine whether the matters addressed in the settlements were the same. *Id.* at 1186-87. The court therefore remanded the matter to the district court with instructions to make that determination. *Id.*

Finally, the problem of successive settlements reared its head in *United States v. Charter Int'l Oil Co.*, 83 F.3d 510 (1st Cir. 1996). The court in *Charter* did not have to determine whether or not the second settlement extinguished or barred the contribution rights of the parties to the first settlement, however, because it concluded that the matters addressed in the settlements were not the same.


For a more detailed discussion of the advantages and disadvantages of the UCATA approach, both perceived and real, see Frohman, supra note 76; Kornhauser and Revesz, supra note 80.
settlements between the government and PRPs as the UCFA approach. Consequently, the UCATA approach should be rejected in favor of the UCFA approach.

B. The Application of the UCATA Approach has Resulted in Procedural and Constitutional Problems—Problems Which Will Not Exist Under the UCFA Approach

An interpretation of Section 113(f)(2) which gives rise to a disproportionate liability scheme will result in procedural and constitutional problems in connection with the approval of settlements under SARA. Two such problems, already adverted to, come to mind—problems with the nonjoinder of nonsettling PRPs in actions for the approval of settlements under SARA and problems with the approval of settlements without first holding evidentiary hearings on the fairness and reasonableness of the settlements.

1. Problems With Nonjoinder of Nonsettling PRPs

As noted above, SARA requires that settlements between the government and PRPs be judicially approved and incorporated into consent decrees. Furthermore, the courts have held that a settlement between the government and PRPs under SARA does not become effective until it has been approved and incorporated into a consent decree. Hence, the rights and liabilities of the nonsettlors with respect to the response costs at the site are not altered or affected by the settlement until it is approved and incorporated into a consent decree.

The approval of such a settlement and its incorporation into a consent decree, however, necessarily constitutes an adjudication or determination of the rights and liabilities of all of the nonsettling PRPs with respect to the response costs at the site. It extinguishes their contribution rights, determines their potential liabilities for response costs at the site, and may significantly enhance or increase those potential liabilities.

164. See 42 U.S.C. §§ 9604(a)(1), 9613(f)(1), 9622(c)(3)(E) (1995); United States v. Conservation Chem. Co., 628 F. Supp. 391, 401-02 (W.D. Mo. 1985); United States v. Laskin, No. C84-2035Y, 1989 U.S. Dist. LEXIS 4900, at *16-20 (N.D. Ohio Feb. 27, 1989). See also the cases and authorities dealing with private party settlements cited in supra notes 76 and 79. Cf. AmClyde, 511 U.S. at 207, 213-17, 114 S. Ct. at 1465-67, 1470 ("The proportionate share rule is more consistent with the proportionate fault approach of Reliable Transfer because a litigating defendant ordinarily pays only its proportionate share of the judgment. Under the pro tanto approach, however, a litigating defendant's liability will frequently differ from its equitable share, because a settlement with one defendant for less than its equitable share requires the nonsettling defendant to pay more than its share. . . . In sum, although the arguments for the two approaches are closely matched, we are persuaded that the proportionate share approach is superior, especially in its consistency with Reliable Transfer.").

Proceedings under CERCLA and SARA, including motions for the approval of settlements and the entry of consent decrees, are not exempted from the requirements of the Federal Rules of Civil Procedure. Consequently, Rule 19 of the Federal Rules of Civil Procedure applies to actions for the approval of settlements under CERCLA, and controls questions concerning the joinder of nonsettling PRPs in such actions.

Persons who are or may be jointly and severally liable are usually not even necessary parties under Rule 19. Their joinder in actions against persons who are or may be jointly and severally liable with them is not required because complete relief can be accorded among those who are parties to the action without their joinder and the disposition of the action will not, as a practical matter, prejudice their interests or create a risk of inconsistent obligations or multiple liability.

166. See 42 U.S.C. §§ 9606(a), 9607(a)-(c), 9613(f)(1) (1995) ("Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law."); Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81."); Fed. R. Civ. P. 81.

167. Rule 19 of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

(a) Persons to be Joined if Feasible.
A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party.

(b) Determination by Court Whenever Joinder not Feasible.
If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.


This analysis under Rule 19 clearly applies to and controls claims or matters governed by the UCFA approach, with its proportionate rule. Nonsettlers always receive a reduction in their liability that is at least equal to the settlor's equitable shares of the obligation. They can only be held jointly
Under the "disproportionate liability scheme" which the First Circuit has read into Section 113(f)(2), however, that analysis can not be readily applied to CERCLA settlements. Because the approval of a settlement between the government and PRPs and its incorporation into a consent decree will not only extinguish the nonsettlers' contribution rights, but operate as an adjudication of the nonsettlers' potential liability and prejudice their interests by augmenting or increasing that potential liability, the nonsettlers are, at the very least, necessary parties to actions for the approval of such settlements.\footnote{169} The nonsettlers have interests in the approval of such settlements, and the approval of such settlements in the nonsettlers' absence will, as a practical matter, impair or impede their ability to protect those interests—it will extinguish their contribution rights and determine their potential liabilities. Accordingly, a court to whom a settlement is presented for approval may not be able to act on that settlement until all of the persons who are or may be PRPs with respect to the site have been joined as parties to the action, if any party objects to their nonjoinder and it is possible to join them.

Moreover, it is possible that all of the persons who may be liable for the response costs at a site should be considered \textit{indispensable} parties to actions for the approval of settlements between the government and other PRPs.\footnote{170} A judgment rendered in the absence of those persons will, by definition, be and severally liable for the difference between the amount of the obligation and the settlors' equitable shares of that obligation, and can still seek contribution from the other nonsettlers, to the extent that they are compelled to pay more than their equitable shares of the obligation to the plaintiffs. Consequently, under the UCFA approach, the potential liabilities of the nonsettlers are not increased and the interests of the nonsettlers are not prejudiced by the approval of a settlement or the fact that their contribution rights against the settlors will be extinguished.


\footnote{170} See, e.g., Confederated Tribes v. Lujan, 928 F.2d 1496, 1498-1500 (9th Cir. 1991); Rapoport v. Banco Mexicano Somex, S.A., 668 F.2d 667, 668-69 (2d Cir. 1982); Acton Co. of Mass. v. Bachman Foods, Inc., 668 F.2d 76, 77-78, 80-82 (1st Cir. 1982); Doty v. St. Mary Parish Land Co., 598 F.2d 885, 886-88 (5th Cir. 1979); Warfield v. Marks, 190 F.2d 178, 179-80 (5th Cir. 1951); Vasser v. Shilling, 93 F.R.D. 146, 148-51 (M.D. La. 1982), aff'd, 696 F.2d 994 (5th Cir. 1983); 3A Moore et al., \textit{supra} note 168, § 19.07-2[1], at 19-133, 19-133 n.2, 19-189 to 19-190, 19-190 n.3. Cf. United States v. Union Elec. Co., 64 F.3d 1152, 1159-70 (8th Cir. 1995); United States v. Acton Corp., 131 F.R.D. 431, 432-34, 436 (D.N.J. 1990) (holding that nonsettling PRPs can intervene of right under both 42 U.S.C. § 9613(i) and Rule 24(a)(2) of the Federal Rules of Civil Procedure in proceedings for the approval of a settlement between the government and settling PRPs because the contribution rights of the nonsettling PRPs will be extinguished by the approval of the settlement). Cf. United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1186-87 (3d Cir. 1994) (holding that the parties to an initial settlement with the government can intervene of right under both 42 U.S.C. § 9613(i) and Rule 24(a)(2) of the Federal Rules of Civil Procedure in proceedings for the approval of a subsequent settlement between the government and other parties, if one or more of the matters addressed in the settlement are the same and approval of the subsequent settlements will therefore extinguish or bar contribution rights of the parties to the initial settlement).
prejudicial to those persons under a disproportionate liability scheme. In addition, the court to whom the settlement is submitted cannot, by protective provisions in the judgment or the shaping of relief, lessen or avoid that prejudice without violating the statute—the prejudice is a by-product of the statutory scheme, if Section 113(f)(2) creates a disproportionate liability scheme. Furthermore, the government can obtain complete relief with respect to sites under CERCLA, whether any settlements which the government may have negotiated with PRPs are approved or not. Both the potential settlors and the nonsettlers will remain jointly and severally liable to the government for the response costs which are incurred at the site, and, if time is a consideration or urgent action is needed, the government can simply order the PRPs to take those actions or can take those actions itself and file claims for the recovery of the costs it incurs in doing so against the PRPs at the site.

The question therefore becomes whether the court can approve a settlement between the government and PRPs, if all of the other persons who are potentially responsible for cleanup costs at the site are not joined in the action. Under Rule 19 it appears that the court must postpone action on the approval of a settlement until all of those persons are joined as parties to the action, whether any objection is raised to their nonjoinder or not, and that it may be required to dismiss the motion for approval of the settlement if any of those persons cannot be joined as parties to the action.

However, whether or not nonsettlers are considered to be necessary or indispensable parties to an action for approval of a settlement under CERCLA and SARA, it is clear that the nonsettlers will not be bound by any consent decree approving such a settlement if they are not joined as parties in that action. Accordingly, they will remain free to challenge or attack that

171. See, e.g., Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111, 88 S. Ct. 733, 738-39 (1968) ("When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below."); U.O.P. v. U.S., 99 F.3d 344, 347 (9th Cir. 1996); Pit River Home & Agricultural Co-op. Ass'n v. United States, 30 F.3d 1088, 1099 (9th Cir. 1994); CP Nat'l Corp. v. Bonneville Power Admin., 928 F.2d 905, 911 (9th Cir. 1991); Greeneville Hous. Auth., 468 F.2d at 479, 479 n.4; 3A Moore et al., supra note 168, § 19.01-1[2], at 19-23 to 19-25 ("A court cannot render a valid judgment binding upon a person over whom it has not obtained requisite jurisdiction—in personam, quasi in rem, or in rem, as the case may be, unless that person is in privity with or is adequately represented by a party over whom the court has jurisdiction. To extend the judgment in violation of these principles and make it binding upon the person not before the court would constitute a denial of due process as to the absent party. Such a judgment is not, as to the absent party, entitled to full faith and credit. This being the case, a party who is before the court and whose rights would be adversely affected by entry of a judgment without binding effect upon the absent party can raise the issue of indispensability. When he fails to do so, however, on appeal it is proper to treat it as foreclosed. On the other hand, when the judgment actually adversely affects the interests of outsiders, the matter is viewed as so basic that the appellate court should raise it on its own motion.") (emphasis added).

172. See Martin v. Wilks, 490 U.S. 755, 760-65, 109 S. Ct. 2180, 2184-86 (1989); Hansberry v. Lee, 311 U.S. 32, 40, 61 S. Ct. 115, 117 (1940) ("It is a principle of general application in Anglo-
consent decree in a separate action. If the nonsettlers' challenge to the consent decree is successful, the consent decree may have to be vacated or set aside. And if the consent decree is vacated or set aside, the settlers will lose any contribution protection which they may have received as a result of the initial entry of the consent decree. Section 113(f)(2) only bars claims for contribution against parties who have resolved their liability to the government in an "administrative or judicially approved settlement."

2. Problems With the Approval of Settlements and Due Process

The adoption of the UCATA approach also creates problems with the approval of settlements. Under the UCATA approach, settlements must be entered into in "good faith" to bar or extinguish the nonsettlers' rights to seek contribution from the settlers. As a corollary of this requirement, a hearing must be held under the UCATA approach to determine the fairness or "good faith" of a settlement before that settlement will bar claims for contribution by the nonsettlers against the settlers or determine the nonsettlers' liabilities.

Unlike UCATA, SARA does not expressly require that settlements between the government and PRPs be entered into in "good faith" before those settlements will bar claims for contribution against settling PRPs. SARA provides that only settlements between the government and PRPs which have been judicially or

American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.

173. See Wilks, 490 U.S. at 760-65, 109 S. Ct. at 2184-86.

The nonsettlers should have standing to challenge the consent decree. The entry of such a decree will, in effect, extinguish their contribution rights, limit the reduction in liability which they are entitled to receive as a result of the settlement to the amount of the settlement, and determine their liability for the response costs at the site. See 42 U.S.C. § 9613(f)(2) (1995); Wilks, 490 U.S. at 758-62, 109 S. Ct. at 2183-84. ("Although [there is] a 'strong public policy in favor of voluntary affirmative action plans, . . . [that] interest 'must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed.'"); Eichenholz v. Brennan, 52 F.3d 478, 482-83 (3d Cir. 1995); Alumax Mill Prods. v. Congress Fin. Corp., 912 F.2d 996, 1001-02 (8th Cir. 1990).

The fact that the nonsettlers are not bound by consent decrees which are entered into in actions to which they were not parties raises another question: whether Congress can extinguish or bar the nonsettlers' contribution claims under Section 113(f)(2) on the strength of consent decrees which would not otherwise be binding upon the nonsettlers or affect their rights. A scheme which attempts, by legislative fiat, to attribute to consent decrees effects which they could not otherwise have, consistent with the dictates of due process, may itself be violative of due process. Treatment and analysis of that question, however, is beyond the scope of this article.

174. Section 4 of UCATA provides that a settlement between a plaintiff and one or more tortfeasors bars claims for contribution against the settling tortfeasors and reduces the plaintiff's claims against the remaining tortfeasors by the amount stipulated in the settlement or the amount of the consideration paid for the settlement, whichever is greater, if the settlement was entered into in "good faith." See UCATA § 4, 12 U.L.A. 264 (1996).
administratively approved will bar suits for contribution against the settling PRPs.175

The courts, however, have held that settlements between the government and PRPs under SARA cannot be approved unless they are fair, reasonable, and consistent with the purposes and requirements of CERCLA and SARA.176 The courts have also held that such settlements can be considered fair only if they were arrived at in a procedurally fair manner (i.e., without collusion or bad faith) and if they are substantively fair (i.e., if the amounts being paid pursuant to the settlements bear a close enough relationship to the settlors’ equitable shares of the liability).177 In light of this judicial construction, the requirement of judicial or administrative approval which SARA imposes upon settlements serves the same function as the substantive requirement of “good faith” under UCATA.178 The manner in which the “good faith” requirement has been

176. See infra cases cited in note 186.
177. Id.
178. See, e.g., H.R. Conf. Rep. No. 99-962, at 225 (Oct. 3, 1986) (Conference Report on H.R. 2005, Superfund Amendments and Reauthorization Act of 1986), reprinted in 1 SARA Notebook, supra note 58, at 113-2 (“Conference substitute—The conference substitute adopts the language of the House amendment with clarifications and modifications. . . . The conference substitute adopts new section 113(f) as contained in the House amendments, and thus provides contribution protection for those who enter into administrative settlement agreements with the government, as well as those who enter into consent decrees for settlements.”); H.R. 2005, 99th Cong. § 113(b) (1985) (H.R. 2005 as passed by the House on December 10, 1985 (adding a proposed new Section 113(f)(2) to CERCLA), reprinted in SARA Notebook, supra note 58, at 113-4 to 113-5 (“A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.”) (emphasis added); H.R. 2005, 99th Cong. § 135 (1985) (H.R. 2005 as passed by the Senate on September 26, 1985 (adding a proposed new Section 107(l)(2) to CERCLA), reprinted in 1 SARA Notebook, supra note 58, at 113-15 to 113-16 (“When a person has resolved its liability to the United States or a State in a judicially approved good faith settlement, such person shall not be liable for claims for contribution regarding matters addressed in the settlement.”) (emphasis added); H.R. 3852, 99th Cong. § 113(b) (1985) (H.R. 2817 as agreed upon by House Committees for purposes of floor consideration) as introduced on December 4, 1985 (proposing a new Section 113(f)(2) of CERCLA), reprinted in 1 SARA Notebook, supra note 58, at 113-23 (“A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.”) (emphasis added); House Comm. on Judiciary, Superfund Amendments of 1985, H.R. Rep. No. 99-253, pt. 3, at 19 (October 31, 1985), reprinted in 1 SARA Notebook, supra note 58, at 113-48 (“The Judiciary Committee amendment to this paragraph deletes ‘good faith’ as an independent requirement for obtaining immunity from contribution claims. The amendment recognizes that judicial examination and approval of the settlement itself is adequate to protect against improper or ‘bad faith’ settlements.”); House Comm. on Energy and Commerce, Superfund Amendments of 1985, H.R. Rep. No. 99-253, pt. 1, at 13 (August 1, 1985) (proposing a new Section 113(g)(2) for CERCLA), reprinted in 1 SARA Notebook, supra note 58, at 113-28 (“When a party has resolved its liability to the United States or a State in a judicially approved good-faith settlement, such person shall not be liable for claims for contribution or indemnity regarding matters addressed in the settlement.”) (emphasis added); United States v. Rohm & Haas Co., 721 F. Supp. 666, 678 n.13 (D.N.J. 1989):
interpreted and applied under UCATA should therefore shed some light on the manner in which the judicial or administrative approval requirement should be interpreted and applied under SARA.

One of the first questions that arises with respect to hearings to determine the fairness or "good faith" of settlements under UCATA and SARA is whether those hearings must be evidentiary hearings. One would think that the fairness hearings required in connection with settlements under UCATA and SARA would be evidentiary hearings. The nature and purpose of the hearings would appear to support that conclusion.

The nonsettling parties have almost no chance of establishing that settlements which adversely affect their interests were collusive or were not entered into in good faith if they are not allowed to call and examine witnesses, including, but not limited to, the parties to the settlement, and to offer evidence. Fairness hearings which do not allow the nonsettlers to offer evidence, but restrict them to the self-serving paper record compiled by the settlers, do not provide the nonsettlers with meaningful opportunities to challenge settlements which were arrived at without their input and which adversely affect their interests, or to establish collusion or bad faith on the part of the settlers.

The courts have consistently recognized in other contexts that evidentiary hearings are necessary where questions of collusion or bad faith are involved.\textsuperscript{179} They have repeatedly declared that questions of collusion and bad

\textsuperscript{179} See, e.g., Poller v. Columbia Broad. Sys., 368 U.S. 464, 473, 82 S. Ct. 486, 491 (1962); Okada v. MGIC Indem. Corp., 795 F.2d 1450, 1456 (9th Cir. 1986); Hotel Restaurant Employees And Bartenders Intern. Union v. Rollison, 615 F.2d 788, 793 (9th Cir. 1980); S.E.C. v. Koracorp Indus., Inc., 575 F.2d 692, 698-99 (9th Cir. 1978); Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180, 184-85 (8th Cir. 1976); 6 (Part 2) Moore et al., supra note 168, §§ 56.15[4], 56.17 [27], [31-1], [41-1], at 56-293 to 56-303, 56-478 to 56-482, 56-499, 56-526 to 56-531, respectively; Fed. R. Civ. P. 56, Advisory Committee Notes, 1963 Amendment—Subdivision (e) ("Where an issue as
faith are fact-sensitive questions, that the resolution of those questions turns upon determinations of motive, intent, state of mind, and credibility, and that such questions are usually inappropriate for resolution by summary judgment—i.e., on the basis of affidavits or paper records. 180

Consequently, one would think that a fairness hearing in connection with a settlement under UCATA or SARA would ordinarily be an evidentiary hearing. Anything less would not be a fairness hearing, but a self-fulfilling prophecy. Settlements will almost always be found to have been entered into in good faith, when they are insulated from meaningful attack or penetrating scrutiny—i.e., when nonsettling parties are prevented from looking behind the self-serving paper record created by settling parties to justify their actions. 181

Only a few of the courts in states which have adopted the UCATA approach have considered whether an evidentiary hearing must be held to determine if a settlement was entered into in “good faith.” Those courts have recognized that it may sometimes be necessary to hold evidentiary hearings in order to determine whether the settlement was made in “good faith.” Those same courts, however, have held that evidentiary hearings are not always or even usually required in order to determine whether or not a settlement was reached in “good faith” under the UCATA approach. 182

Similarly, only a few courts have considered whether an evidentiary hearing is required to determine the fairness and reasonableness of a settlement under SARA. The courts that have considered the question, however, have held that evidentiary hearings are not required under SARA, absent unusual circumstances or a showing of particularized need. These courts have indicated that it would

180. Id.

The courts in most of the states which have adopted the UCATA approach have not yet decided whether an evidentiary hearing is necessary to determine the “good faith” of a settlement. The question is still an open one in those jurisdictions.
be contrary to the purposes of SARA to hold evidentiary hearings to determine the fairness or reasonableness of settlements in the absence of such circumstances or showings.\(^{183}\) Under that approach, the courts which have been asked to review and approve CERCLA settlements have uniformly refused to hold evidentiary hearings on the fairness and reasonableness of those settlements or to engage in any meaningful review of those settlements.\(^{184}\) Thus, while nonsettlers are apparently entitled to receive notice of motions for the approval

---

183. See United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1085-86 (1st Cir. 1994) ("The district court did not err in declining to hold an evidentiary hearing to delve into matters of efficacy. Requiring hearings to review the reasonableness of CERCLA consent decrees as a matter of course would frustrate the statutory objective of expeditious settlement. . . . Consequently, requests for evidentiary hearings are, for the most part, routinely denied—and properly so—at the consent decree stage in environmental cases. . . . While a hearing may be necessary or desirable in special circumstances, . . . such cases are relatively rare. This case invokes the general rule, not the long-odds exception to it. The court had ample information before it, and—even without an evidentiary hearing, the parties had 'a fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions. . . .'). Moreover, appellants have pointed to nothing out of the ordinary that would suggest a particularized need for an evidentiary hearing.") United States v. Cannons Eng'g Corp., 899 F.2d 79, 93-94 (1st Cir. 1990) ("Appellants complain that the district court erred in failing to hold an evidentiary hearing on the suitability of the consent decrees. They are wrong. . . . We start with the proposition that 'motions do not usually culminate in evidentiary hearings. . . .' That being so, it rests with the proponent of an evidentiary hearing to persuade the court that one is desirable and to offer reasons warranting it. . . . In general, we believe that evidentiary hearings are not required under CERCLA when a court is merely deciding whether monetary settlements comprise fair and reasonable vehicles for disposition of Superfund claims. . . . As in other cases, the test for granting a hearing 'should be substantive: given the nature and circumstances of the case, did the parties have a fair opportunity to present relevant facts and arguments to the court and to counter the opponent's submissions?'"); United States v. Bliss, 133 F.R.D. 559, 568-69 (E.D. Mo. 1990); United States v. Rohm & Haas Co., 721 F. Supp. 666, 686-87 (D.N.J. 1989); Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 519 (W.D. Mich. 1989); In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1031, 1031 n.21 (D. Mass. 1989).

The United States Supreme Court has indicated in another context, however, that the courts may be required to hold evidentiary hearings before they can approve settlements under the UCATA approach, if the "good faith" requirement which UCATA imposes on settlements in order to protect the interests of nonsettlers is to serve its purpose. See AmClyde, 511 U.S. at 213, 114 S. Ct. at 1467-68 ("Courts and legislatures have recognized this potential for unfairness and have required 'good-faith hearings' as a remedy. When such hearings are required, the settling defendant is protected against contribution actions only if it shows that the settlement is a fair forecast of its equitable share of the judgment. . . . [T]o serve their protective function effectively, such hearings [must] be minitrials on the merits . . ."). The same rationale should apply with respect to the requirement that settlements under CERCLA be judicially or administratively approved.

Evidentiary hearings may be necessary if the requirement that settlements be judicially or administratively approved is to serve its purpose—i.e., to prevent collusion, make certain the government recovers all of its costs, and protect the interests of the nonsettlers by ensuring that the settlers do not pay less than their equitable shares of the costs at a site. See 42 U.S.C. §§ 9604(a)(1), 9613(f)(2), (3) (1995). After all, the requirement that settlements be judicially or administratively approved was intended to serve the same purpose as the "good faith" requirement of UCATA—to protect the interests of nonsettlers by making certain that settlements are not collusive, but are fair and reasonable. See, e.g., Rohm & Haas, 721 F. Supp. at 678 n.13.

184. See supra cases cited in note 39.
of settlements between the government and the settling parties so that they can object to settlements which they believe to be collusive, unreasonable, or unfair, they are not permitted to conduct discovery or present evidence to substantiate their objections.

The nonsettlers' rights and liabilities with respect to the site are, in essence, being determined in proceedings in which they are not afforded any meaningful opportunity to challenge what is presented to the court by the government and the settling parties. If that is in fact the statutory scheme, it may be constitutionally infirm. It may not satisfy the requirements of procedural due process.\(^\text{185}\)

---

\(^\text{185}\) See Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."); Goldberg v. Kelly, 397 U.S. 254, 263-66, 268-70, 90 S. Ct. 1011, 1018-20, 1021 (1970) ("[W]ritten submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decisionmaker by [agency personnel] has its own deficiencies; since [agency personnel] usually [gather] the facts upon which [the agency's decision] rests, the presentation of [opposing views] cannot safely be left to [them]. . . . [W]here important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); Greene v. McElroy, 360 U.S. 474, 496-99, 79 S. Ct. 1400, 1413-15 (1959). See also AmClyde, 511 U.S. at 213, 114 S. Ct. at 1467-68 (In this case, the court adopted the UCFA or proportionate share approach to determining the effect of partial settlements upon the liability of nonsettlers in admiralty proceedings. In discussing the UCATA or pro tanto approach, however, the court commented upon the potential for disproportionate liability under that approach and the concomitant need for "good faith hearings." The court indicated that such hearings would have to be evidentiary hearings in order to serve their purpose. It declared: "Courts and legislatures have recognized this potential for unfairness and have required 'good faith hearings' as a remedy. When such hearings are required, the settling defendant is protected against contribution actions only if it shows that the settlement is a fair forecast of its equitable share of the judgment. . . . [T]o serve their protective function, such hearings would have to be minitrials on the merits, but in practice they are often quite cursory."). In re Masters Mates, 957 F.2d at 1031 ("We hold that contribution does not exist after a court approves a fair settlement bar. Otherwise settlements among fewer than all the parties would be difficult to reach. However, third party participation in an evidentiary fairness hearing and court approval of the settlement bar are necessary to protect the due process rights of third parties."). Both the Court of Appeals for the First Circuit and the district court in Cannons Eng'g rejected substantive due process challenges to the creation of a disproportionate liability scheme in SARA—i.e., arguments that Congress could not, under the due process clause, create a scheme that might ultimately require parties to bear more than their proportionate share of the response costs at a site. See Cannons Eng'g, 899 F.2d at 92 n.6; United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1050 (D. Mass. 1989). The First Circuit and the district court did so on the grounds that there is no federal common law right to contribution from joint tortfeasors, and that Congress had the power under the Constitution to limit or abrogate any such right to contribution anyway, where it had a valid legislative purpose for doing so. Id. That substantive due process argument, however, has nothing to do with and no bearing upon the procedural due process concerns raised here. Congress did create a right to obtain contribution from other PRPs in CERCLA, and the courts consistently so found and held in the cases decided prior to the adoption of SARA. See the article cited in supra note 5. Congress explicitly confirmed the existence of that right in SARA. See 42 U.S.C. § 9613 (1995). The fact that Congress has created and conferred that right on PRPs in CERCLA and SARA, however, does not mean that Congress or the courts can extinguish that right or deprive PRPs of its benefits in any manner they wish. Congress and the courts can only do so in a manner that satisfies the requirements of procedural due
In addition, the courts which have been asked to enter consent decrees approving settlements between the government and PRPs have shown an almost complete indifference to, and lack of concern for, the interests of the nonsettlers. Each of those courts has held that, in reviewing and approving such settlements and incorporating them into consent decrees, courts must determine whether or not those settlements are fair, reasonable, and consistent with the goals and requirements of CERCLA. Each of those courts has also indicated that the effect of such settlements on the liability of nonsettlers and the fairness of such settlements to nonsettlers is one of the factors that must be considered in determining whether or not the proposed settlements are fair. After making those statements, however, each of those courts proceeded to review the effects of the proposed settlements on the nonsettlers' liability and their fairness to the nonsettlers under approaches so deferential to the government and the settlors as to constitute no meaningful review on behalf of the nonsettlers at all.

In fact, several of those courts have suggested that the proposed settlements adequately protected the interests of the nonsettlers because they were the product of protracted “arms-length negotiations” and bargaining between the government and the settlors. Obviously, if that is all that is required to establish that the settlement was made in “good faith,” then the requirement of judicial approval is an empty formalism. If Section 113(f)(2) adopts the UCATA approach to determining the effect of settlements between the government and PRPs on the liability of nonsettlers and establishes a disproportionate liability scheme, as those courts have held, no one can protect the interests of the nonsettlers in connection with those settlements but the courts.

The government has no incentive to do so. Under a disproportionate liability scheme, it does not even have an incentive to make certain that it is recovering the total of the settlors' equitable shares of the response costs at a site from the settlors. If it does not receive an amount equal to the total of the settlors' equitable shares of the response costs at a site in a settlement, it can simply

process. See, e.g., General Time Corp. v. Bulk Materials, Inc., 826 F. Supp. 471, 477 (M.D. Ga. 1993) (“Case law also supports the view that the statutorily created right of contribution is a property interest, which cannot be extinguished without procedural due process of law.”); C.P.C. Int'l, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269, 1283 (W.D. Mich. 1991). That may mean that the courts can not approve a settlement, where the approval of that settlement will extinguish or bar the statutory contribution rights of third parties, without first holding an evidentiary hearing on the termination of those parties' statutory contribution rights. See the cases cited in supra note 139.

186. See, e.g., Cannons Eng'g, 899 F.2d at 85-92; Rohm & Haas, 721 F. Supp. at 681-97; Cannons Eng'g, 720 F. Supp. at 1035-46; In re Acushnet River, 712 F. Supp. at 1027-38.

187. Id. But see United States v. Acton Corp., 733 F. Supp. 869, 872 (D.N.J. 1990) (In this case, the court suggested that the effect of a settlement on the liability of the nonsettlers and its fairness to nonsettlers need not be considered, if the settlement is reasonable in light of other factors. It declared: “The public interest deserves considerable weight .... If the proposed decree is reasonable in light of these factors, the Court need not consider the fairness of the decree to nonsettling parties.”).

188. Id.
pursue the nonsettlers for the deficiency. In addition, the settlors have no reason to protect the interests of the nonsettlers. Their interests are diametrically opposed to those of the nonsettlers. Their goal is to settle their liability for response costs at the site as cheaply as possible, and if that means they can settle their liability for response costs at the site for less than the total of their equitable shares of those response costs and shift a portion of their liability for the response costs to the nonsettlers, they will do so. Finally, the nonsettlers themselves cannot protect their interests in connection with those settlements, if they are not afforded an opportunity to contest those settlements in a meaningful fashion. And the courts have deprived them of any opportunity to do so by holding that CERCLA does not usually require evidentiary hearings on the fairness of such settlements and refusing to hold such hearings.

Consequently, as noted above, only the courts are in a position to protect the interests of the nonsettlers and ensure that settlements between the government and other PRPs are fair to the nonsettlers. The courts, however, have declined to do so by reviewing those settlements for fairness in a manner that is so deferential as to constitute no meaningful review at all.

---

189. In fact, the scheme encourages the government to do precisely that—settle with those most at fault and pursue the nonsettlers for any deficiency—in order to maximize its overall recovery. See supra notes 137-138 and accompanying text.

190. See cases cited in supra note 39. See Boomgaard and Breer, supra note 76, at 120 ("The court's level of intensity in reviewing consent decrees is often described as being greater than 'rubber stamp' approval and less than de novo review. Yet in reality most courts lean towards rubber stamp approval, granting substantial deference to [settlements] . . . ").

The author was able to locate only a few cases in which courts refused to approve settlements between the government and PRPs under CERCLA. See, e.g., United States v. Montrose Chem. Corp. of California, 50 F.3d 741 (9th Cir. 1995); United States v. Town of Moreau, 751 F. Supp. 1044 (N.D.N.Y. 1990).

In Montrose, the Court of Appeals for the Ninth Circuit reversed the district court's approval of a settlement between the United States and the State of California and a number of local governmental entities for response costs and natural resource damages. The district court had determined that the settlement was both procedurally and substantively fair, even though the district court: (i) had not been provided with any information on and did not know what it would cost to clean up the site and restore the natural resources; and (ii) could not possibly have compared the amount of the settlement to the total costs of clean up and restoration to determine whether the amount of the settlement bore any relationship to the proportion of the total costs attributable to the settling parties. See Montrose, 50 F.3d at 745-48. The Ninth Circuit held that the district court abused its discretion when it approved the settlement because the district court simply did not have enough information to make an independent determination that the settlement was fair and reasonable when it did so. Id.

In Moreau, the district court refused to approve a settlement between the government and PRPs because the government and the settling PRPs were so inept or incompetent that they could not even put together a self-serving record to support the proposed settlement. The record that was submitted to the court in connection with the settlement was incomplete, contained a number of omissions, appeared to have been manipulated and/or selectively edited, and did not contain enough information to allow the court to make the minimal determinations it had to make in order to approve the settlement. The court therefore refused to approve the settlement and entered a consent decree on that record. See Moreau, 751 F. Supp. at 1050-52.
If Section 113(f)(2) creates a disproportionate liability scheme, the provisions of CERCLA and SARA which establish the procedures for securing approval of settlements between the government and PRPs and the effect of those settlements on the potential liability of nonsettlers are constitutionally suspect. Those provisions never afford the nonsettlers a meaningful opportunity to be heard on the settlements before their rights and liabilities are adjudicated by the approval of those settlements.191

In addition, Section 104(a)(1) may require the courts to hold evidentiary hearings in connection with the approval of settlements between the government and PRPs. If Section 104(a)(1) of CERCLA means that the government is not authorized to enter into settlements with PRPs for less than the total of those PRPs' equitable shares of the response costs at a site, the courts can no longer follow the approach which they have followed to date in reviewing and approving settlements.

To date, the courts have been willing to engage in only the most limited and cursory review of such settlements. They have consistently held that they are not required to hold evidentiary hearings before passing upon the fairness and reasonableness of such settlements, absent unusual circumstances or a showing of particularized need, have consistently refused to hold evidentiary hearings, and have even refused to engage in any meaningful review of the paper record submitted to them in connection with such settlements.192 In short, they have consistently failed or refused to apply the level of scrutiny to those settlements necessary to achieve one of the objectives that Congress had in mind when it required judicial approval of settlements—i.e., to ensure that those settlements are not collusive "sweetheart" deals which will allow polluters to shift any of the costs of correcting the harm caused by their activities to others.

However, if Section 104(a)(1) means what it says, the government cannot grant discounts or special treatment to PRPs who come forward or are willing to settle, and cannot enter into settlements with those PRPs for less than the total of their equitable shares of the response costs at a site. If that is true, the courts cannot approve settlements as "fair, reasonable, and consistent with the purposes and requirements of the statute" until they have determined that the settlement will require the settlors to pay amounts which equal or exceed their equitable

---

191. See supra notes 183-185 and accompanying text.
192. See United States v. Rohm & Haas Co., 721 F. Supp. 666, 687 (D.N.J. 1989) ("In this case, Rohm & Haas does not urge us to hold an evidentiary hearing, it merely asks to review the paper record (cashbooks, receipts, depositions, etc.) and determine whether its view of that evidence is more plausible than that of the United States. But even this we will not do.").
shares of the response costs at a site, and will have to take a much harder look at those settlements.

The reason is simple. If Section 104(a)(1) means what it says, the courts cannot approve a settlement without first establishing, with a much greater degree of certainty, what it will cost to clean up or remediate a site, what the settling parties' equitable shares of those costs are, and whether or not the settlement will require the settling parties to pay amounts or perform work with costs which equal or exceed the total of their equitable shares of those costs—determinations which, in all probability, will require evidentiary hearings and a careful evaluation of the facts, rather than blind acceptance of the representations of the government and the settling PRPs. Otherwise, the courts cannot find or hold, in light of the statutory mandate of Section 104(a)(1), that the settlement is consistent with the goals and requirements of the statute. Section 104(a)(1) therefore drastically alters the approach which courts must follow and the level of scrutiny which the courts must apply in reviewing and approving major party settlements under CERCLA.

V. Conclusion

The provision of Section 113(f)(2) which declares that a settlement between the government and PRPs "reduces the potential liability of the others by the amount of the settlement" cannot reasonably be viewed as an adoption of the UCATA approach or as the linchpin of any "disproportionate liability scheme" under SARA. It simply does not make sense to interpret that provision in that manner, in the context of a statutory scheme which:

1. prohibits settlements between the government and PRPs for less than the total of the settlors' equitable shares of the response costs at a site;
2. contemplates that the government will usually negotiate or enter into settlements with PRPs for significantly more than the total of their equitable shares of the response costs at a site; and
3. does not provide for or permit an evidentiary hearing to determine the fairness of settlements between the government and PRPs to nonsettlors.^

193. The absence of provisions requiring evidentiary hearings on the fairness and reasonableness of settlements raises due process concerns and serious questions as to the constitutionality of Section 113(f)(2), if it constitutes an adoption of the UCATA approach or a "disproportionate liability scheme." See supra text accompanying notes 174-191. In the absence of provisions for evidentiary fairness hearings, such an interpretation of Section 113(f)(2) creates a scheme under which the government and the settling parties can dramatically alter the rights and liabilities of nonsettlors through contracts or agreements on which the nonsettlors are not consulted and to which the nonsettlors do not consent or agree. It also creates a scheme under which the courts can adjudicate the rights and liabilities of the nonsettlors by approving such agreements without ever affording the nonsettlors a meaningful opportunity to be heard in connection with those settlement agree-
Furthermore, such an interpretation of Section 113(f)(2) is at odds with the legislative history of SARA, which indicates that SARA was intended to ameliorate the harshness of the scheme that existed under CERCLA—not to augment or exacerbate it.\textsuperscript{194}

In addition, the great weight of authority indicates that the UCFA approach to determining the effect of settlements between the government and PRPs on the liability of nonsettlers is the approach that is most consistent with the objectives and policies of CERCLA and SARA, and the approach that should be followed to determine the effect of those settlements. Furthermore, the UCFA approach is not inconsistent with Section 113(f)(2), if the purpose of Section 113(f)(2) was to prevent the government from recovering more than the total costs incurred in responding to the releases of hazardous substances at sites. And the other provisions of SARA and the scheme which they establish for settlements between the government and PRPs indicate that that was in fact the probable purpose of Section 113(f)(2).\textsuperscript{195} Finally, the continued use of the UCFA approach will eliminate several procedural and constitutional problems associated with the UCATA approach. The UCFA approach’s built-in assurance of fairness to nonsettlers obviates any need to join the nonsettlers in actions for the approval of settlements between the government and PRPs or to hold evidentiary hearings in order to determine the fairness or reasonableness of those settlements.

Accordingly, Section 113(f)(2) can most reasonably be viewed as a modification to the UCFA approach for determining the effect of settlements on nonsettlers designed to prevent windfalls or double recoveries by the government as a result of those settlements. Under the UCFA approach, as modified by Section 113(f)(2), settlements between the government and PRPs reduce the potential liability of nonsettlers by the settlors’ equitable shares of the response costs at a site or the amount of the settlement, whichever is greater.

That interpretation of Section 113(f)(2) is entirely consistent with the scheme which SARA establishes for settlements between the government and PRPs. It also furthers the goal of assuring full recovery of the costs of responding to

\textsuperscript{194} \textit{See} Light, \textit{The Importance of "Being Taken"}, supra note 101. In that article, the author suggests that the courts, by virtue of their piecemeal review and interpretation of the provisions of CERCLA and SARA, have created a scheme that goes well beyond and is far harsher than anything Congress intended or created.

\textsuperscript{195} CERCLA, again, is a cost recovery statute. \textit{See} 42 U.S.C. § 9607(a). It was not intended to authorize or permit windfalls or double recoveries by the government, and Congress expressly established that fact in 42 U.S.C. § 9614(b), which prohibits persons who have recovered response costs under CERCLA from recovering for the same costs under other state or federal laws and prohibits persons who have recovered response costs under other state or federal laws from recovering for those same response costs under CERCLA. Section 113(f)(2) simply adds the final piece of the puzzle necessary to implement the policy against double recovery with respect to the government. It prevents the government from recovering for the same response costs more than once under CERCLA.
releases of hazardous substances from the persons who caused or contributed to those releases, while ensuring that the costs of responding to those releases are allocated or apportioned among those persons in a fair and equitable manner.

The courts should therefore hold that the UCFA approach continues to be valid and should prevail in determining the effects of a settlement between the government and PRPs upon the potential liability of nonsettlers. Section 113(f)(2) simply modifies that approach by establishing that nonsettlers are entitled, at a minimum, to a reduction in their potential liability equal to the amount of the settlement.