RIKER DANZIG SCHERER HYLAND PERRETTI LLP

U.S. v. Kramer, United States District Court for the District of New Jersey, 757 F. Supp. 397

United States Dept. of Justice, Environment & Natural Resources Div. by Bernard P. Bell, Washington, D.C., U.S.E.P.A., Office of Regional Counsel by Rudolph S. Perez, and U.S. Atty. by Louis Bizzarri, Asst. U.S. Atty., Camden, N.J., for plaintiff, U.S.

Podvey, Sachs, Meaner & Catenacci by H. Curtis Meanor, Newark, N.J., and Shea & Gould by Norman W. Bernstein, New York City, for defendant, UNISYS Corp.

Connell, Foley & Geiser by Frank A. Lattal, Roseland, N.J., and Sidley & Austin by Langley R. Shook, Washington, D.C., for defendant, W.R. Grace & Co.-Conn.

Levin & Hluchan by Glenn A. Harris, Marlton, N. J., for defendant Atochem, Inc., and American Nat. Can Co.

Brown and Connery by Jane A. Lorber, Westmont, N.J., and Reed, Smith, Shaw & McClay by Louis A. Naugle, Pittsburgh, Pa., for defendant, NVF Co., Inc.

Lowenstein, Sandler, Kohl, Fisher & Boylan by Richard F. Ricci, Roseland, N.J, for defendant, Olin Corp.

Deasey, Mahoney & Bender, Cherry Hill, N.J., for defendant, General Metaleraft, Inc.

Piece, Mack, Kennedy, Jaffe, Perrella & Yoskin by Kenneth H. Mack, Trenton, N.J. and Morgan, Lewis & Bockius by Denis V. Brenan, Michael R. Dillon, Kathleen R. Welsh, Philadelphia, Pa., for defendant, ICI Americas Inc.

Pitney, Hardin, Kipp & Szuch by William Hyatt, David W. Payne, Morristown, N.J., for defendant, American Cyanamid Co., Continental Can Co., E.I. DuPont de Nemours & Co., and Rohm and Haas Co.

Sive, Paget & Riesel, P.C. by Pamela Esterman, New York City, for defendant, N.L. Industries.

Crummy, Del Dec, Dolan, Griffinger & Vecchione by Ruth V. Rosenberg, Newark, N.J., for defendant, Cole Office

Environments, Div. of Joyce Intern., Inc.

Archer & Greiner by Christopher R. Gibson, Haddonfield, N.J., for defendants, Morton Intern. Inc. and Bridgestone/Firestone, Inc.

Duane, Morris & Heckscher by Seth V.D.H. Colley, Medford, N.J., for defendant, The Gilbert Spruance Co.

Wilson, Elser, Moskowitz, Edelman & Dicker by Joseph T. Walsh, III, Newark, N.J., for defendant, Albert J. Mitchell.

Blackburn, Michelman & Tyndall by David F. Michelman, Cherry Hill, N.J., for defendant, Globe Disposal Co.

Riker, Danzig, Scherer, Hyland & Perretti by Dennis J. Krumholz, Andrew J. Perel, Morristown, N.J., for defendant, Nabisco, Inc.

Schnader, Harrison, Segal & Lewis by Marianne E. Brown, David G. Battis, James W. Gicking, Philadelphia, Pa., for defendant, The Lehigh Press, Inc.

Robinson, St. John & Wayne by Lisa Agresti Carey, Newark, N.J., for defendant, Helen Kramer.

Michael N, Becci, Associate Corporate Counsel, Newton, Pa., for third party de-' fendant, Standard Pressed Steel Co.

Fox and Fox by Gabrie H. Halpern, Newark, N.J., for third pfn-ty defendant, Reagent-Chemical & Research, Inc. Katzenbach, Gildea & Rudner by Ezra D. Rosenberg, Lawrenceville, N.J., for third party defendant, Boeing Co., Vertol Div.

Caplan & Luber by Steven N. Yermish, Cherry Hill, N.J., for third party defendants, Simon Wrecking Co., Inc. and MidState Trading Co.

De Marco & Fiore, Hammonton, N.J., for third party defendant, United Asphalt Co., Inc.

Riesenburger & Kizner, Vineland, N.J., for defendant and third party plaintiffs, A. Marianni's Sons, Inc.

Durkin & Durkin by Thomas E. Durkin, Jr., Dennis A. Durkin, Newark, N.J., for third party defendant, Mayco Oil & Chemical Co.

Manta and Welge by Joel Schneider, Cherry Hill, N.J., for defendant, Rollins Environmental Services, (NJ) Inc.

Hannoch Weisman by A. Patrick Nucciarone, Roseland, N.J., for third party defendant, Bessemer (Kingsland).

OPINION

GERRY, Chief Judge:

This matter is before the court on plain tiff's Rule 12(f) motion to strike approximately 200 of nearly 300 affirmative defenses set forth in the answers of 16 of the now 29 defendants. Plaintiff, United States ("the Government"), brought this case pursuant to section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

42 U.S.C. § 9607, to recover response costs expended at the Helen Kramer Landfill ("the Site") in Mantua, New Jersey. To narrow the issues and reduce the time and expense of discovery, the Government moves to strike all defenses other thin those specified by section 107(b), became section 107(a) restricts defendants to the three section 107(b) defenses, making all other affirmative defenses legally insufficient.

The 16 defendants[1] whose affirmative defenses are at issue have filed a joint memorandum opposing the striking of their equitable and constitutional defenses.[2] They argue first that constitutional defenses may always be asserted and cannot be cut off by statute. Second, because CERG LA must be read as a whole and all of its provisions given effect, defenses are avail able which arise under those sections of CERCLA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, that are necessary to the implementation of section 107 [3] Third, defendants should be permitted to assert all the defenses that courts have held to be relevant to any CERCLA joint and several liability determination.

Moreover, defendants assert that they intend to assert a counterclaim against the Government, should discovery reveal that the Government itself was a significant generator of hazardous substances at the Site. Such a counterclaim, defendants argue, will change the character of the case from a section 107(a) collection action to "a hybrid which possesses features of both CERCLA Sections 107 and 113 ... [with] a sufficient Section 113 equitable allocation component to allow. Defendants to plead equitable defenses." Defendants' Joint Supplemental Memo at 2. [4] [1] At oral argument on September 7, 1990, defendants argued that the outcome of the Government's motion to strike non-107(b) affirmative defenses makes no practical difference to the posture of the case, because if the court strikes the defenses, the same arguments will be raised by defendants in their section 113 counterclaims for contribution, brought simultaneously in this suit with the Government's section 107 claim. The Government responded that "the very real and very practical difference" arises on a motion for summary judgment, because a counterclaim is not a defense to liability while affirmative defenses are. Transcript of Oral Argument on September 7, 1990 ("Tr.") at 30, 8-13.[5]

Were the court to strike the affirmative defenses, the likely practical consequence would be that the Government would be prepared to move for summary judgment on its section 107 claim well before defendants were ready to so move on their section 113 counterclaims. Defendants could be found jointly and severally liable for *all* response costs long before they would be ready to prove that other potentially responsible parties ("PRPs")-including perhaps the Government itself-were liable for *part* of those costs. Thus, as the Government argues, whether defendants' affirmative defenses remain part of the Government's section 107(a) claim, or are stricken now and revived later as part of defendants' section 113(f)(2) counterclaims, "is not an artificial distinction, it's a distinction with a very real difference." Tr. 30, 13-14.

For the following reasons we will grant plaintiff's motion and strike all the affirmative defenses before us, with the exception of defenses alleging divisibility of the harm as they pertain to joint and several liability [6]

I. BACKGROUND

The Helen Kramer Landfill is an inactive landfill in Mantua, New Jersey. From approximately 1963 to 1981, the 77-acre site was used for the disposal of municipal garbage and industrial waste. The State of New Jersey revoked the landfill registration in early 1981, and on March 3, 1981, a New Jersey state court ordered the landfill to cease operations.

On September 8, 1983, the Environmental Protection Agency ("EPA") placed the Helen Kramer Landfill on the National Priorities List ("NPL"), a list of the nation's most threatening hazardous waste sites. It now ranks fourth on that list. 42 U.S.C. § 9605(a); 40 C.F.R. Part 300, Appendix B.

Pursuant to section 104 of CERCLA, 42 U.S.C. § 9604, EPA conducted a Remedial Investigation and Feasibility Study ("RI/FS") from July 1983 until September 1985 to investigate contamination at the Site, at an alleged cost of over $2 million.

On October 16, 1989, plaintiff filed a complaint against 22 defendants, asserting claims under section 107 CERCLA, 42 U.S.C. § 9601 *et seq.* The complaint was amended on May 8, 1990 to name additional defendants and change the language regarding the declaratory judgment sought. The first amended complaint ("Am.Comp.") names 29 defendants and seeks: (1) a judgment against all defendants, jointly and severally, for all response costs [7] incurred by plaintiff at the Site (alleged to be already at least $4.6 million); [8] (2) a declaratory judgment that defendants are jointly and severally liable for all future response costs arising from releases and threatened releases of hazardous substances[9] at the Site, pursuant to section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2); and (3) an award of attorneys' fees and costs.

The amended complaint alleges, among other things, that the 16 defendants whose affirmative defenses are at issue on this motion are liable under section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), as persons who arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances at the Site, within the meaning of section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3). Further, defendants are jointly and severally liable to plaintiff under section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

On November 20, 1990, 13 defendants [10] filed a third-party complaint on behalf of themselves and all other defendants in this action,[11] naming more than 250 defendants, including 17 local governments. The third-party complaint seeks contribution pursuant to section 113(f) of CERCLA, 42 U.S.C. § 9613(f), and asserts that plaintiffs "have a right of contribution ... against each and every generator, transporter, owner/operator, and all such persons referenced in § 107(a) of CERCLA." Third-Party Complaint at 9. Some of the local government authorities named are alleged too have contributed "large amounts of liquid sewage sludge containing hazardous substances and properties [to] . the Helen Kramer Landfill," including "inorganic chemicals, metals, and organic constituents that are hazardous substances, and have, among other things, significantly caused and/or contributed to the high chemical oxygen demand ("COD") and excessively large amounts of methane gas prevalent at the site." *Id.*, § VI, p. 60.[12] Other local governments are named as generators of :'large amounts of municipal and industrial wastes containing hazardous substances which were transported to and disposed of at the Helen Kramer Landfill." *Id.*, VII, H, pp. 63-64. [13]

The third-party complaint seeks a declaratory judgment that, pursuant to § 113(f) of CERCLA, the third-party defendants are liable to them "for recovery, reimbursement, and/or contribution toward all response costs [including interest] incurred and/or to be incurred by [t]hird-[p]arty [p]laintiffs concerning or relating in any way to

the Helen Kramer Landfill Site." Further, plaintiffs seek an order requiring defendants "to immediately pay to ... [p]laintiffs their share of contribution for response costs thus far incurred by [t]hird-[p]arty [p]laintiffs," including interest, and to pay third-party plaintiffs their "costs of suit, including reasonable attorneys fees," and any other relief the court "may deem equitable and just." *Id.* § XI, p. 70.

II. FACTS ALLEGED BY DEFENDANTS

In their answers, defendants set forth the following as facts, grouped below as defendants allege they pertain to various defenses. Although described as facts, many of these are conclusions of law, and we -have so identified them below. For purposes of completeness we have not excluded these conclusions, but are not bound by them for purposes of this motion.

a) Constitutional Defenses

1. Municipalities located in and outside of New Jersey arranged for the disposal of wastes that contained hazardous substances. (U 8) [14]

2. The municipalities arranged for the disposal of the bulk of the wastes sent to the subject site. (U 11)

3. EPA has a policy of not asserting CERCLA liability against municipalities which arrange for the disposal of hazardous substances but does assert CERCLA liability against industries that arrange for the disposal of hazardous substances. Defendants allege that this policy deprives them of Equal Protection (a legal conclusion). (A 34, O 17-18, WR 36, GM 30, 31, NL 27, ICI 21, U 8 & 20)

4. The policy to not sue municipalities was adopted without providing defendants notice and an opportunity to comment. Defendants allege that this violates the Administrative Procedure Act and denies their due process right to be heard (legal conclusions). (U 8 & 20)

b) Statutory Defenses

5. No hazardous substances for which defendants are responsible were disposed of at the landfill. (AC 10, A 34, 0 10, WR 22, GM 29)

6. Some or all of the present or past costs and future costs, for which plaintiff seeks reimbursement in this action, were incurred by plaintiff as the result of acts or omissions of third parties other than employees or agents of defendants or other than one whose acts or omissions occurred in connection with a contractual relationship, existing directly or indirectly, with defendants. (AC 3 paragraph 1)

7. The costs which the Government seeks to recover are not costs of removal or remedial action response costs as

that term is defined in CERCLA. (AC 5, O 5, WR 18, NL 21, ICI 18)

8. The costs were incurred in a manner which was inconsistent with the National Contingency Plan ("NCP"). (Defendants here assert a legal conclusion, but do not set forth the facts upon which it is based.) (AC 6, WR 20, GM 9, NL 17)

9. Some or all of the costs were unreasonable in amount, were duplicative. not cost effective (facts) or were not incurred in accordance with applicable law (legal conclusion). (AC 16, U 16, A 28, WR 23, GM 23, NL 10)

10. Some or all of the costs represent plaintiff's indirect costs (fact), which are not recoverable under CERCLA (legal conclusion). (AC 19)

11. Some or all of the removal or remedial action for which plaintiff allegedly incurred the costs was not in accordance with applicable law (legal conclusion), or was performed improperly, or in an unauthorized or non-cost effective manner (facts), in violation of the NCP (legal conclusion) by plaintiff or by plaintiff's contractors (facts). (AC 16, 19 & 20, NL 14)

12. On September 27, 1985 plaintiff issued a Record of Decision ("ROD") selecting certain remedial actions to be taken with respect to the landfill. (AC 23 paragraph 1)

13. Plaintiff has failed to comply with applicable law with respect to the adoption of the ROD. (Again, this is a legal conclusion couched as a fact.) (U 10)

14. In developing, issuing and implementing the ROD, plaintiff acted arbitrarily, capriciously and unreasonably (a legal conclusion), and some or all of the costs which the government seeks to recover were incurred by plaintiff in developing, issuing or implementing the ROD. (AC 23 paragraphs 2-3)

15. Plaintiff did not determine that the removal and remedial action for which plaintiff incurred the costs would not be done properly by defendants. (AC 8 paragraph 1)

16. Some or all of the costs were incurred by plaintiff before it entered into a contract or cooperative agreement with New Jersey (fact), which violated section 104(c)(3) of CERCLA (legal conclusion.) (AC 9 paragraph 1)

17. Plaintiff failed to give the parties an opportunity to participate in the remedy selection process (fact), and was required to do so under CERCLA (legal conclusion). (NL 17)

18. Some or all of the costs were incurred by plaintiff before CERCLA became effective, or before the landfill was first listed on the National Priorities List (AC 13 paragraph 1)

c) Joint And Several Liability And Other Defenses

19. The response costs allegedly expended by plaintiff at the Site were part of ordinary landfill closure costs. (U 8)

20. The harms for which plaintiff allegedly incurred the costs were and are divisible (fact), and therefore joint and several liability is not applicable, there being a reasonable basis for apportionment (legal conclusion). (AC 11, A 29, U 18, GM 24, NVF 15)

21. Plaintiff itself is a person as defined in CERCLA (legal conclusion) (AC 21 paragraph 1), and plaintiff by contract or agreement arranged for disposal or treatment of hazardous substances owned or possessed by plaintiff at the Site. (AC 21 paragraph 2)

22. Plaintiff itself is jointly and severally liable under CERCLA. (This is a pure legal conclusion). (AC 21 paragraphs 1-4)

23. Defendants did not select the site at which their industrial wastes were disposed or deposited. (U 2)

24. Defendants exercised due care with respect to the hazardous substances referred to in the complaint, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and complied in full with all applicable laws. (This is a legal conclusion.) (AC 3 paragraph 2, 2, A 31, O 11, WR 15)

25. Defendants took reasonable precautions against the foreseeable acts or omissions of third parties and the consequences that could forseeably have resulted from such acts or omissions. (This is a legal conclusion.) (AC 3 paragraph 3)

d) Equitable Factors

26. Defendants have at all times acted in good faith toward plaintiff and with respect to the Site. (This is a legal conclusion.) (AC 22 paragraph 4a, GM 28, U 19, WR 34, A a33, AC 22, .J20)

27. Defendants contribution to the alleged harm, if at all, was *de minimis*, remote, indirect, speculative or transient. (AC 22 4c, A 7, A 22, WR 32, GM 7, NVF 16, ICI 17). (Congress anticipated that de minimis parties could be treated differently, at least for settlement purposes. 42 U.S.C. § 9622(g).)

28. Defendants never owned, operated or had any control over the landfill or its operations. (AC 22 paragraph 4d)

29. The landfill could have been operated in a safe and lawful manner by others, and would have been operated in a safe and lawful manner by others had plaintiff and other regulatory agencies exercised their supervisory authorities in a proper and effective manner, so as to prevent any release or threatened release of hazardous substances from the Site. (This is purely speculative and not a factual assertion.) (AC 22 paragraph 4e)

30. Defendants had a right to rely upon and reasonably did rely upon (legal conclusions), authorized and licensed transporters of hazardous substances, as well as the owners and operators of the landfill, to conduct their business carefully, safely, and without injury in a manner to prevent the release or threatened release of hazardous substances from the Site. (AC 22 paragraph 14(f) & (g).)

31. Defendants reasonably relied upon, and had a right to rely upon (legal conclusions) plaintiff and other regulatory authorities, to select only properly qualified transporters and owners and operators to transport hazardous substances to the Site, and to treat or dispose of hazardous substances at the Site, and to supervise the operation and closure of the Landfill so that those activities would be conducted carefully, safely, and without injury, in accordance with the requirements of applicable law, so as to prevent the release or threatened release of hazardous substances from the Landfill. (AC 22 paragraph 4h)

III. DISCUSSION

a) Standard For Striking Defenses Under Rule 12(f)

Rule 12(f) provides, in part: "Upon motion made by a party ... the court may order stricken from the pleading any insufficient defense." Fed.R.Civ.P. 12(f). "All well-pleaded facts are taken as admitted on a motion to strike but conclusions of law or of fact do not have to be treated in that fashion. Matter outside the pleadings normally is not considered on a Rule 12(f) motion." 5A Wright & Miller, Federal Practice and Procedure: Civil 2d (Federal Practice) § 1380, pp. 655-656 (1990).

In general, motions to strike are disfavored:

> Motions to strike a defense as insufficient are not favored by the courts because of their dilatory character. Thus, even when technically appropriate and well-founded, they often are not granted in the absence of a showing of prejudice to the moving party. Nonetheless, they are a useful and appropriate tool when the parties disagree only on the legal implications to be drawn from uncontroverted facts. But even when the defense presents a purely legal question, the courts are very reluctant to

> determine disputed or substantial issues of law on a motion to strike; these questions quite properly are viewed as determinable only after discovery and a hearing on the merits.
>
> Nor will a Rule 12(f) motion be granted if there is a substantial question of fact or a mixed question of law and fact that cannot be resolved, even if it is possible to determine the issue by drawing inferences from facts and statements that are not disputed.... In sum, a motion to strike will not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined on a hearing on the merits.

Id., § 1381, pp. 672-678 (1990).

However, motions to strike "serve a useful purpose by eliminating insufficient defenses and saving the time and expense which would otherwise be spent in litigating issues which would not affect the outcome of the case." *United States v. Marisol, Inc.*, 725 F.Supp. 833, 836 (M.D.Pa. 1989). Still, the court's discretion is narrowly circumscribed on a motion to strike affirmative defenses. We may strike only those defenses so legally insufficient that it is beyond cavil that defendants could not prevail upon them. "[A] court should not grant a motion to strike a defense unless the insufficiency of the defense is 'clearly apparent.' ... The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where ... the factual background for a case is largely undeveloped" *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 188 (3d Cir.1986). Here, there has been little or no opportunity for discovery and hence to develop the factual background. It would thus appear premature to strike defenses that have any possible merit, based on the facts alleged in the many answers made by defendants.

b) CERCLA Overview

> "Congress enacted CERCLA in December 1980 '[t]o provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites,' Pub.L. No. 96-510, Stat. 2767 (1980) (purpose clause). Congress was aware when it enacted CERCLA that the costs of cleanup would exceed the Fund established by section 221 of the statute. *See, e.g.*, S.Rep. No. 848, *reprinted* in 1 Legis.Hist. at 325. Thus, dollars expended by the federal and state governments to clean up hazardous waste sites are, whenever possible, to be recovered from responsible parties through the liability scheme ... set forth in section 107. 42 U.S.C. § 9607. Section 107 imposes liability on present site owners and operators, owners and operators at the time of disposal, and specified categories of generators and transporters

> of hazardous substances.
>
> In keeping with this broad liability scheme, the only substantive affirmative defenses to liability under CERCLA are those found in section 107(b). The exclusivity of section 107(b) defenses is explicitly discussed in section 107(a) which provides for liability '[n]otwithstanding any other provision or rule of law, and subject *only* to the defenses set forth in subsection (b) of this section.' As a result of this unequivocal intent, a strong majority of courts have held that liability under CERCLA section 107(a) is subject only to the limited defenses provided in section 107(b)."

Kelley v. Thomas Solvent Co., 714 F.Supp. 1439, 1445 (W.D.Mich.1989) ("*Thomas Solvent*") (emphasis original). *See also United States v. Western Processing Co.*, 734 F.Supp. 930, 939 (W.D.Wash.1990) ("*Western Processing*") ("In summary, the better reasoned decisions and the majority of cases have held that the limited defenses of Section 107(b) are exclusive and that equitable defenses such as unclean hands cannot be asserted because of the clear statutory language and because they would thwart the public interest.").

c) Section 107(a) Response Cost Recovery Claims And Defenses

Section 107(a) of CERCLA imposes liability on four classes of responsible parties for response costs incurred by the United States: 1) the owner and operator of the facility; 2) any person who owned or operated the facility at the time of disposal of any hazardous substance; 3) any person who by contract, agreement or otherwise arranged for disposal or treatment of hazardous substances owned or possessed by that person; and 4) any person who accepted any hazardous substances for transport to disposal or treatment facilities selected by that person. 42 U.S.C. § 9607(a)(1)-(4).

Section 107(a) requires proof of three elements: (1) that there was a release or a threat of a release of a hazardous substance at a facility; (2) that as a result of the release or threatened release, the United States incurred response costs; and (3) that defendants fall within one of the categories of responsible parties set forth above.

Section 107(a) provides that liability shall attach "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section." 42 1U.S.C. § 9607(a).

Section 107(b) exempts from liability those who;

> can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by-

(1) an act of God;
(2) an act of war;
(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant -if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could forseeably result from such acts or omissions;
(4) any combination of the foregoing paragraphs.

42 U.S.C. § 9607(b).

Simply, the section 107(b)(3) defense is the "complete absence of causation." *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir.1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989). That defense has three elements. A defendant must prove: (1) the release or threatened release was "caused solely by" an act or omission of an unrelated third party who was not an employee or agent of the defendant and with whom the defendant did not have a "contractual relationship"; (2) defendant exercised due care as to the hazardous substance; *and* (3) defendant took precautions against foreseeable acts or omissions of that unrelated third party. The Government asserts that no other substantive affirmative defenses beyond those in section 107(b) may be asserted.

The essential question before the court is whether defendants are limited to the section 107(b)(3) defense (since neither an act of God nor an act of war are at issue here). Plaintiff argues that the express language of section 107(a) so limits defendants, which offer a wide variety of affirmative defenses that admittedly fall outside the parameter of section 107(b)(3). Defendants argue that those defenses should not be stricken.

d) Section 113(g)(2) Requires A Declaratory Judgment In A Section 107(a) Response Cost Recovery Action

Before the complaint was amended, defendants cross-moved for judgment on the pleadings on the Government's claim for a declaratory judgment. Once the Government amended its complaint, and changed the language upon which defendants had based their cross-motion, as well as two affirmative defenses, then defendants withdrew their cross-motion. See Case Management Order ("CMO") No. 2, paragraph 28. However, defendants have not withdrawn the two affirmative defenses. They are: failure to state a claim and lack of subject matter jurisdiction

regarding plaintiff's declaratory judgment claim. Since the first amended complaint changed the relevant language upon which those affirmative defenses were based, for the following reasons we shall strike them.

Pursuant to section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), and 28 U.S.C. § 2201, the complaint sought a declaratory judgment that defendants are "liable for all present and future releases and threatened releases off hazardous substances at the Site." Complaint, 2 of Prayer for Relief, at p. 10. Defendants alleged that the complaint was defective because "[t]here is simply no authority for a declaration of liability for 'releases or threatened releases' in the abstract liability is only for response costs actually incurred that are not inconsistent with the [National Contingency Plan ("NCP")]." Joint Memorandum of Law in Opposition to United States' Motion to Strike Defendants' Defenses ("Joint Memo") p. 6. However, th, - - an O ndei complaint seeks "a declaran r, judgment thatt the defendants are jointly and severally liable for all future response costs incurred by the United States in connection with the Site." *Id.*, 2 of Prayer for Relief, at p. 10 (emphasis added). Section 113(g)(2), in relevant part, provides: In any [action for recovery of the costs referred to in section 107] ... the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. 42 U.S.C. § 9613(g)(2) (emphasis added). The amended complaint seeks a declaratory judgment for "all future response costs," as specified in section 113(g)(2), which requires the court in a section 107 response costs recovery action to enter such a declaratory judgment. *See United States v. Shaner*, Civ. No. 85-1372, slip op. at 26, 1990 WL 115085, 1990 U.S. Dist.LEXIS 6893 (E.D.Pa. June 5, 1990) (section 113 (g)(2) "expressly authorizes a court to enter a declaratory judgment on a PRP's liability for further response costs").

Thus, because AC's affirmative defenses of failure to state a claim and lack of subject matter jurisdiction are based on language that is no longer in the complaint, and the amended complaint conforms to the statutory form for the mandatory declaratory judgment in a section 107 cost recovery action, plaintiff states a claim for a declaratory judgment under section 113(g)(2), and the court has subject matter jurisdiction over that claim. Accordingly, both those affirmative defenses will be stricken.

e) Section 113 Creates Right To Seek Contribution And Permits Equitable Defenses To compensate for the potentially unfair burden that section 107 joint and several strict liability might impose on named PRPs, when other PRPs have not been named in an action brought by the government under that section, CERCLA provides a right under section 113 .for named PRPs to seek contribution from other PRPs to apportion response costs equitably. It is during this second stage of CERCLA proceedings when equitable considerations are proper.

Section 113(f)(1) provides, in relevant part: "Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) -*during* or following any civil action under section ... 107(a)... 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. § 9613(f)(1) (emphasis added). Thus, defendants need not suffer undue delay in obtaining contribution under section 113, since a section 113 action may be brought "during" the pendency of a section 107(a) action. Indeed, as noted above, defendants have filed a third-party complaint seeking contribution under section 113 agaist more than 250 third-party defendants, including 17 local governments. Thus, the section 113(f) contribution action is being brought "during" the civil action in which the government seeks to recover its response costs pursuant to section 107(a).

In

Western Processing

, the district court wrote:

> There are to distinct contexts in which the issue of "apportionment arises. It is critical that these two different contexts are not confused. In the first context, the question is whether the harm resulting from two or more causes is indivisible, or whether the harm is capable of division or apportionment among separate causes. If there is a single harm that is theoretically or practically indivisible, each defendant is jointly and severally liable for the entire injury. However, if there are distinct harms that are capable of division, then liability should be apportioned according to the contribution of each defendant.
> The second context in which the issue of "apportionment" arises occurs after the first inquiry regarding the indivisibility of the harm. If the defendants are found to be jointly and severally liable, any defendant may seek to limit the amount of damages it would ultimately have to pay by seeking an order of contribution apportioning the damages among the defendants.
>
> Thus, this Court may conclude in the contribution action that Unocal has over-paid based on equitable factors and is entitled to contribution. But the court's discretion in allocating damages among the defendants during the contribution phase does not affect the defendants' liability.
>
> 734 F.Supp. at 938, quoting United States v. Stringfellow, 661 F.Supp. 1053, 1060 (C.D.Ca1.1987) (emphasis added.) Thus, an affirmative defense here that the harm at the Site is distinct and divisible is proper and goes to the liability of those defendants that can demonstrate divisibility of the harm. But as Western Processing observed, consideration of "equitable factors" only comes into play during the contribution phase and does not affect the liability of each defendant in a section 107 action.
>
> Similarly, section 106 contemplates equitable considerations in deciding whether to grant injunctions

under that section. Under section 106 the court may consider "the equities of the case" but under section 107, in sharp contrast, PRPs have joint and several strict liability for all response costs, [n]otwithstanding any other provision or rule of law, and subject only to the defenses in section 107(b).

f)Plaintiff Is Not Barred From Brining This Section 107 Action Even If It was A Generator, Transporter Or Operator At The Site.

Defendants argue that discovery will reveal that the Government was a large waster generator at the Site, and will therefore be liable for contribution in an anticipated counterclaim brought pursuant to section 113. The impact of that counterclaim, defendants initially alleged, will be to change the posture of the case from a section 107 response cost recovery action to a section 113 action for contribution, made by the Government as one generator seeking contribution from other PRPs. Because equitable defenses would be available if the court construes the case as falling under section 113, that argument went, the court should refrain from striking the equitable defenses until the record is developed sufficiently to determine whether the action will be maintained under section 107 or must be brought under section 113.

Defendants' argument then evolved into an allegation that there is a "sufficient Section 113 equitable allocation component to allow Defendants to plead equitable defenses." *See* Defendants' Joint Supplemental Memo. At 2. Because the Government "is itself liable as a generator of hazardous substances found at the site and Defendants accordingly plead a right to contribution, the CERCLA section 113(f)(1) contribution provisions necessarily must be read into the underlying Section 107 claim." *Id.* at 3.

At oral argument on September 7, 1990 defendants' counsel argued that "the procedural posture that we are in -means that the liability of the Government in this case is going to be heard now whether denominated as a counterclaim or denominated as an affirmative defense." Tr. 15, 9-15. Counsel is correct that United States is named as a defendant in a section 113 contribution claim brought in this action, the liability of the Government for contribution will be determined during this action, although almost certainly after defendants' joint and several liability to the Government is determined under section 107(a).

Using the above premise as a launch point, counsel then argued that the Government's motion to strike is "absolutely and completely moot. It accomplishes nothing to advance this case to conclusion." Tr. 22, 2-4. And if not moot, then arguing over whether the affirmative defenses are only proper in the context of counterclaims is "an artificial distinction":

> [W]hat possible difference does it make to treat this as or to say the same set of facts can be asserted as a counterclaim against the United States to be heard now here but cannot be asserted as an affirmative defense to be heard against the United States now and here in mitigation of United States' claim? It's all one [and] the same thing.
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> [T]here seems to be an artificial distinction being sought to be made here between liability and mitigation.... The Government's liability for contributing to this site mitigates the amount that we are liable for for contributing to this site.... [O]ur position is that the government is jointly and severally liable, just like us.... [T]he government is no different as one generator than any other generator.

Tr. 15, 22 to Tr. 16, 2; Tr. 17, 7-14, 20-21; Tr. 18, 8-9.

The Government's potential liability for contribution does not affect this section 107(a) response cost recovery action. The Government's potential liability alters neither the type of affirmative defenses permissible under section 107(a), nor the Government's right to full recovery of its response costs. Defendants are correct that the Government's ultimate recovery of its response costs would be decreased, once it was found liable for contribution and the amount to be apportioned to it of total response costs was determined. However, it is in the nature of the claims made, that even when, as here, a section 107(a) claim co-exists in a single action with section 113 contribution claims, defendants' liability on the Government's section 107(a) claim almost certainly will be determined before the Government's liability for contribution.

Defendants attempt to collapse this very real practical difference in the timing of the proofs by arguing that the Government's liability for contribution "mitigates the amount that [defendants] are liable for for contributing to this site." Ultimately, they may be right, but practically, the Government recovers

first, then contribution claims are resolved-even when all are comprised within one action. Defendants are also mistaken that the Government is jointly and severally liable, "just like us." As defendants recognized later during oral argument, the "liability of initial, defendants sued by the Government under 107(a) ... is joint and several[, but according to judicial precedent,] ... the liability of third-party defendants is several only." Tr. 27, 3-11.

Finally, defendants are correct that, as to the Government's liability for contribution, it "is no different as one generator than any other generator." But the Government stands in a much different posture as plaintiff in a section 107(a) action, than it would as a PRP defendant in the same action, because it is the Government and not the other PRPs that has incurred the response costs at the Site. Had any other PRP-and on this motion we consider the Government to be a PRP-gone ahead and incurred response costs at the Site, then that PRP could have brought a section 107(a) recovery action, and this case would be in the same procedural posture, but with the Government as a defendant. But the brute fact is that the Government and not the named defendants has spent public monies on the cleanup, and is therefore entitled to full recovery of those monies, whatever its potential liability for contribution.

The legislative history of the Superfund Amendments of 1986 (which enacted section 113) makes clear that the United States may bring either a section 106 or 107 action, regardless of whether the United States itself was a generator of waste at the site:

> This section does not affect the right of the United States to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, whether or not the United States was an owner or operator of a facility or a generator of waste at the site. Where the United States has been required to pay response costs as a generator or facility owner or operator, the United States may maintain an action to recover such costs from other responsible parties.

See H.R.Rep. No. 253(1), 99th Cong., 2nd Sess. 1, 79-80 (1985), *reprinted in* 1986 U.S.Code Cong. & Admin.News 2835, 2861-62.

The Western Processing court held that the government was not barred from section 107 recovery merely because it had been an operator of a hazardous waste site: "The fact that the United States is a former site operator ... does not bar a finding of liability against the defendants nor bar recovery in this [section 107(a)] action. At a future proceeding in the contribution and counterclaims action ... the

United States may be found liable as a former site operator and responsible for some portion of response costs incurred at the site." 734 F.Supp. at 939-940. That court recognized that the section 113 proceeding would be the appropriate forum to consider the Government's liability for response costs. We agree.

Defendant Morton makes a slightly different argument, but toward the same end of seeking consideration of equitable factors regarding plaintiff's potential liability within the section 107(a) claim, rather than in the section 113 claim.

Morton argues that plaintiff is a liable party,[15] and that if "Morton is successful in establishing the United States' liability, this will be a contribution case. The Court will have to determine at one time who is liable, what legitimate response costs have been incurred, and what percent of equitable responsibility should be borne by the various parties." Morton Memorandum of Law in Opposition to the United States' Motion to Strike Its Separate Defenses ("Morton Memo"), at p. 7.

Morton relies on *PVO Intl., Inc. v. Drew Chemical Corp.*, 19 ELR 20,077, 16 Chem. Waste Lit.Rep. 669 (D.N.J.1988), for the proposition that "Section 107(a) requires [the court] to allocate clean-up costs between [the parties] according to relevant, equitable factors." *Id.*, 16 Chem.Waste Lit.Rep. at 683, *quoted in* Morton Memo at 8. Thus, while not explicit in Morton's memorandum, we read Morton's argument not to be that plaintiffs liability will make this a section 113 contribution case, but that the court should apply equitable factors to allocate clean-up costs under the section 107(a) claim, rather than under the section 113 claim.[16]

PVO used the following reasoning:

> [S]ection [107(a)] does not specifically provide for apportionment of costs between liable parties. However, Section 107(a) should be read in conjunction with the contribution provision in section 113(f)(1), which does provide for allocation of response costs "among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. sec. 9613. Congress clearly intended courts to allocate cleanup costs between liable parties, and it would be anomalous to allocate such responsibility in contribution actions but to allow it to fall only on defendants in section 107(a) actions, regardless of any partial responsibility of the plaintiff in contaminating the property or any other factors that would make it unfair to burden the defendant with the entire cost of cleanup. Thus, I conclude that section 107(a) requires me to allocate cleanup costs between [the parties] according to relevant equitable factors.

16 Chem.Wasu Lit.Rep. at 683.[17], What is implied here is that, since "Congress clearly intended courts to allocate cleanup costs between liable parties," and made provisions for such allocation in section 113 contribution actions, it also must have intended that those same equitable factors be considered and allocation be done in section 107 actions.

Collapsing the distinction between section 107 and section 113 ignores the clear language and structure of the statute. Section 107 imposes liability "[n]otwithstanding any other provision or rule of law and subject only to" the defenses set forth in section 107(b). Congress enacted section 113 as a separate section to address contribution.

We agree with *PVO* that it would be "anomalous" to permit apportionment of clean-up costs among PRPs in a section 113 action and not to permit apportionment in a section 107 action, but *only if* defendants in a section 107 action could not seek contribution in a section 113 action. But the structure of CERCLA does not preclude consideration of equitable factors, including the liability of a PRP who was (or is) plaintiff in a section 107 action. Rather, CERCLA separates those equitable factors from section 107 and considers them in a section 113 contribution action. "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. § 9613(f)(1). Defendants need not suffer undue delay in seeking contribution under section 113, since a section 113 action may be brought "during" the pendency of a section 107(a) action (defendants have done so here). *Id.*

Moreover, sections 107 and 113 serve distinct purposes. CERCLA was enacted to facilitate cleanup of

the tens of thousands of hazardous waste sites in this country. Section 107 permits the Government or a private party to go in, clean up the mess, pay the bill, then collect *all* its costs not inconsistent with the NCP from other responsible parties-even if plaintiff was also responsible for the contamination. Any PRP is entitled under section 113 to bring a contribution action against other PRPs-including the PRP who previously cleaned up the mess and was paid for its trouble through a section 107 proceeding-to apportion costs equitably among all the PRPs. Practically speaking, section 107 permits a PRP, including the Government, to collect all its response costs, even those that that same PRP may be required to pay back to other PRPs as its equitable share in a section 113 proceeding.[18]

What might be called a windfall for a plaintiff PRP in a section 107 action serves as an incentive for private parties to clean up hazardous waste sites, to risk their own capital initially, knowing that by then prevailing in a section 107 action, they will be reimbursed perhaps in excess of what might be shown in a section 113 action to have been their equitable share. If the courts collapse the distinction between a section 107 and 113 proceeding, there will be less incentive for private parties to initiate clean up, since they would lose the use of that *temporary*windfall gained in a section 107 action.

Moreover, reimbursing the Government for its entire response costs in a section 107 action-whatever its own liability as a PRP-serves the important public policy of maintaining Superfund reserves for response costs at other sites.

In sum, we reject apportioning clean-up costs in a section l07 action (absent proof that the harm is divisible); CERCLA clearly provides that such apportionment is to be accomplished through a section 113 contribution action.

g) Defendants' Affirmative Defenses

1. Failure To State A Claim

Many defendants assert the defense that the complaint fails to state a claim upon which relief may be granted.[19] The amended complaint seeks relief under sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607(a) and 9613(b). Under section 107(a) the government "seeks to recover costs expended, and to be expended, in response to the release or threat of release of hazardous substances into the environment at" the Site. Pursuant to section 113(g)(2)(B), the government further seeks a "declaratory judgment on the joint and several liability of the named defendants for all future response costs incurred by the United States in connection with the Site." Am.Comp., paragraph1, at p. 2.

To establish a prima facie case for liability under section 107, the government must show that:

> (1) the site is a "facility";
> (2) a "release" or "threatened release" of a "hazardous substance" from the site has occurred;
> (3) the release or threatened release has caused the United States to incur response costs; and
> (4) the defendants fall within at least one of the four classes of responsible persons described in section 107(a).

United States v. Aceto Agricultural Chemicals Corp. ("*Aceto*"), 872 F.2d 1373, 1378-79 (8th Cir.1989); *Marisol*, 725 F.Supp. at 837.

The amended complaint states a claim under section 107(a) of CERCLA by alleging:

(1) "From approximately 1963 to 1981, hazardous substances were disposed of at the Site," and the "Site is a facility within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9)." Am.Comp., paragraphs 31 and 39.

(2) The soil, surface waters, air above the Site, and leachate and groundwater at the Site are all contaminated with hazardous substances. *Id.*, paragraphs 34-37. "There were and are releases, within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), and the threat of continuing releases of hazardous substances into the environment at the Site." *Id.*, paragraph 41.

(3) "The United States has incurred 'response costs' of at least $4.6 million plus interest, and will continue to incur 'response costs' as defined in Sections 101(25) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(25) and 9607(a), to respond to the release or threatened release of hazardous substances at the Site." *Id.*, paragraph 47. (4) Defendants fall within at least one of the four classes of responsible persons listed in section 107(a). *Id.*, paragraphs 43-46.

Section 113(g)(2) is a companion section to section 107(a), and requires the court "to enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613(gx2). The amended complaint alleges that the Government "will continue to incur 'response costs' " at the Site. *Id.*, Il 47, The amended complaint states a claim for a declaratory judgment under section 113(g)(2). *Id.*, paragraph 2 Prayer For Relief, p. 10. Plaintiff states a claim under sections 107(a) and 113(g).

Therefore, defenses of failure to state a claim are insufficient as a matter of law and will be stricken.

2. Failure To Offer Proof Of Imminent And Substantial Endangerment

Defendants NL Industries, Atochem and Olin assert that the Government has failed to allege or offer proof of actual or potential imminent and substantial endangerment to public health, welfare or the environment arising from the release or threatened release of hazardous substances at the Site.[20] The Government argues that these defenses should be stricken because no proof of imminent or substantial endangerment is required in a cost recovery action under section 107(a).

Section 107(a) does not require proof of imminent and substantial danger to public health, welfare, or the environment. The court will therefore strike these defenses. Accord Marisol, 725 F.Supp. at 837.

3. Acts Or Omissions Of A Third Party

Several defendants assert that any release or threat of release or any costs or damages resulting therefrom are the result of acts or omissions of third parties.[21] These defenses do not conform with the statutory requirements of section 107(b)(3) and therefore will be stricken. However, defenses that conform with section 107(b) will not be stricken, such as NVF's 11th defense.

As noted above, the section 107(b)(3) third party defense is based on "complete absence of causation" by defendant of the release or threatened release at the site. Section 107(b)(3) exempts from liability those who can establish by a preponderance of the evidence that: (1) the release or threatened release was "caused solely by" an act or omission of an unrelated third party who was not an employee or agent of the defendant and with whom the defendant did not have a "contractual relationship"; (2) defendant exercised due care as too the hazardous substance; and (3) defendant took precautions against foreseeable acts or omissions of that unrelated third party.

Third party defenses that fail to conform to the above statutory requirements of section 107(b)(3) have been stricken as insufficient. Thus, defenses stating that a third party was the "proximate cause"[22] have been found to be different from a defense alleging that the third party was the "sole cause," and must be stricken. Similarly, defenses alleging that the acts or omissions were committed by persons over whom defendants had "no control"[23] have been found to be insufficient, because the-statute requires that defendants allege that those third parties were neither employees, agents, nor in a contractual relationship with defendants. *See Marisol*, 725 F.Supp. at 838-839; *Thomas Solvent*, 714 F.Supp. at 1446; *O'Neil v. Picillo*, 682 F.Supp. 706, 712 (D.R.I.1988), *aff'd*, 883 F.2d 176 (1st Cir.1989), *cert. denied sub nom. American Cyanamid Co. v. O Neil*

, - U.S. - 110 S.Ct. 1115, 107 L.Ed.2d 1022 (1990); *United States v. Stringfellow*, 661 F.Supp. 1053, 1061 (C.D.Cal.1987); *United States v. Mottolo*, 695 F.Supp. 615, 626 (D.N.H. 1988). Similarly, defenses alleging reasonable reliance upon others to dispose of waste[24] or alleging superseding, intervening, illegal, criminal or tortious acts of third parties do not meet the statutory requirements of section 107(b)(3) and must be stricken. *Marisol*, 725 F.Supp. at 839.

4. Defendants Exercised Due Care And Complied With The Law And Industry Practice, And The United States Was Negligent

Many defendants assert that they acted in good faith and with due care and complied with all statutory, regulatory and common law requirements regarding waste disposal [25] UNISYS and W.R. Grace assert that they took precautions in handling and managing their materials in accordance with state of the art, trade customs and industry practice.[26] Several defendants assert that the United States was negligent, contributed materially to the harm, caused the harm, and assumed the risk of the consequences of its conduct.[27] W.R. Grace in its 9th and 10th defenses asserts that it owed no duty to the United. States and could not foresee the risk of the damages alleged in the complaint.

CERCLA imposes strict liability. *Aceto*, 872 F2d at 1377; *Monsanto*, 858 F.2d at 167; *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2nd Cir.1985) ("Congress intended that responsible parties be held strictly liable," subject to defenses in section 107(b)); *Artesian Water Co. v. Government of New Castle County*, 659 F.Supp. 1269, 1277 (D.Del.1987), *aff'd*, 851 F.2d 643 (3d Cir.1988); *Stringfellow*, 661 F.Supp. at 1062; *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 805 (S.D.Ohio 1983); *United States v. Price*, 577 F.Supp. 1103, 1113-14 (D.N.J.1983) ("Though strict liability may impose harsh results on certain defendants, it is the most equitable solution in view of the alternative-forcing those who bear no responsibility for causing the damage, the taxpayers, to shoulder the full cost of the cleanup.").

Because of CERCLA's strict liability scheme and limited affirmative defenses, "defenses based upon claims that defendants were not negligent or that they exercised due care cannot be used to avoid liability." *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 204 (W.D. Mo.1985). *Accord City of Philadelphia v. Stepan Chemical Co.*, 14 Chem.Waste Lit. Rep. 982, 983-84, 1987 WL 15214 (E.D.Pa. 1987). In rejecting a defense that defendants had acted in a proper and reasonable manner, exercised due care, complied with applicable laws and regulations, the court in *United States v. Dickerson*, 640 F.Supp. 448, 451 (D.Md.1986), held that "[t]his defense has no application to this suit, because CERCLA imposes strict liability for the classes of defendants listed in § 9607(a)(1)-(4), subject only to the very limited defenses enumerated in § 9607(b)."

Therefore, the defenses alleging due care, compliance with the law and industry practice, and foreseeability of the risk are insufficient as a matter of law and must be stricken.

Similarly, the defense that the United States was contributorily negligent, caused the harm at the Site or assumed the risk of harm at the Site, are all insufficient and must be stricken. These defenses in essence allege a third-party defense that falls outside the parameters of section 107(b)(3). Moreover, defendants may assert these claims in their section 113 contribution claim.

5. No Direct Or Proximate Cause

Several defendants argue that their conduct was not the cause in fact or proximate cause of the releases or threatened releases at the Site.[28] As the government argues, CERCLA establishes liability without regard to traditional tort notions of causation. "Interpreting section 9607(a)(1) as including a causation requirement makes superfluous the affirmative defenses provided in section 9607(b), each of which carves out from liability an exception based on causation. Without a clear congressional command otherwise, we will not construe a statute in any way that makes some of its provisions surplusage." *New York v. Shore Realty Corp.*, 759 F.2d at 1044. *See also United States v. Maryland Bank & Trust Co.*, 632 F.Supp. 573, 576 (D.Md.1986) ("Section 107 imposes strict liability ... without regard for causation"). The legislative history shows that "Congress specifically rejected including a causation requirement in Section 9607(a)." *Shore Realty*, 759 F.2d at 1044. Defenses based on lack of actual or proximate causation are insufficient under CERCLA and therefore must be stricken.

6. The Government's Failure To Enforce Environmental Laws, Comply With CERCLA, Provide Notice, Mitigate Damages, And Enter Into A Contract With New Jersey

All defendants assert defenses that plaintiff's claims are barred or limited because the Government did not comply with statutory or procedural prerequisites before bringing this action. For example, Cole's 29th defense alleges that plaintiff failed to exhaust its administrative remedies. American Cyanamid Group asserts that plaintiff failed to enforce its environmental laws and to protect the environment[29] NL and AC assert that plaintiff failed to conform its actions to CERCLA's requirements,[30] and that plaintiff failed to give notice to defendants before starting response actions.[31] Many defendants allege that plaintiff failed to mitigate damages.[32] Finally, defendants assert that plaintiff cannot recover costs incurred before it entered into a contract or cooperative agreement with New Jersey pursuant to section 104(c)(3) of CERCLA:[33]

CERCLA imposes no statutory or procedural prerequisites to bringing a section 107(a) response cost recovery action. Section 107(a) expressly provides liability "[n]otwithstanding any other provision or rule of law," subject to the defenses in section 107(b). If the Government incurs response costs following a release or threatened release into the environment, such as is alleged to have occurred at the Helen Kramer Landfill, then CERCLA entitles EPA to recover its costs from responsible parties as set forth in section 107(a). 42 U.S.C. §§ 9604(a) and 9607(a). If defendants fall within one of the four categories of responsible parties under section 107(a), they are strictly liable to the Government for reimbursement of response costs. *See Shore Realty*, 759 F.2d at 1042, 1044.

The liability provisions of section 107(a) are independent of requirements in other provisions of CERCLA. *See, e.g., Thomas Solvent*, 714 F.Supp. at 1447 (striking defenses asserting lack of compliance with CERCLA, stating that "there are no[ ] procedural prerequisites in CERCLA to commence a cost recovery action"); *United States v. Miami Drum Services, Inc.*, 25 Env't Rep.Cas. 1469, 1479, 1986 WL 15327 (S.D.Fla.1986) ("this Court concurs with the majority rule that the liability provisions of Section 107(a) are wholly separate and independent from the requirements of Section 104 of CERCLA"). Thus, the alleged failure of the Government to comply with CERCLA or enforce environmental laws is not a defense to a section 107(a) cost recovery action and such allegations will be stricken.

Similarly, plaintiff is not required to

Attorney:

Dennis J. Krumholz

Headquarters Plaza, One Speedwell Avenue, Morristown, New Jersey 07962-1981 • t: 973.538.0800 f: 973.538.1984
50 West State Street, Suite 1010, Trenton, New Jersey 08608-1220 • t: 609.396.2121 f: 609.396.4578
500 Fifth Avenue, New York, New York 10110 • t: 212.302.6574 f: 212.302.6628
399 Knollwood Road, Suite 201, White Plains, NY 10603 • t: 914.539.3360 f: 914.539.3361
1200 Summer Street, Suite 201C, Stamford, CT 06905 • t: 203.326.6740 f: 914.539.3361
www.riker.com