



© Tony O. Champagne 1992

ENVIRONMENTAL HAZARDS

Private Cost Recovery Actions Under THE LOUISIANA SUPERFUND LAW

By Roger A. Stetter

Alarmed by environmental hazards at abandoned chemical dump sites, and prodded by sensational national media coverage concerning Love Canal, Valley of the Drums and other notorious waste sites, Congress enacted the original Superfund law in 1980, *i.e.*, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 USCS §9601 *et seq.* (CERCLA or Superfund).¹ CERCLA was amended and reauthorized in 1986 by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (SARA), codified at 42 USCS §9601 *et seq.* Although the primary objective of Superfund is to

enable the government to recover site cleanup costs from the parties connected with hazardous waste sites, the statute has been judicially construed to grant private parties the right to recover their cleanup expenditures from other potentially responsible parties (PRPs).

Many states, including Louisiana, have enacted their own Superfund schemes (or Baby Superfund statutes) to address environmental problems resulting from poor waste disposal practices, including the migration of hazardous substances into the soil, groundwater, adjacent streams, lakes and rivers, and into the air. Most government enforcement actions and private

cost recovery litigation under Superfund involve old waste sites — some of them abandoned 50 years ago and now only dimly remembered by our grandparents' generation, if at all — but Superfund also extends liability to releases from actively managed facilities owned by large and small corporations, governmental entities and individuals.²

Remedial liability for the cleanup of waste sites under Louisiana statutory law is governed by Chapter 12 of the Louisiana Environmental Quality Act (the Act), R.S. 30:2271-2281, which was first enacted in 1984 (Acts 1984, No. 791) and patterned after CERCLA. The Louisiana Superfund law expressly provides for private recovery of cleanup costs. Plaintiffs can include both "innocent" landowners, who did not cause any environmental problem but own contaminated real estate and are thus liable for its cleanup, and culpable parties who spend money to clean up contaminated property and have the right to proceed against other PRPs for contribution.

This article provides an overview of the rights and liabilities of private parties under the Louisiana Superfund law and offers practical guidance for litigating private cost recovery actions.

Overview of Louisiana Superfund Law

In General

Like the federal statute, the Louisiana Superfund law provides for private recovery of cleanup costs only, *i.e.*, some or all of the funds expended on investigation and remediation of contaminated real estate. No recovery may be had for business losses or economic damages, such as diminished property values, nor for personal injuries arising from alleged exposure to site-related contamination. That is the domain of toxic torts or common law causes of action, which do sometimes provide such relief.³

Nonetheless, the Louisiana Su-

perfund law places a potent legal tool in the hands of a party who seeks to recover the funds it expended from "recalcitrant" PRPs who refuse to participate in necessary remedial action at a waste site. A PRP who agrees with a government demand to clean up a waste site is entitled to sue any other responsible party who refuses to participate for *twice* its share of the "remedial costs," which are broadly defined to include all reasonable expenses and attorneys' fees of prosecuting the cost recovery action to final judgment.⁴

The Louisiana Superfund law imposes strict liability upon a sweeping array of "persons" identified as having contributed to the particular site requiring cleanup action. The term "person" means any individual or entity, whether private or public, including the United States government, the state of Louisiana and its political subdivisions, and any municipality.⁵ The categories of PRPs who may be held liable for cleanup costs include present and former owners and operators of the site, transporters that brought wastes to the site, and entities that generated or arranged for the disposal or treatment of wastes that were ultimately disposed of at the site.⁶

established the Superfund program when even properties with a prior history of industrial use were not investigated for hazardous waste prior to being purchased. With the enactment of SARA in 1986, Congress provided some relief to innocent purchasers of polluted property. A current owner can now escape liability by demonstrating that he did not know, or have reason to know, that the property contained hazardous substances at the time of acquisition.⁸ In contrast, the Louisiana Superfund law does not provide an "innocent landowner" (or "due diligence") defense to current owners of real property.⁹

Most courts have also held that past site owners or operators may only be held liable under CERCLA if they were actually involved with the disposal of hazardous substances on the property.¹⁰ Again, however, the Louisiana statute provides no solace to innocent past site owners and operators. The statute, as amended in 1986, now reads that the court shall hold the defendant liable if it finds that he:

Is or was the owner or operator of the pollution source or facility subsequent to the disposal of hazardous waste.¹¹

Superfund law like the federal statute, the Louisiana Superfund law provides for private recovery of cleanup costs only. . . .

Owner Liability

One troublesome feature of the Louisiana Superfund scheme is the severe liability imposed on both present and former owners and operators of contaminated property. It is well established under CERCLA that a current owner of real property (or "operator" of a facility) is subject to remedial liability even though he did not contribute to contamination of the property or know that it contained hazardous substances.⁷ This was often the case in the era before Congress

What is striking about this formulation is that even **past** owners or operators may supposedly be held liable for remediation of waste sites which they never polluted.¹²

There is good reason to treat past owners as a distinct class from current owners. Today, a potential buyer or lender can usually avoid cleanup liability by due diligence efforts. If contamination is found during a pre-purchase environmental audit, the seller can agree to perform any necessary remediation or, if the risks seem too

great, the prospective buyer or lender can walk away from the deal. This was not a realistic option in the past when Superfund laws did not exist and the business and financial community were not on the lookout for possible environmental problems:

a governmental demand to undertake remedial action at the site; and
▶ The plaintiff has agreed to undertake remedial action at the site and has made a written demand on the defendant to pay its share of remedial costs.

“the process of reconstructing the facts as to whose wastes and what wastes were disposed of at a particular site is tedious, complicated and uncertain.”¹⁸

One troublesome feature of the Louisiana Superfund scheme is the severe liability imposed on both present and former owners and operators of contaminated property.

Environmental due diligence today is an incident as familiar to a real estate transaction as a termite report. A short decade ago, such a search for environmental problems was a rarity. What has intervened can be summed up in three words: fear of liability.¹³

Prima Facie Case

Given the sweeping liability provisions of the law, there are several classes of potential party plaintiffs. These include (1) “innocent” site owners who bought the property not knowing that it contained hazardous substances; (2) implicated site owners or operators who were involved in creating the environmental problems at the site; (3) off-site entities that generated or transported wastes ultimately disposed of at the site; and (4) neighboring property owners who incur costs of protective action.

A plaintiff must prove the following elements to establish liability in a private cost recovery action under the Act:

The site in question is a “pollution source” or “facility”;

▶ An actual or threatened “discharge” or “disposal” of a “hazardous substance” from the site has occurred or is about to occur, which may present an “imminent and substantial endangerment” to health or the environment;

▶ The defendant is a potentially liable party and has refused to comply with

Although these requirements may seem rather formidable, it is not very difficult to prove liability — once the PRPs have been identified and their relationship or link to the site can be demonstrated through competent evidence. That is because the key provisions in the statute which trigger liability have been defined with sweeping breadth and absence of negligence is not a defense.¹⁴ The term “hazardous substance” now includes over 700 substances, and the definition of a “pollution source” embraces any site or location where a hazardous substance may be found.¹⁵ The terms “discharge” or “disposal” encompass every conceivable means by which waste can be introduced into or migrate in the “environment,” including land, air and water or subsurface water.¹⁶ The phrase “imminent and substantial endangerment” is not defined in the Act, but federal courts have interpreted the same phrase broadly in the context of injunctive actions brought by the United States Environmental Protection Agency (EPA) against responsible parties under CERCLA, holding that no showing of actual harm is required.¹⁷

Thus, the key issue of proof in the liability phase of a private cost recovery action is linking the particular defendant with the waste site. Sometimes that is easy, for example, by proving past ownership of a site through a routine chain of title search. Often, however, it is very difficult to tag a generator with liability since:

Defenses to Liability

The Louisiana Superfund law lists three causation-based “defenses” to liability for cleanup costs, *i.e.*, where the damage was caused *solely* by an act of God, an act of war or the act or omission of a third party unrelated to the defendant.¹⁹ These defenses are of extremely limited value. Furthermore, the courts have rejected certain traditional “equitable” defenses arising out of real property transactions which they deemed to conflict with the liability scheme or remedial goals of Superfund. These include the doctrine of *caveat emptor* (let the buyer beware), which would bar a successor owner who acquired an already contaminated facility from recovering any cleanup costs from the predecessor owner, and the defense of “unclean hands,” which would prevent one PRP from obtaining contribution for cleanup costs from other PRPs who also caused pollution at a waste site.²⁰

However, the list of statutory defenses clearly was not meant to be exclusive and many other defenses to liability may be asserted in private cost recovery actions brought under the Act. Some legal defenses that may be raised in a private cost recovery action are:

▶ The action is time barred;²¹

▶ The plaintiff agreed to release and/or indemnify the defendant against future environmental claims;²²

▶ The defendant is not a PRP since it has not received a demand for remediation from DEQ;²³

▶ The defendant, a parent company, is not liable for the waste disposal activities of its wholly-owned subsidiary, since plaintiff has not demonstrated that it is appropriate to pierce the corporate veil;²⁴

▶ There has not been any release into the environment, *e.g.*, the spill of a hazardous substance onto the concrete floor of an enclosed manufactur-

ing plant which does not leave the building;

- ▶ The plaintiff has not incurred "remedial costs" as defined in the statute;
- ▶ The statute does not impose retroactive liability, *i.e.*, it does not impose liability for either *conduct* that was engaged in by a defendant or *costs* that were incurred by a plaintiff before the statute was enacted (or amended to create new liabilities);²⁵
- ▶ The action must be stayed pending completion of alternative dispute resolution procedures which were agreed upon by the parties;²⁶ and
- ▶ The plaintiff's claims are barred under the doctrine of *res judicata*.²⁷

Some of the factual defenses which may be asserted by a defendant are:

- ▶ The defendant never owned, operated or leased the facility or site in question;
- ▶ The defendant's waste is not a hazardous substance;
- ▶ The defendant's waste was not sent to the site;

The term "hazardous substance" now includes over 700 substances, and the definition of a "pollution source" embraces any site or location where a hazardous substance may be found.

- ▶ The defendant's waste is no longer present at the site (for example, it was burned by the landfill operator, reclaimed or transshipped to another disposal site);
- ▶ The defendant's waste is insignificant to the need for remedial work at the site;²⁸ and
- ▶ The remedial action taken by the plaintiff was not "reasonable" or "cost-effective."²⁹

Exclusions

There are two exclusions from liability in the Act. First, the term "hazardous substance" specifically does not include petroleum, natural gas or synthetic gas of pipeline quality.³⁰ This so-called "petroleum exclusion," which is copied verbatim from CER-

CLA, has an important effect on the reach of the statute since leaks from underground gasoline tanks are a common environmental problem at gasoline service stations throughout the country. In *Wilshire Westwood Associates v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989), the court held that the cost of cleaning up a leak from a gasoline tank was not recoverable under CERCLA because a "hazardous substance" was not involved. The court interpreted the petroleum exclusion to include leaded gasoline even though it contained standard industry additives, such as benzene and lead, which are specifically listed in the table of hazardous substances issued by EPA under CERCLA.³¹

A second exclusion from liability, and a tribute to banking industry lobbyists, was originally added by the Legislature in 1990 and expressly made retroactive. Now cast as a "defense," it protects secured lenders

who acquire title to contaminated property through a *dation en paiement* or foreclosure from becoming liable for cleanup of the property by virtue of their ownership.³² To claim the benefit of this protection, however, the party must not have caused the release or have known that the property contained a hazardous substance at the time it perfected its security interest. This provision also applies to persons who acquire contaminated property through inheritance or who manage such property for the purpose of administering an estate or trust.

Allocation of Liability Among PRPs

The allocation of shares of liability among responsible parties is a major issue in Superfund litigation. Ironi-

cally, however, the statutes provide little or no guidance on what factors the courts should use to decide this issue.

The prevailing view under CERCLA is that all defendants who meet the criteria for liability under Section 107 are jointly and severally liable to the *government*, unless a defendant can prove that there is a reasonable basis for apportioning the harm. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). On the other hand, it is reasonably clear that the doctrine of joint and several liability does not apply in private cost recovery actions. Even before Congress amended CERCLA by creating a statutory right of contribution and directing the courts to use "equitable factors" to apportion liability among PRPs, courts held that liability among PRPs is not joint, but only several. *See, e.g., United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 229 (W.D. Mo. 1985)("[n]o tortfeasor can be required to make contribution beyond his own equitable share of the liability").

Under the Louisiana Superfund law, each defendant is only responsible for his "proportionate contribution" to the site remediation costs, regardless of who the plaintiff is in the cost recovery action — the state of Louisiana or a private party. The apportionment of liability scheme includes the *Chem Dyne* formulation, but ends with the following significant caveat:

"... however, any party shall have the right to establish his proportionate contribution to the site and his liability shall be limited to his degree of contribution."

R.S. 30:2276(F)(emphasis added). A bill was introduced in the 1991 Regular Session of the Louisiana Legislature (House Bill 1178) to eliminate this important proviso and create absolute solidary liability among PRPs, but it died in the House Natural Resources Committee.

Neither CERCLA nor the Louisi-

ana Superfund law state what factors the courts should use in apportioning liability among responsible parties. Some federal courts have used the comparative fault principles that had been proffered by Congressman Gore in a proposed amendment to CERCLA which was dropped from the final bill, the so-called "Gore amendment" factors, to apportion liability among PRPs, to wit:

- ▶ The ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
- ▶ the amount of hazardous waste involved;
- ▶ the degree of toxicity of the hazardous waste involved;
- ▶ the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- ▶ the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of the hazardous waste; and
- ▶ the degree of cooperation by the parties with federal, state or local officials to prevent harm to the public health or the environment.

United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). *See, also, United States v. Monsanto Co.*, 858 F.2d 160, 172 (4th Cir. 1988)(rejecting volume alone as a basis for apportionment without a showing of the relationship between volume and harm at the site).

Courts are wise to reject volume as the sole criterion for allocating shares of liability among responsible parties, particularly in light of the expansive definition of what constitutes a "hazardous substance" and the jurisprudential rule that any concentration of a hazardous substance in a party's waste is sufficient to trigger liability under Superfund.³⁴ However, further guidance is needed from the lawmakers to achieve greater fairness and uniformity of results in this important area of the law. Until that day comes, cost allocation will continue to be a

major battleground in Superfund litigation and the courts will have wide discretion to use whatever factors seem "equitable" at the time or may be suggested by ingenious lawyers and their environmental experts in this high stakes game under Superfund.³⁵

Procedural Obstacles to Suit

There are some "procedural" aspects of the Louisiana Superfund law which make it unattractive to private party plaintiffs.

In particular, private cost recovery actions may be filed only by statutorily responsible parties, as enumerated in the Act, who have been ordered to undertake remedial action at a site by the Louisiana Department of Environmental Quality (DEQ) or EPA.³⁶ Furthermore, before he has any right to sue other responsible parties under the Act, the plaintiff must agree to clean up the waste site. If DEQ is the

Practical Guidance on Litigating Private Cost Recovery Actions

Forum Selection and Other Remedies

Unless there is a compelling reason to litigate in state court, private cost recovery actions should be brought in federal court. This can be accomplished by joining a cost recovery claim under CERCLA §107(a) with a similar claim under the Louisiana Superfund law, since the key element for establishing liability, *i.e.*, the release or threatened release of a hazardous substance into the environment, is the same under both statutes. The United States district courts have exclusive original jurisdiction to adjudicate CERCLA claims without regard to the amount in controversy, and have supplemental jurisdiction over any pendent state law claims.

The Louisiana Superfund law lists three causation-based "defenses" to liability for cleanup costs. . . .

lead agency for the site, the plaintiff also must obtain its approval of a "plan for remedial action" (*i.e.*, cleanup plan) before suit can be filed.³⁷

Anyone who has had the misfortune to become involved with contaminated real estate and received an order from government regulators to "undertake remedial action" knows that it may take years to develop a cleanup plan, and longer still to negotiate a consent agreement with the government and the major PRPs to undertake remediation of a waste site. It is not reasonable to deny a party access to court until these activities have been completed.

The procedural obstacles to filing a private cost recovery action under the Louisiana Superfund law are not in the public interest and should be eliminated.

There are two very important reasons why the plaintiff in a private cost recovery action should invoke the federal statute. First, a private cost recovery action can be commenced much sooner under CERCLA than state law since prior governmental approval of a remedial plan is not required.³⁸ Furthermore, the right to obtain declaratory relief, and thus settle quickly the issue of liability for remediation of contaminated property, is expressly granted by CERCLA.³⁹

A second, and not so obvious, reason to assert the federal statutory claim is that the principles of liability are reasonably well established under CERCLA. The case law on the rights of private parties under Section 107 of CERCLA, and for indemnification and contribution under the law of contract or tort, has evolved rapidly dur-

ing the past ten years. There are literally thousands of reported federal cases dealing with these issues.⁴⁰ In contrast, there are few reported cases interpreting the cost recovery provisions of the Louisiana Superfund law.⁴¹ Given the ambiguous terminology in several of the Louisiana statute's major provisions, and the inherent vagaries of litigation, a private party plaintiff will usually be on surer ground if the case for recovery of cleanup costs is predicated on both federal and state Superfund statutes.

In pollution damage cases, plaintiff's counsel should consider the subject of contractual and common law rights arising out of real property transactions. Contracts, deeds, or other instruments transferring title or possession to real property may allocate or transfer environmental liabilities between the parties, such as an indemnification agreement in the event contamination is discovered on the property. Leases and loan agreements may allocate or create new liabilities, such as a lessee's agreement not to bring hazardous substances on the property, or a borrower's agreement to manage and dispose of all hazardous waste properly in accordance with environmental permits and applicable laws and regulations. Although liability to the government may not be avoided by means of indemnification, hold harmless clauses or similar contractual devices, such agreements are effective and binding as between the parties.⁴²

The remedies available under common law causes of action (such as strict liability, negligence, fraud, trespass and redhibition) also should be carefully researched since they may far surpass those available under Superfund laws.⁴³ In short, all possible avenues of relief (and defense) should be considered in the context of Superfund litigation. Any state law claims or defenses that a party has against an opposing party may be litigated in the federal Superfund action.

Timing Considerations

The prospective plaintiff in a cost recovery action must weigh carefully the advantages of early litigation against the risks of inviting toxic tort suits by neighbors and the possible adverse impact that such litigation can have on government administrative proceedings or enforcement suits.

The filing of a private cost recovery action in reference to a polluted site and the attendant publicity surrounding such suits may incite private parties living near the hazardous waste site or adjacent landowners to file

be allocated among the responsible parties, also will probably have a direct bearing on the future course of any government proceedings involving the site, whether or not the doctrine of *res judicata* legally would preclude relitigation of those issues.

All things considered, it is usually best for responsible parties to clean up waste sites first and, if necessary, bring suit later to establish liability and allocate shares of responsibility for cleanup costs.⁴⁴ Given the large financial outlay usually required to clean up contaminated properties,

The allocation of shares of liability among responsible parties is a major issue in Superfund litigation.

toxic tort suits in an attempt to recover for alleged personal injuries and property damage. Furthermore, information developed during the cost recovery action, including the public health hazards and migratory potential of toxic wastes that were dumped at the site, may provide critical evidence to plaintiffs' toxic tort lawyers which makes it easier for them to win their cases. It is not unusual in cost recovery litigation, particularly as regards the issue of how to allocate shares of responsibility for cleanup costs among the parties, for one company to overstate the significance of another company's waste at the site.

On the government side of the equation, aggressive prosecution of private cost recovery actions may educate government personnel regarding the role your client played at a waste site, or assist justice department attorneys, who might otherwise lack the time or financial resources, in bringing enforcement actions seeking literal compliance with government cleanup demands. The judicial rulings in a private cost recovery action, covering such matters as whether a particular defendant ever sent waste to the site and how cleanup costs should

and the inherent difficulty of allocating shares of liability among potentially responsible parties, it is sometimes not possible to postpone cost recovery litigation among PRPs until waste sites have been remediated. However, "interim" cost allocation agreements have been used successfully for this purpose.

Each participating company agrees to pay a specified percentage of the cleanup costs, on an interim basis. The interim cost allocation agreement is nonbinding and the parties to the agreement expressly reserve their rights to sue each other, and/or other PRPs, and to have a court decide all liability and allocation issues after the remedial work has been successfully completed. If a party is later found not to have any liability, it should be able to recover all of its past expenditures from the parties who are adjudged liable, as well as the litigation costs and reasonable attorneys' fees necessary to prosecute the cost recovery action. This procedure works well if a sufficient number of responsible parties, including the major PRPs, are able to agree on an interim arrangement (and allocation formula) to fund the necessary remedial action at the site.⁴⁵

which fully articulates the procedures with which either a private or public agency must comply. Private adoptions and "intrafamily" adoptions² are also treated in separate chapters of Title XII.³ Gone are the major minefields for the practicing lawyer, like whether a notarial act of surrender will suffice⁴ or which sorts of putative fathers must be given notice and an opportunity to be heard in opposition to a proposed adoption.⁵

New Safeguards for Surrenders

There are three new features of Title XI which reinforce the historic requirement of Louisiana law that a parent must execute his or her surrender for adoption voluntarily and with full knowledge of its consequences.⁶ What traditionally has distinguished an agency adoption from a private adoption (and thus justified the presumption that an agency surrender is irrevocable upon execution) is that skilled agency casework specialists have provided prebirth counseling for birth parents.⁷ Such counseling can insure that the birth parent comprehends all options, including adoption, will be prepared for the emotional wrench of giving up the child, and will be made fully aware of the legal and psychological consequences of signing the act of surrender. New Article 1120 requires that prior to the execution of a surrender, the birth mother must attend a minimum of two counseling sessions with a trained, licensed mental health counselor. An affidavit of compliance executed by the counselor must be attached to the act of surrender.

The birth father is authorized to waive such counseling. Certainly the empirical data supplied by appeals confirm that birth fathers are far less likely to file later challenges alleging involuntariness or lack of knowledge of a surrender's effect. At least insofar as infant adoptions are concerned, the very real physiological differences between the roles of mothers and fathers

during pregnancy and delivery offer sufficient justification for deeming fathers less vulnerable to overreaching than mothers.⁸

Second, new Article 1121 requires that counsel for the surrendering birth parent must execute his or her own personal affidavit that the nature of the surrender has been fully explained and that the parent appeared to understand the explanation. Under prior law,⁹ the birth parent was required to make a similar declaration in the surrender that he or she had received such legal counseling. The purpose of requiring the lawyer's attestation is not to restrain inadequate lawyering (though if that is prevented in even one out of a thousand cases it would be worth it) but to create an additional piece of documentary evidence which can further insulate a properly obtained surrender from a later claim of fraud or duress. This new Article also requires that the surrendering birth parent be given a copy of the surrender as executed.

The clear trend throughout the country is toward achieving finality of issues in adoptions as early as possible.

Third, a fill-in-the-blank form which meets all of the requirements for a presumptively valid surrender is included in new Article 1122. Preparing a legally sufficient surrender is not an occasion for creative innovation. There are words of art in adoption surrenders, such as "rights permanently and irrevocably terminated" which are as pivotal as "pay to the order of." While, of course, an attorney is free to draft his or her own surrender documents based upon what are now clearly articulated requirements, the form should at least be useful as a "fail-safe" checklist.

Finally, if the requirements for the contents and for the processes of securing a surrender of parental rights have been followed, Article 1142

promises that the surrender in any type of adoption is not subject to annulment except upon proof of duress or fraud. Under the prior law, only surrenders in agency adoptions were considered irrevocable upon execution. In contrast, the private adoption surrender was subject to the problematic 30-day window of time in which a parent could file a notice of opposition. As the court's lengthy opinion in *In re J.M.P.*¹⁰ well illustrates, it has never been entirely clear what sorts of claims, other than fraud or duress, that a birth parent might successfully assert within this period. Would a change of mind (or heart) be enough?

By providing additional safeguards to insure that the birth parent has received both psychological and legal counseling about the consequences of giving up a child for adoption and by unambiguously spelling out the consequences of a surrender in the form, the hazards of a successful fraud or duress claim have been greatly diminished, if not eliminated entirely. New

Article 1148 further provides that no action to annul a surrender can be brought for any reason after 90 days of its execution or after a decree of adoption has been entered. The clear trend throughout the country is toward achieving finality of issues in adoptions as early as possible.¹¹ As our own Supreme Court has described the need for special finality rules in adoptions:

If the hearing is scheduled and conducted at the normal pace of other civil proceedings, the child often will have become psychologically attached to the adoptive parents before the hearing and cannot be returned to his biological parent without subjecting him

Frequently, the facts necessary to prove liability are available from public sources, including PRP responses to government "information requests," or through a careful internal investigation of the plaintiff's own records and interviews of its current or former employees.

Once suit has been filed, counsel for plaintiff must keep control over the case and prevent it from becoming bogged down in defense motions and inordinate discovery requests. This can be accomplished by obtaining a case management order which includes reasonable motion and discovery deadlines. The case management order not only should limit the time in which discovery may be taken, but also should require coordination among the various defendants so that they are required to serve joint discovery requests and take only one round of depositions of fact and expert witnesses.

For its part, the plaintiff should make intelligent use of the discovery tools by focusing on what is truly essential to prove its case or refute substantial defenses. Again, good strategic planning and mastery of the case from the perspective of the plaintiff and its witnesses will lead often to the conclusion that very little discovery is needed by the plaintiff to prepare the case for trial. A frequently overlooked point is that the plaintiff's case is usually won or lost on the strength of its witnesses, not by what the defendants have to say. The time spent in preparing the witnesses who will tell plaintiff's story to the judge and marshaling the evidence to be used in its case-in-chief is usually the most important time that plaintiff's counsel will devote to the case.

The plaintiff also should take advantage of various procedural motions to cut through sham defenses and expedite the matter for trial. These include a motion to strike affirmative defenses, a motion for full or partial summary judgment on liability or remedy issues and a motion for a "scheduling order" under Rule 16 of

the Federal Rules. The scheduling order may cover a wide range of matters, such as an advance ruling from the court on the admissibility of evidence at trial, reference of particular issues to a magistrate or master, and the order of proceedings at trial. Plaintiff, for example, may want bifurcation, with the issue of liability tried first, if a favorable decision on liability would probably result in a settlement and save the client money.

Another very important vehicle to streamline the case for trial is the final pretrial order. Plaintiff has the task of preparing a draft pretrial order and circulating it among defense counsel. This should be viewed as an opportu-

motion for summary judgment, where the party either knows it has a valid defense or believes that the plaintiff lacks sufficient evidence to prove that it is liable. For example, a generator defendant is entitled to summary judgment if the plaintiff cannot produce credible evidence that its waste was sent to the disposal site.⁴⁹ Although not required to prove what disposition was made of its waste to obtain summary judgment, the defendant may wish to file supporting affidavits of operational or records personnel which affirmatively show that it never used the waste site in question. Probative documentary evidence may also be available — includ-

All things considered, it is usually best for responsible parties to clean up waste sites first and, if necessary, bring suit later to establish liability and allocate shares of responsibility for cleanup costs.

nity to narrow the issues for trial and educate the judge on the weakness of the defense, not as a burden or empty formality. By the time the case has reached the stage of pretrial order preparation, the parties should be able to limit sharply the contested factual and legal issues for trial. What if opposing counsel refuses to stipulate to well-established facts or the admissibility of documents (and trial exhibits) which would simplify the trial or avoid unnecessary proof? Or will not agree to eliminate frivolous or factually unsupported defenses? Or engages in similar delaying tactics? Counsel for the plaintiff should set up a pretrial conference with the trial court and request appropriate relief. Judges take a dim view of litigants who are unwilling to cooperate in reasonable efforts to simplify a case for trial or who are less than candid in their dealings with the court and opposing counsel.

A defendant also should be alert to the possibilities of early termination of cost recovery litigation through a

ing waste disposal files, financial records and facility access records, such as gate entry logs, move tickets, *etc.* — which effectively rule out any waste shipments to the disposal site in question.

Conclusion

A badly drafted and hastily enacted statute,⁵⁰ Superfund has nonetheless had a profound impact on how industry and government manage their wastes and where they send them.⁵¹ The law also has provided strong incentives to purchasers, developers and lenders to carefully investigate real estate or a business for potential environmental problems before making a purchase or an acquisition.⁵²

However, Superfund was not aimed at either preventing new chemical waste dumps or encouraging environmental due diligence in connection with the purchase of real property or acquisition of a business. Rather, the

chief purpose of the law (or so the courts have held) was to clean up old waste sites, which were the legacy of past and largely unregulated waste disposal practices, by imposing a harsh regime of retroactive and strict liability on a broad class of parties who were connected with the site.

Whatever the critics have said about Superfund — and it has been the subject of continuing controversy and criticism for more than a decade — the law apparently is here to stay. With the enactment of SARA in 1986, Congress greatly expanded the original Superfund law, along with EPA's bankroll to implement the program.⁵³ The states, including Louisiana, responded to these developments by enacting their own "Baby Superfund" laws throughout the country. What is more, the demand for costly remediation of old waste sites not only will grow as more sites are identified, but also may intensify as society develops the technical ability to detect and quantify ever small concentrations of waste in the environment and the public health implications of environmental contamination become better understood.⁵⁴

Mercifully, private parties who are confronted with the potentially devastating liability of cleaning up old or new waste sites can obtain relief under the cost recovery provisions of CERCLA and the Louisiana Superfund law. They are entitled to sue other responsible parties to recover past expenditures (or for contribution towards the costs of cleaning up the site), obtain declaratory relief for future site remediation costs and also recover their litigation costs and reasonable attorneys' fees.

However, private cost recovery actions do not offer a sure-fire remedy. Even if the potentially liable parties can be identified and have financial assets that are worth pursuing, the plaintiff has the burden of proving liability and convincing the judge that the relief claimed is reasonable and proper. The ability of skilled defense counsel to defeat or diminish such

claims should not be underestimated, especially in private cost recovery litigation where the government is not the plaintiff and neither side has any particular advantage.

The lesson learned from both prosecuting and defending these lawsuits is that neither side is ever assured of victory. However, the successful litigant is usually the one whose counsel has a clear vision early in the case of what must be done to prosecute or defend the lawsuit and is best prepared to accomplish the litigation objectives through mastery of the facts, adroit use of the available procedural tools, and knowledge of the applicable law.

FOOTNOTES

1. See, e.g., A. Levine, *Love Canal: Science, Politics and People* (1982).

2. See, e.g., *Chemical Waste Management, Inc. v. Armstrong World Industries, Inc.*, 669 F. Supp. 1285 (E.D. Pa. 1987); *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986).

3. See generally, Arnold, "Toxic Torts and the Recovery of Response Costs Under CERCLA," *National Resources & Environment* at 23 *et seq.* (Spring 1988).

4. R.S. 30:2276(G)(1)&(2) and 2272(9)(a). The 1990 Legislature enhanced the right of private parties to recover their expenditures or obtain contribution from other PRPs by expressly making such relief available at all enforcement lead sites, *i.e.* whether the Louisiana Department of Environmental Quality (DEQ) or EPA is the lead governmental agency with regard to the site, and without the need to await a prior suit by the state or EPA. R.S. 30:2276(G)(1)&(2) (Acts 1990, No. 1020, §1).

5. R.S. 30:2004(8). Municipal landfills were a major dumping ground for both household trash and industrial waste prior to 1976, when Congress enacted the Resource Conservation and Recovery Act, 42 USCS §6901 *et seq.* (RCRA), and the cities and towns which own them are being increasingly sued by major corporations for contribution under Superfund statutes. See *B.F. Goodrich v. Murtha*, 32 ERC 1487 (D. Conn. 1991) (municipalities may be liable under CERCLA for environmental cleanup costs at solid waste landfills if there is proof that the trash they sent to landfills contained hazardous substances); *The Times-Picayune*, July 21, 1991, at page A-3 (Companies File Suit for Towns to Share in Cleanup of Waste).

6. R.S. 30:2273. Federal courts have also found successor corporations (owners of liable entities) and corporate officers and employees liable under Section 107 of CERCLA. See, e.g.,

Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 837 (1989) (corporate merger); *Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 29 ERC 1723 (D. Mass. 1989) (purported stock-for-assets transaction in which liability for PCB contamination expressly disclaimed treated as *de jure* merger); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (controlling stockholder who is also officer liable); *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988) (owning and managing stockholders liable); *United States v. NEPACCO, Inc.*, 810 F.2d 726 (8th Cir. 1986) (plant supervisor who personally arranged for disposal of plant waste liable). Cf. *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 29 ERC 1450 (W.D. Wash. 1989) (no liability where asset purchase agreement included CERCLA indemnification provision in favor of purchaser).

7. See, e.g., *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

8. 42 USCS §9607(b)(3) and 9601(35).

9. The Legislature recently enacted a public notice statute to prevent an owner who has "actual or constructive" knowledge that his property is contaminated from passing it along to an unsuspecting buyer. The landowner is required to place a notice of contamination in the mortgage and conveyance records of the parish where the property is located, in accordance with regulations to be adopted by DEQ. Failure of the landowner to file the required notice may be grounds for redhibition unless the purchaser also had such knowledge. R.S. 30:2039 (as amended by Acts 1991, No. 851). The statute was intended to apply to property transfers on or after Sept. 7, 1990; however, DEQ still has not adopted necessary regulations to implement the statute, e.g., prescribing the form of notice and the time within which it must be placed in the property records.

10. See, e.g., *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 21 ERC 1108 (C.D. Cal. 1984); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985).

11. R.S. 30:2276(A)(5) (emphasis added).

12. Although listed among the categories of PRPs, a prior owner who was merely in the chain of title of a contaminated facility may not be held liable for the cleanup of the site because the section of the statute which imposes liability for cleanup costs does not extend to such parties. See R.S. 30:2276(F) and discussion on "Allocation of Liability Among PRPs," *infra*.

13. J. Moscovitz, *Environmental Liability and Real Property Transactions: Law and Practice* at 3 (1989).

14. The Act expressly states that, "The court does not have to find that the defendant was negligent, knew that the hazardous substance was being improperly disposed of, or that the activity was illegal at the time of disposal." R.S. 30:2276(B).

15. The term "hazardous substance" is defined in the Act to include any "material" which is identified or designated as "hazardous" in regulations promulgated by DEQ or the Department of Public Safety and Corrections (DPS), but specifically excludes petroleum, nat-

ural gas or synthetic gas of pipeline quality. R.S. 30:2272(4)(a)-(c). DPS regulations designate as "hazardous material" any substance included on the most recent list developed under CERCLA. Louisiana Administrative Code (LAC) 33:V.10105 (A)(6). The term therefore embraces all of the substances which EPA has listed as hazardous under CERCLA, and the various "hazardous wastes" (both listed and characteristic) which have been classified as such by DEQ's Hazardous Waste Division. EPA's "Hazardous Substance List" under CERCLA appears at 40 CFR §302.4 (Table 302.4). DEQ listed and characteristic hazardous wastes appear at LAC 33:V §4901 (Tables 1-5) and §4903, respectively. The term "pollution source" is defined at R.S. 30:2272(8).

16. These terms are defined at R.S. 30:2004(10) and 2173(1), respectively.

17. See, e.g., *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870, 881 (E.D. Ark. 1980); *Reserve Mining Co. v. EPA*, 514 F.2d 492, 529 (8th Cir. 1975) (*en banc*).

18. The Information Network for Superfund Settlements, *PRP Organization Handbook* at 3 (1989).

19. R.S. 30:2277 (1)-(3). A fourth defense to liability was added by the 1991 Regular Session of the Legislature, i.e. where property is acquired through a dation or foreclosure, and is discussed in the section on Exclusions.

20. See, e.g., *Smith Land & Improv. Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 837 (1989) (caveat emp-tor not a defense under CERCLA); *AM Intern., Inc. v. International Forging Equipment*, 743 F. Supp. 525 (N.D. Ohio 1990); *General Electric Co. v. Litton Business Systems, Inc.*, 920 F.2d 1415 (8th Cir. 1990) (unclean hands not a defense under CERCLA).

21. R.S. 30:2276(H).

22. *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986) (release language in purchase agreement barred any CERCLA contribution claim against prior site owner); *Chemical Waste Mgt. v. Armstrong World Indus.*, 669 F. Supp. 1285 (E.D. Pa. 1987) (landfill operator's Section 107 claims against off-site generators may be barred by provisions of waste disposal contract).

23. *Riverside Market Development Corp. v. International Building Products*, 1990 WL 72249 (E.D. La. 1990), *aff'd*, 931 F.2d 327 (5th Cir. 1991).

24. *Joslyn Manufacturing Co. v. T. L. James & Company*, 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991).

25. Several federal courts have concluded that CERCLA is retroactive but the issue has not yet been decided by the United States Supreme Court. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *United States v. Hooker Chemicals & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988). The issue of whether the liability provisions of the Louisiana Superfund law will be held retroactive has not been addressed in any reported case.

26. *AMF Incorporated v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985).

27. See, e.g., *Aliff v. Joy Manufacturing Co.*, 914 F.2d 39 (4th Cir. 1990) (CERCLA §107

claim barred by plaintiff's prior suit for false representation in conveying property contaminated with PCB wastes since he could have presented a CERCLA theory of recovery in the first suit).

28. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989).

29. R.S. 30:2272(9)(b)

30. R.S. 30:2272(4)(c).

31. See 40 CFR §302.4 (Table 302.4). Leaks of gasoline or other petroleum products from underground storage tanks are regulated under RCRA, 42 USCS §6991(a)-(g), and DEQ's Underground Storage Tank Regulations, LAC 33 Part XI. Liability for releases of oil from vessels are governed by Section 311 of the Clean Water Act, 33 USCS §1321, and the Oil Pollution Act of 1990, 33 USCS §2701-2761, which was enacted in the wake of the Exxon Valdez oil spill in March of 1989. See generally, S. Novick, *et al.*, *Law of Environmental Protection* §13.05 [2] (1991 ed.). During the 1991 First Extraordinary Session of the Legislature, Louisiana enacted its own oil spill act, entitled the Oil Spill Prevention and Response Act, R.S. 30:2451-2496. See Walker, "Louisiana Oil Spill Prevention Act," *La. Coastal Law* (July 1991).

32. In *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986), the court held that a bank became liable for cleanup costs under CERCLA §107 when it took title to the property securing the loan.

33. R.S. 30:2277(4) (Acts 1991, No. 773, amending and reenacting R.S. 30:2273(1) which was added by Acts 1990, No. 681, §1).

34. Courts interpreting Section 107 of CERCLA have held that there is no concentration or "quantity floor" below which a substance is not considered hazardous under CERCLA. A teaspoon of a listed hazardous substance can subject a generator to liability under CERCLA. *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983); *United States v. Carolawn Co.*, 21 ERC 2124 (D. S.C. 1984).

35. The Gore amendment factors are principally useful in apportioning liability among generator PRPs and offer little guidance regarding the liability relationship between or among various categories of PRPs, e.g., between a current site owner and generator PRPs, or among gen-

erator PRPs, waste transporters and a landfill operator. For example, in *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991), the appeals court affirmed a decision that the owner of a site that had been leased to an electroplating firm was liable for one-third of the cleanup costs based in part on its "moral contribution as the owner of the site." It concluded that "Congress intended the court to deal with these situations by creative means, considering all the equities and balancing them in the interests of justice." *Id.* at 573.

36. R.S. 30:2276(G)(1)&(2).

37. R.S. 30:2276(G)(1)&(2). Such "preauthorization" is not required at EPA lead sites. *Id.* See also *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988).

38. Although private cost recovery actions brought under CERCLA do not require prior EPA approval, the plaintiff's expenditures must be "consistent" with the National Contingency Plan (EPA's "blueprint" for Superfund cleanup actions) in order to be recoverable under the statute. 42 USCS §9607(a)(4)(B). A few courts have construed this requirement very strictly and denied the plaintiff any recovery where, for example, the public was not given the opportunity to comment on the cleanup plan. See, e.g., *General Electric Co. v. Litton Business Systems, Inc.*, 920 F.2d 1415 (8th Cir. 1990); *County Line Investment Co. v. Tinney* (10th Cir. 1991), 6 TXLR 125 (June 26, 1991). The 1990 NCP now provides that private party response action will be considered "consistent" with the NCP if it is in "substantial compliance" with EPA regulations and results in a "CERCLA-quality cleanup." 40 CFR §300.700.

39. 42 USCS §9613(g)(2)(B). Declaratory relief is available to private parties under CERCLA §107, provided the plaintiff has incurred some response costs and the case is therefore considered sufficiently ripe to warrant judicial relief. See, e.g., *Lykins v. Westinghouse Elec.*, 18 ELR 21498 (E.D. Ky. 1988); *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 860 F.2d 344 (9th Cir. 1988). The Louisiana Superfund law does not expressly provide for declaratory relief. However, such relief



DETERMINING EMPLOYABILITY AFTER PERSONAL INJURY

CRAIG L. FELDBAUM, Ph.D.

Licensed Psychologist

Certified Vocational Evaluation Specialist

Licensed Vocational Rehabilitation Counselor

Diplomate: American Board of Vocational Experts

▼ Expert testimony

- ▼ Vocational & psychological evaluation of marketable skills
- ▼ Assessing psychological damages & occupational consequences
- ▼ Labor market surveys

3838 N. Causeway Blvd. ■ Lakeway III - Suite 3090 ■ Metairie, LA 70002
Office (504) 830-3838 ■ FAX (504) 830-3837

should be available under the declaratory judgment provisions of the Louisiana Code of Civil Procedure, Articles 1871-1883.

40. See "Outline of RCRA/CERCLA Enforcement Issues and Holdings," Chem. Waste Lit. Rptr. (April 1991); McSlarrow, *et al.*, "A Decade of Superfund Litigation: CERCLA Case Law From 1981-1991," 21 ELR 10367 (July 1991).

41. The only reported cases are *Joslyn Manufacturing Co. v. T. L. James & Co.*, 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991), and *Riverside Market Development Corp. v. International Building Products*, 1990 WL 72249 (E.D. La. 1990), *aff'd*, 931 F.2d 327 (5th Cir. 1991).

42. 42 USCS §9607(e); R.S. 30:2276(1), 2278. See, e.g., *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987).

43. See generally, Arnold, "Toxic Torts and the Recovery of Response Costs under CERCLA," *Natural Resources & Environment* at 23 *et seq.* (Spring 1988).

44. See generally, Brent Gilhousen, "Corporate Counsel Perspective on CERCLA Litigation," presented at ABA Annual Conference on Environmental Law, Keystone, Colo., March 15, 1990.

45. One method for resolving the cost allocation issue is through Alternative Dispute Resolution. See generally, Stetter, "Response Strategies for Potentially Responsible Parties at

Hazardous Waste Sites," 37 *La. Bar Journal* 71 (Aug. 1989).

46. These reports are required under Title III of SARA, the Emergency Planning and Community Right-to-Know Act of 1986, 42 USCS §11001-11050.

47. R.S. 40:1-44. See generally, Reporters Committee for Freedom of the Press, "Tapping Officials' Secrets" (1989).

48. See, e.g., *Albright v. The Upjohn Co.*, 788 F.2d 1217 (6th Cir. 1986) (imposing Rule 11 sanctions upon a plaintiff's counsel for suing Upjohn for providing tetracycline to the plaintiff which it did not in fact supply).

49. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

50. See, e.g., *In re alleged PCB Pollution of the Acushnet River*, 26 ERC 2088, 2090 n.2 (D. Mass. 1987); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984); *New York v. Exxon Corp.*, 633 F. Supp. 609, 613-14 (S.D.N.Y. 1986). See also *United States v. Mottolo*, 605 F. Supp. 898, 902 (D. N.H. 1985).

51. See generally, Quarles, "In Search of a Waste Management Strategy," *Natural Resources & Environment* at 3 *et seq.* (Summer 1990).

52. See generally, Frantz, "Minimizing Environmental Liabilities Associated with the Purchase or Sale of Real Property and Businesses," 2 TXLR 723 (Nov. 25, 1987).

53. SARA increased the Hazardous Substance Response Trust Fund (superfund) five-fold to \$8.5 billion for fiscal years 1987 through 1991. Congress has reauthorized the Superfund

program at the same level of funding through Sept. 30, 1994. 21 *Chem. Waste Lit. Rptr.* 284 (Jan. 1991).

54. See generally, J. Moscovitz, *Environmental Liability and Real Property Transactions: Law and Practice* at 12-13 (1989).

About the Author . . .

Roger A. Stetter is a partner in the New Orleans law firm of Lemle & Kelleher. He is a 1971 graduate of the University of Virginia School of Law and a former member of the LSU Law Center faculty. This article is an abridged version of one of the chapters in his book, *The Louisiana Environmental Law Handbook*, which will be published this spring by Lawyers Cooperative Publishing and include a comprehensive discussion of that subject by over 25 distinguished members of the Louisiana environmental bar. This article is published with permission of Lawyers Cooperative Publishing which shall own the copyright in the work.

ORDER YOUR LAW LEAGUE T-SHIRTS TODAY!

Fashionable nautical design in patriotic colors

Royal blue top quality t-shirt
printed in colors of white and red



To order, send check payable to

LAW LEAGUE OF LOUISIANA
c/o Mimi Fritchie, T-Shirt Chairman
P.O. Box 729
Slidell, LA 70459

Number of shirts ordered _____

Amount of check enclosed _____

S M L XL

\$10.00 each