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CASENOTE

THE EFFECT OF DEMINIMIS POLLUTING IN THE SIXTH CIRCUIT

*Kalamazoo River Study Group v. Rockwell Intl. Corp.*¹

I. INTRODUCTION

In 1980 Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).² CERCLA came about in response to several nationally publicized toxic waste problems including Times Beach, Missouri.³ CERCLA was enacted to promptly cleanup waste and to ensure that those responsible for the contamination paid the cleanup costs.⁴ However, in *Kalamazoo River Study Group v. Rockwell Intl. Corp.*, the Sixth Circuit allowed a known polluter to escape liability, despite being found liable for a determined amount of pollution. The point of this casenote is to argue that Congressional intent would have been better represented had the Sixth Circuit reversed and remanded *Kalamazoo*, requiring the district court to award contribution based on judicially determined release amounts.

II. FACTS AND HOLDING

Until the 1970's the synthetic liquid polychlorinated biphenyls (PCBs) was widely used in many industrial processes,⁵ including use in capacitors and transformers, cutting, hydraulic, and quench oils, carbonless copy paper manufacturing, and paper recycling.⁶ Manufacturers halted production of PCBs in the 1970's in response to its hazardous nature, specifically the risk it imposed to the environment and health of employees.⁷ At approximately the same time production ceased, the State of Michigan began a study on the Kalamazoo River to determine its level of PCBs contamination.⁸ Michigan completed the study in 1990 and concluded that thirty-five miles of the river were contaminated by PCBs.⁹

Based on Michigan's findings, the Environmental Protection Agency (EPA) placed a portion of the Kalamazoo River and Portage Creek (the Site) on the National Priorities list as a Superfund Site pursuant to 42 U.S.C. § 9605.¹⁰ The EPA then authorized Michigan to conduct an Endangerment/Risk Assessment of the Site.¹¹ Following the risk assessment, Michigan identified Georgia Pacific Corporation, Millennium Holdings, Incorporated, and Plainwell, Incorporated, as parties potentially responsible for the release of PCBs into the Site.¹² The three companies then

¹ 274 F.3d 1043 (6th Cir. 2001). (Hereinafter *Kalamazoo I*).

² 42 U.S.C. § 9601 *et seq.* (2002).

³ Cathi M. Kraetzer, *A Little Waste Goes a Long Way: The Recovery of Response Costs Under CERCLA*, 66 Mo. L. Rev. 649, 649 n. 3 (2001).

⁴ Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 Colum. J. Envtl. L. 1, 5 (1982).

⁵ *Kalamazoo I*, 274 F.3d at 1045.

⁶ *Kalamazoo River Study Group v. Rockwell Intl. Corp.*, 107 F. Supp.2d 817, 823 (W.D. Mich. 2000). (Hereinafter *Kalamazoo II*).

⁷ *Kalamazoo I*, 274 F.3d at 1045.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 1045-1046.

entered into an agreement whereby they would fund a Remedial Investigation and Feasibility Study (RI/FS) of the Site and the surrounding area.¹³

The RI/FS was to include ninety-five miles of the Kalamazoo River, including portions both above and below the Site.¹⁴ Fort James Operating Company later agreed to join the RI/FS.¹⁵ These four companies, all paper manufactures, joined together to create the Kalamazoo River Study Group (KRSG).¹⁶ By 1999 the KRSG had spent approximately three million dollars on the RI/FS.¹⁷ The KRSG allocated among themselves percentage shares of the costs.¹⁸ Allied agreed to accept a thirty-five percent share, Georgia-Pacific thirty-five percent, Plainwell fifteen percent, and James River fifteen percent.¹⁹

In 1995 the KRSG sued Rockwell and seven other companies for contribution to fund the RI/FS and future cleanup costs of the Site.²⁰ This suit was brought pursuant to 42 U.S.C. § 9613(f).²¹ Seven of the defendants settled or otherwise resolved the issue, leaving only Rockwell in this case.²² The district court split the bench trial into two parts.²³ The first trial determined whether Rockwell had released PCBs into the Site.²⁴ The second trial focused on response costs attributable to Rockwell.²⁵ At the liability stage the district court, using a "threshold of significance standard,"²⁶ determined that Rockwell and KRSG had both contributed sufficient PCBs into the Site to be liable under CERCLA.²⁷ After determining that Rockwell had released PCBs and was therefore liable for a portion of the response costs, the court had to decide on what percentage to allocate to Rockwell.²⁸

The district court determined that three factors are generally relevant when allocating response costs: (1) the quantity of PCBs released by the party; (2) the relative toxicity of the PCBs; and (3) the cooperation of the parties with regulatory agencies.²⁹ The district court determined that factors two and three did not favor either party and therefore based the decision entirely on the quantity of PCBs.³⁰ The district court determined in phase one of the trial that Rockwell had released no more than twenty pounds of PCBs into the Site.³¹ In contrast, the court believed that KRSG

¹³ *Id.* at 1046.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1045-1046.

¹⁷ *Kalamazoo II*, 107 F. Supp.2d at 821.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 650 (6th Cir. 2000) (Hereinafter *Menasha*); *Kalamazoo I*, 274 F.3d at 1046.

²¹ *Kalamazoo I*, 274 F.3d at 1046.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ The term was defined as imposing a requirement that a defendant's release of hazardous material is of sufficient significance to justify response costs. *Id.* at 1046. In *Kalamazoo River Study Group v. Eaton Corp.*, 142 F. Supp.2d 831 (6th Cir. 2001), Eaton Corp. had won summary judgment from the trial court based on the threshold test. The 6th Circuit reversed the trial courts use of the "threshold of significance standard" in the liability phase and stated that requiring a party suing for contribution to show causation was contrary to the central purpose of CERCLA, that is prompt cleanup of hazardous waste. CERCLA only requires a showing of hazardous substance release not a link between the cost of cleanup and the waste generated by a particular party. *Menasha*, 228 F.3d at 655-657. Causation can be a factor examined when determining contribution, but not in determining liability. *Id.* at 656. However, the reversal of the standard in no way affected the case against Rockwell, as Rockwell was found to have met the "threshold of significance" standard it would obviously meet the new lower standard. *Kalamazoo I*, 274 F.3d at 1046.

²⁷ *Kalamazoo I*, 274 F.3d at 1046.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1047.

members had released "hundreds of thousands of pounds" of PCBs into the Site.³² Accordingly, no response costs were allocated to Rockwell because of its relatively miniscule release of PCBs.³³

III. LEGAL BACKGROUND

A. CERCLA Introduction

In 1980, a lame duck session of Congress hurriedly put together a compromise "Superfund" bill that had, in some form or another, been in the works for over three years.³⁴ CERCLA partially came about in response to a 1979 study by the EPA which found that there were between thirty and fifty thousand hazardous waste sites in the United States, at least twelve hundred of which posed a serious threat to public health.³⁵ Congress enacted CERCLA for two main purposes: 1) to promptly cleanup hazardous waste sites, and 2) to ensure that those responsible for the waste pay for the cleanup.³⁶ This second purpose is evident in the introductory language of the bill:

[t]he legislation would also establish a Federal cause of action in *strict liability* to enable the Administrator to pursue rapid recovery of the costs incurred for the costs of such actions undertaken by him from persons liable therefor and to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.³⁷

Once the EPA locates a hazardous waste site, a preliminary investigation is conducted to determine which wastes are present and if the public is in danger.³⁸ Extremely dangerous sites are placed on the National Priorities List (NPL).³⁹ Once a site is on the NPL, CERCLA authorizes cleanup in one of two ways.⁴⁰ The EPA may clean up the site itself and sue potentially responsible parties (PRPs) for the cleanup costs,⁴¹ or the EPA can order PRPs to conduct the cleanup themselves.⁴² Prior to cleanup, a Remedial Investigation and Feasibility Study (RI/FS) must be conducted.⁴³ The RI/FS involves an examination of the site and a determination of the best method of cleanup.⁴⁴ If a PRP is conducting the study, the EPA will supervise.⁴⁵ Once the RI/FS is completed, a course of action will be determined, followed by a period of public comment.⁴⁶ Upon

³² *Id.*

³³ *Id.*

³⁴ Grad. 8 Colum. J. Envtl. L. at 1.

³⁵ H.R. Rpt. 96-1016, at 18 (May 16, 1980) (reprinted in 1980 U.S.C.A.N. 6119, 6120).

³⁶ Blake A. Watson, *Liberal Construction of CERCLA Under The Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv. Envtl. L. Rev. 199, 202-203 (1996).

³⁷ H.R. Rpt. 96-1016, at 17 (May 16, 1980) (reprinted in 1980 U.S.C.A.N. 6119, 6120) (emphasis added).

³⁸ Karen L. Demeo, *Is CERCLA Working? An Analysis of the Settlement and Contribution Provisions*, 68 St. John's L. Rev. 493, 501 (1994).

³⁹ *Id.* at 501-502.

⁴⁰ *Id.* at 502. 42 U.S.C. §9604(1) (2002) states that the President is authorized "to remove or arrange for the removal of" hazardous substances. The section goes on to say that the landowner or other responsible party may be allowed to carry out the cleanup if the President determines the party will do so "properly and promptly." *Id.*

⁴¹ Demeo, *supra* n. 38, at 502.

⁴² *Id.*

⁴³ *Id.* at 503.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 504.

closure of the comment phase the Remedial Design (RD) phase begins.⁴⁷ The RD phase consists of fine-tuning the chosen course of action.⁴⁸ Next, the Remedial Action (RA) phase begins; it is at this point that site cleanup begins.⁴⁹

Under CERCLA a party is liable for cleanup costs if it falls within one of four categories of responsible parties.⁵⁰ If a party is otherwise liable, they can be relieved of liability if they qualify for one of the three statutory defenses.⁵¹ Almost immediately courts began to find an implied right of contribution for parties charged with cleanup.⁵² This meant that a party, ordered by the government to cleanup a site or pay for the cleanup, could sue other potentially responsible parties (PRPs) to recover a percentage of the cleanup costs.⁵³ This type of suit is usually handled in a bifurcated trial.⁵⁴ Phase one consists of determining the liability of the parties, while phase two is the allocation phase where different percentages of liability are assessed.⁵⁵

In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA).⁵⁶ SARA, among other things, codified the contribution rights that courts had implicitly found in CERCLA.⁵⁷ 42 U.S.C. 9613(f)(1) states in part "any person may seek contribution from any other person who is liable or potentially liable under 42 U.S.C. § 9607(a)." The statute goes on to say that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such *equitable factors* as the court determines are appropriate."⁵⁸ The clear text of the statute results in contribution allocation that is completely within the court's discretion and, as a result, can vary greatly case to case.⁵⁹ Appellate courts are generally reluctant to overturn a district court's equitable decision unless there is an error of law, or an abuse of discretion.⁶⁰

B. Equitable Decisions

Since appellate courts review a district court's equitable decisions only for an abuse of discretion, it is important for parties to understand the factors the district court may rely on in reaching its equitable decision. Many courts use the "Gore Factors" as a starting point in determining contribution.⁶¹ The Gore Factors are derived from an amendment Congressman Albert Gore proposed during the 1980 CERCLA debates.⁶² Although the amendment was not adopted in

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Carolina L. Carver, *Spreading the Costs of Environmental Cleanup: Contribution Claims Under CERCLA and RCRA*, SE73 ALI-ABA 333, 339 (2000). Those four categories are: (1) current owner or operator of the site; (2) owner or operator at the time that disposal of hazardous substances took place; (3) any party which contracted to have hazardous materials disposed of at the site; and (4) parties which transported hazardous substances to the site if they chose the site. 42 U.S.C. §9607(a) (2002).

⁵¹ 42 U.S.C. 9607(b) (2002). The statutory defenses are act of god, act of war, act or omission of a third party which is not the parties agent or connected by contractual obligations. *Id.*

⁵² Carver, *supra* n. 50, at 339.

⁵³ Richard D. Buckley, Jr., *Making a Case of Statutory Amendment to the Comprehensive Environmental Response, Compensation and Liability Act: Solving the Section 107/Section 113 Cause of Action Controversy*, 31 Tulsa L.J. 851, 856 (1996).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Pub. L. No. 99-499, 100 Stat. 1613, (1986).

⁵⁷ Buckley, *supra* n. 53, at 857.

⁵⁸ 42 U.S.C. § 9613(f)(1) (2002) (emphasis added).

⁵⁹ Carver, *supra* n. 50, at 340.

⁶⁰ Robert P. Dahlquist, *Making Sense of Superfund Allocation Decisions: The Rough Justice of Negotiated and Litigated Allocations*.

⁶¹ *Envil. L. Rep.* 11098, *2 (September 2001).

⁶² Carver, *supra* n. 50, at 346.

⁶² *Id.*

the final legislation, courts have continued to use them as a framework for CERCLA liability.⁶³ Congressman Gore's amendment stated:

In apportioning liability under this subparagraph, the court may consider among other factors, the following: (i) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (ii) the amount of hazardous waste involved; (iii) the degree of toxicity of the hazardous waste involved; (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or environment.⁶⁴

The Gore factors provide a basis for academic and theoretical analyses of CERCLA liability. However, in practice the four factors composed by District Court Judge Ernest C. Torres are more useful.⁶⁵ Judge Torres' factors are: 1) the extent to which cleanup costs are attributable to wastes for which a party is responsible; 2) the party's level of culpability; 3) the degree to which the party benefited from the disposal of the waste; and 4) the party's ability to pay its share of the cost.⁶⁶ Of course a district judge is not required to follow either approach; which is evidenced in the present case when Judge Bell choose to analyze three factors.⁶⁷

C. What is a party liable for?

Under CERCLA a party can be found jointly and severally liable, or severally liable, depending on the section of the statute for which the claim is based.⁶⁸ Under § 9607 a party is jointly and severally liable for the entire cost of cleanup unless qualified for a defense listed in § 9607(b).⁶⁹ The 1986 SARA addition of § 9613(f)(1) states that a party could seek contribution from other PRPs adding several liability.⁷⁰

In early CERCLA litigation, after the EPA had required a party to pay, that party would sue other PRPs under § 9607, thereby establishing joint liability with them.⁷¹ However, most courts today hold that a suit by one PRP against another, is a contribution claim, and therefore only allow suits to be brought under § 9613, thereby allowing only several liability.⁷²

⁶³ Dahlquist, *supra* n. 60, at *3. Some commentators question the use of the Gore Factors in light of the fact that Congress expressly rejected them by non-adoption. "Hence, it is ironic, and probably wrong, for courts and commentators to continually assert that the factors should form the framework for allocating liability under CERCLA. Superfund allocation cases may be the only type of legal proceeding where courts and parties feel compelled to follow a procedure . . . that was rejected by Congress." *Id.*

⁶⁴ 126 Cong. Rec. 26781 (1980).

⁶⁵ Dahlquist, *supra* n. 60, at *3-4.

⁶⁶ *Id.* at *4.

⁶⁷ *Kalamazoo I*, 274 F.3d at 1046. Listed in the text accompanying *supra* n. 29.

⁶⁸ Carver, *supra* n. 50, at 339-343.

⁶⁹ *Id.* at 339. Joint and Several liability means that an injured party "may sue for and recover the full amount of recoverable damages from any joint and severally liable person." Restatement of the Law Torts: Apportionment of Liability §10 (2000).

⁷⁰ Carver, *supra* n. 50, at 340-344. The broad equitable discretion allowed by this section could allow for joint liability, however most courts have determined that it includes several liability only. *Id.* at 344.

⁷¹ *Id.* at 341.

⁷² *Id.* at 341-342.

It is perhaps easiest to understand the difference with an example. Suppose that the EPA determines, through a preliminary investigation, that land owned by XYZ is contaminated. If the site is added to the NPL, the EPA can order XYZ to cleanup the site, or the EPA can cleanup the site itself and sue for costs under section 9607. In either case XYZ is going to bring a § 9613 suit against any other PRPs who might have contributed to the pollution on site.⁷³ For ease of discussion, assume the EPA chose to conduct the cleanup itself. The EPA would then file suit under § 9607 to recover costs. XYZ would be jointly and severally liable; they would pay for the entire cleanup. If XYZ joined other PRPs to the suit they could have their respective percentages determined at that time, but could still be required to pay the full amount. If XYZ paid the entire cost of the cleanup and now sues under § 9613 they are only entitled to receive several liability from the other PRPs; that is, payment for the portion of pollution actually attributed to the PRPs.

IV. INSTANT DECISION

In the instant decision the Sixth Circuit Court of Appeals had to determine whether a party that released PCBs into the environment could be relieved from its duty of contribution due to the fact that it had released very little hazardous waste as compared to the plaintiffs.⁷⁴ The court first ruled that a determination of potential liability does not preclude a court from refusing to allocate response costs to that party.⁷⁵ In support of its decision the court relied on *PMC, Inc. v. Sherwin-Williams Co.*,⁷⁶ where the Seventh Circuit held that a party that admitted to dumping waste could have a zero allocation of clean up costs if its share of the pollution was inconsequential compared to the total amount of the contamination.⁷⁷ However, the Sixth Circuit warned that parties whose release was relatively inconsequential were not always relieved of liability.⁷⁸ By way of example, the court used a scenario where all responsible parties released relatively little contamination.⁷⁹ In such a scenario it would not be unreasonable for the court to allocate a portion of the cleanup to each responsible party despite their relatively small release.⁸⁰ KRSG further argued that the district court's failure to allocate response costs undermined the central purpose of CERCLA.⁸¹ KRSG's argument was that CERCLA requires prompt cleanup of hazardous sites; accordingly a zero liability decision would encourage business to fight contribution claims.⁸² The Sixth Circuit did not agree, stating that a zero liability decision is a very fact specific determination and, consequently, would not have an effect on businesses' decisions to litigate or settle.⁸³

Next, the court ruled that the district court did not err when it determined that Rockwell's release was inconsequential as compared to the release by the members of KRSG.⁸⁴ The district court determined that Rockwell released less than twenty pounds of PCBs.⁸⁵ To reach this determination the district court had to analyze competing expert testimony, and in the end believed

⁷³ Do not forget that XYZ does not have to have contributed any pollution to the site; under section 9607 as a landowner they are liable for cleanup.

⁷⁴ *Kalamazoo I*, 274 F.3d at 1045.

⁷⁵ *Id.* at 1049.

⁷⁶ 151 F.3d 610 (7th Cir. 1998).

⁷⁷ *Kalamazoo I*, 274 F.3d at 1047.

⁷⁸ *Id.* at 1048.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 1049.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1051.

⁸⁵ *Id.* at 1049.

the expert for Rockwell.⁸⁶ The Sixth Circuit, after analyzing some of the experts conflicting opinions, held that the district court's decision was not clearly erroneous.⁸⁷

Finally, the Sixth Circuit ruled that the district court did not err when deciding that the relative toxicity of the parties' release and their cooperation with regulatory authorities did not favor either party.⁸⁸ The court of appeals first analyzed the district court's decision that the toxicity of release did not favor either party.⁸⁹ Rockwell principally released PCBs called Aroclor 1254, while KRSG members primarily released Aroclor 1242.⁹⁰ KRSG argued that the EPA considers Aroclor 1254 more toxic than Aroclor 1242, because of this the district court was wrong in treating their toxicity the same.⁹¹ The Sixth Circuit however pointed to the evidence that provided a reasonable basis for the district court's decision.⁹² Specifically the court pointed out that Michigan does not specify which chemical is involved when it issues fish advisories or other regulatory criteria.⁹³ The Sixth Circuit acknowledged that KRSG presented enough evidence to show that Aroclor 1254 is more toxic than Aroclor 1242, however it was not left with a "definite and firm conviction" that the district court erred in following the approach advocated by Michigan.⁹⁴ Furthermore, in light of the difference in release amounts, even the increased toxicity of Aroclor 1254 would not likely have altered the allocation of response costs.⁹⁵

The appellate court next analyzed KRSG's argument that Rockwell was less cooperative than KRSG and therefore the district court erred in determining that this factor favored neither side.⁹⁶ However, KRSG offered no rebuttal to the district courts determination that neither side fully cooperated, and therefore neither side was entitled to the factor in their favor.⁹⁷

In his concurring opinion Judge Jones expressed his reservations about the current state of CERCLA contribution.⁹⁸ According to Judge Jones the central purpose of CERCLA was to ensure prompt cleanup of hazardous waste sites and to ensure that those responsible pay the cost of cleanup.⁹⁹ In the current case a known polluter, Rockwell, had to pay nothing because its release was minimal compared to the other polluters.¹⁰⁰ This, he believed, is contrary to § 9607(a), which requires strict liability for any release.¹⁰¹ Judge Jones acknowledged that although Congress authorized equitable judicial discretion in § 9613, the legislative history and the principles of equity demand that response costs be apportioned among all polluters no matter how large or small their individual percentages.¹⁰² However, Judge Jones concurred in the judgment because of his belief that discretion should reside with the district court.¹⁰³

⁸⁶ *Id.* at 1050.

⁸⁷ *Id.* at 1051.

⁸⁸ *Id.* at 1052.

⁸⁹ *Id.* at 1051.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1052.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1052-1053 (Jones, J., concurring).

⁹⁹ *Id.* at 1052 (Jones, J., concurring).

¹⁰⁰ *Id.* at 1053 (Jones, J., concurring).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

V. COMMENT

Judge Jones, in his concurring opinion, expressed his concern that a PRP determined by the district court to be a polluter was relieved of liability because it polluted less than other PRPs.¹⁰⁴ "Rockwell, a known polluter, has been allowed to escape response costs on the grounds that its PCB release was sufficiently 'inconsequential' to remove the justification for allocation of costs."¹⁰⁵ CERCLA was passed with the express purpose of promoting prompt cleanup with those responsible paying for the cleanup.¹⁰⁶ However, the district court's decision in this case violates this express purpose.

The district court, while statutorily authorized to utilize its equitable powers in splitting up response costs, allowed a proven polluter to walk away without paying its fair percentage. Since Rockwell paid nothing, KRSG members must pay more than their fair percentage. CERCLA imposes strict liability for any environmental release.¹⁰⁷ CERCLA also states that courts may utilize the equitable factors they deem appropriate in allocating response costs.¹⁰⁸ These two sections appear to be in conflict. However, they would not be in conflict, if courts interpreted § 9613(f) to hold that the contribution amount, but not whether to award, was governed by equitable decisions. In the bifurcated trial the district court determined that Rockwell was a polluter.¹⁰⁹ In the trial's second phase the district court, using its equitable power, decided not to award response costs.¹¹⁰

The most effective way to insure that Congress' goal of prompt environmental cleanup, holding those responsible for the contamination liable for the cost of the cleanup, is to hold all polluters liable regardless as to how little they have polluted.¹¹¹ Even though the district court determined that Rockwell released only twenty pounds of PCBs,¹¹² out of an estimated three hundred and fifty thousand pounds of pollution in the Site,¹¹³ it should have been ordered to pay its percentage of the cleanup. Though that percentage is very small, Rockwell polluted and should pay.

Judge Jones stated that he was voting to affirm, not necessarily because he agreed with the district court, but because he felt that discretion should reside with the district court.¹¹⁴ The easiest solution to Judge Jones' concerns, however, would be to reverse the district court and order it to enforce the percentages it determined were appropriate in phase one of the trial. If appellate courts refuse to do this, Congressional action to amend CERCLA might be necessary to punish polluters such as Rockwell. Even though Rockwell's percentage of the cleanup might be very small, by enforcing the percentage found to be attributable to them the district court would be making a decision in harmony with the Congressional intent underlying CERCLA.

VI. CONCLUSION

In *Kalamazoo River Study Group v. Rockwell International Corporation* a known polluter escaped liability because a district court used its equitable discretion to decide that it was not fair to

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ H.R. Rpt. 96-1016, at 17 (May 16, 1980) (reprinted in 1980 U.S.C.C.A.N. 6119, 6120).

¹⁰⁷ 42 U.S.C. § 9607(a).

¹⁰⁸ *Id.* at § 9613(f)(1).

¹⁰⁹ *Kalamazoo I*, 274 F.3d at 1046.

¹¹⁰ *Id.* at 1046-1047.

¹¹¹ Kraetzer, *supra* n. 3, at *7.

¹¹² *Kalamazoo I*, 274 F.3d at 1047.

¹¹³ *Kalamazoo II*, 107 F. Supp.2d at 820.

¹¹⁴ *Kalamazoo II*, 274 F.3d at 1053 (Jones, J., concurring).

force Rockwell to pay for the pollution it caused because it was sufficiently "inconsequential." This holding sends the wrong message to polluters. Polluters should know that they will pay for their contamination no matter how small.

GARY A. TROXELL