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By

Randall James Bunn

A.B. June 1977, University of California, Davis
J.D. August 1982, Brigham Young University Law School

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INTRODUCTION

In the late 1970s, concern for the environment resulted in the enactment of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),[1] a strict, retroactive, environmental law put in place to clean up the nation's myriad of hazardous waste sites. Also known as the Superfund law, this far-reaching statute set up a framework for assessing cleanup liability for those responsible for environmental damage. Another outgrowth of the concern for damage to the environment was the development of environmental tort law and an increase in the number of actions brought for toxic-related personal injury and property damage. As the investigation into the causes of environmental contamination progressed, it became clear that a number of Superfund sites were the result of private industry performing their military government contracts. Indeed, some of those contracts dated back to the United States' war efforts in World War II.[2]

Because the costs of cleanup are staggering,[3] responsible parties understandably have turned to all possible sources for contribution and indemnification for their potential liabilities. As a result, theories for attempting to pass all or part of that liability on to other parties have also been developing. One such theory currently being

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[1] 42 U.S.C. §§ 9601-9675 (1994).

[2] *See generally*, Note, Van S. Katzman, *The Waste of War: Government CERCLA Liability at World War II Facilities*, 79 VA L. REV. 1191 (1993).

[3] A recent General Accounting Office report estimated that the cost of cleaning up just federal hazardous waste sites could run up to $400 billion. *See $400 Billion Toxic Cleanup Bill*, WASH. POST, July 18, 1996, at A25.

tested seeks to apply indemnification clauses in World War II-era government contracts to force the federal government to pay for current environmental cleanup costs. The theory is based on contracts entered into under the authority of the First War Powers Act of 1941[4] and the Contract Settlement Act of 1944.[5] The purpose of this thesis is to present that theory and to assess its viability as a method to shift the burden of current environmental cleanup costs to the federal government.

The thesis first discusses the bases for liability for environmental damage in Chapter I, reviewing sources of liability under both CERCLA and environmental tort law. The chapter also examines the theory under CERCLA which has been successfully used in one case[6] to hold the United States liable under World War II-era military procurement contracts. In that case the government was determined to be a responsible party as an "owner, operator, or arranger" under CERCLA.[7] The purpose of this discussion is to show, by way of contrast, how the theory differs from the theory of indemnification which is set forth in depth in Chapter III. To illustrate the environmental liability issues, the thesis presents two actual cases involving CERCLA sites formerly used to perform World War II-era contracts and currently being cleaned up under CERCLA. One case is the site of the former Willow Run bomber plant in Michigan used by Ford Motor Company for the performance of its production contract

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[4] First War Powers Act, 1941, ch. 593, 55 Stat. 838, 839 (1941) (codified at 50 U.S.C. App. § 611 (repealed 1966)).

[5] 41 U.S.C. §§ 101-125 (1994).

[6] FMC Corp. v. United States Dep't of Commerce, 786 F.Supp. 471 (E.D. Pa. 1992), *aff'd*, 29 F.3d 833 (3d Cir. 1994).

[7] 42 U.S.C. § 9607(a) (1994).

with the Army Air Forces to produce B-24 Liberator airplanes from 1941 to 1945.[8] The other case is the Tucson International Airport Area Superfund site in Arizona where Consolidated-Vultee Aircraft Corporation performed its contract also with the Army Air Forces as the operating contractor for the Tucson Modification Center for B-24 bombers from 1941 to 1945.[9]

Chapter II sets forth the historical basis of the World War II-era military contracts that included the indemnification clauses. The chapter provides an historical review of World War I-era government contracting, highlighting how that experience affected government contract practice during World War II. The focus is on the federal control of industrial resources to prosecute both wars, how that control led to the development of cost-type contracts to achieve expeditious war mobilization, and the procedure used for terminating contracts by settlement. Again, to illustrate these issues, the World War II-era contracts involving the same two CERCLA sites reviewed in Chapter I are discussed.

In Chapter III, the theory of indemnification as a basis for recovery under the World War II-era contracts is explored. The chapter first focuses on the statutes and regulations that provide a basis for the theory, highlighting the use of cost principles in determining reimbursement. The case law supporting the indemnification theory is then reviewed. Finally, the indemnification theory is applied as it has been espoused by the two contractors referred to in Chapters I and II.

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[8] *See infra*, Chapter I, Part B.1.

[9] *See infra*, Chapter I, Part B.2.

Finally, in Chapter IV the potential barriers against recovery are described. The key barriers include the Anti-Deficiency Act,[10] the problems with reimbursement of costs under the contract, and the issue of finality and release upon contract settlement. The thesis concludes with an overall assessment of the theory and its potential as a successful method of shifting liability for current environmental cleanup costs.

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[10] 31 U.S.C. § 1341(a)(1) (1994).

CHAPTER I

CONTRACTOR LIABILITY FOR CURRENT ENVIRONMENTAL CLEANUP COSTS RESULTING FROM WORLD WAR II-ERA GOVERNMENT CONTRACTS

A. Bases of Liability

1. CERCLA Liability

a. Development of CERCLA as a Basis of Liability

In the late 1970s public attention focused on the national toxic waste disposal problem.[11] The most notorious example of a hazardous waste site disaster was New York's Love Canal.[12] Due in large part to the galvanizing effect the Love Canal had on public and media attention,[13] Congress sought to devise a system that could

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[11] William D. Evans, Jr., *The Phantom PRP in CERCLA Contribution Litigation: EPA to the Rescue*, 26 Env't Rep. (BNA) 2109, 2109 (Mar. 8, 1996).

[12] The Love Canal was an uncompleted three-quarter mile long waterway begun in 1894 by William T. Love to connect the upper and lower portions of the Niagara River. The canal was subsequently sold to Occidental Chemical Company (OCC) in 1947, which disposed of 21,800 tons of liquid and solid chemical wastes in the still-intact unused canal between 1942 to 1952. The following year the Love Canal property (then graded as a chemical waste landfill) was sold to the Niagara Falls Board of Education and an elementary school was subsequently built on the site. In 1976, chemical wastes began to leak into the school playground and basements of surrounding homes. The industrial wastes were linked to an increased rate of miscarriages and birth defects. President Carter declared the Love Canal neighborhood a federal emergency in 1978 and a thousand families were relocated. *See* United States v. Hooker Chems. & Plastics Corp., 722 F. Supp. 960, 961 (W.D.N.Y. 1989) (recounting the history of the Love Canal); *see also* Stephen Henley, *CERCLA Reauthorization 1994 - Its Potential Application to and Effect on the Department of Defense,* at n.44 (1994) (unpublished LL.M Thesis, George Washington University Law School); Marc G. Laverdiere, *Natural Resource Damages: Temporary Sanctuary for Federal Sovereign Immunity*, 13 VA. ENVTL. L. J. 589, 600 (1994). In Dec. 1995, OCC agreed to pay $129 million to settle outstanding cleanup claims in the case. Evans, *supra* note 11 at 2109.

"responsibly respond to inadequate past practices in the use of [hazardous] materials."[14] Congress conducted its own investigation of over 12 hazardous waste dump sites and determined there was a problem of inadequate disposal of hazardous waste in the United States.[15] Specifically, Congress found there were: large quantities of hazardous waste, widespread unsafe design and disposal methods, substantial danger to the environment (particularly through contaminated ground water), and major health hazards.[16]

As a result, in the final weeks of the Carter Administration, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA, commonly referred to as "Superfund"),[17] to respond to the problem of hazardous waste which was endangering public health and the environment.[18] Congress articulated two essential purposes in passing CERCLA:

> First, . . . that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national

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[13] *See* Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F.Supp. 1437, 1441 (S.D. Fla. 1984) (recognizing that the Love Canal prompted Congress to enact CERCLA).

[14] *Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcommittees on Environmental Pollution and Resource Protection of the Senate Committee on Environment and Public Works,* 96th Cong., 1st Sess. 5 (1979)(statement by Sen. Lloyd Bentson).

[15] STAFF OF SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., HAZARDOUS WASTE DISPOSAL, REPORT TOGETHER WITH ADDITIONAL AND SEPARATE VIEWS, pt.1, at 3-4 (Comm. Print 1979).

[16] *Id.* at 3-14.

[17] 42 U.S.C. §§ 9601-9675 (1994); *See also* Henley, *supra* note 12 at 15-16.

[18] H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 1 (1980); *See* United States v. Chem-Dyne Corp., 572 F.Supp 802, 805-08 (S.D. Ohio 1983) (excellent discussion of the purpose and legislative history of the act).

magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.[19]

The legacy and impact of CERCLA far surpassed the broad-minded goals of the 96th Congress. As one commentator concluded, CERCLA "stands alone as a conspicuous example of legislative consequence outdistancing even the boldest imagination of its sponsors."[20] The major expansion and influence of CERCLA came only after the Superfund Amendments and Reauthorization Act of 1986 (SARA).[21] SARA expanded the types of costs which could be recovered against "potentially responsible parties" (PRPs), provided specifically for actions for contribution, and perhaps most importantly, provided for explicit cleanup standards.[22] Under SARA, the Environmental Protection Agency (EPA) was required to develop lists of hazardous

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[19] United States v. Velsicol Chem. Corp., No. 86-2862-4B, 1988 U.S. Dist. LEXIS 17123, at *8 (W.D. Tenn. Apr. 6, 1988) (relating legislative history of CERCLA and noting expansive construction given CERCLA by the courts); *see also* Schiavone v. Pearce, 79 F.3d 248, 253 (2d Cir. 1996) (holding Congress enacted CERCLA with the expansive, remedial purpose of ensuring parties responsible bear the costs of cleanup, citing S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1980), *reprinted in* 1980 U.S.C.A.A.N. 6119, 6119, and in 1 CERCLA, LEGISLATIVE HISTORY, at 320 (1980)).

[20] WILLIAM H. RODGERS, ENVIRONMENTAL LAW 686 (2d ed. 1994); *In re* Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 78 F.3d 285, 289 (7th Cir. 1996) (noting that prior to its reauthorization in 1986, CERCLA was widely thought to be a short-range law and had only accomplished long-term cleanup of only 14 sites by Sept. 30, 1985).

[21] Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C.); *See In re Chicago, id.* at 289.

[22] 42 U.S.C. § 9621 (1994); *In re Chicago, id.*

substances posing the greatest threats at hazardous waste sites and compile profiles of each such substance.[23]

CERCLA stands now as the primary federal statute addressing cleanup of inactive hazardous waste sites[24] and is regarded by some to have "become the most prominent federal environmental statute."[25] It provides broad authority under a "no fault" liability scheme for implementing cleanup of sites contaminated with hazardous substances and imposes responsibilities for required activities and costs.[26] Despite this legislative and regulatory progress, there are still problems with the process in affecting an efficient approach to environmental cleanup.[27]

b. CERCLA Liability Provisions

One of CERCLA's key provisions establishes liability of four classes of persons (PRPs) responsible for hazardous waste releases.[28] Under 42 U.S.C. § 9607(a)(1)-(4)

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[23] 42 U.S.C. §§ 9604(l)(2),(i)(3)(1994); Troyen A. Brennan, *Environmental Torts*, 46 VAND. L. REV. 48, 49 (1993).

[24] Chris Amantea & Stephen C. Jones, *The Growth of Environmental Issues in Government Contracting*, 43 AM. U. L. REV. 1585, 1590 (1994).

[25] Brennan, *supra* note 23 at 48.

[26] Charles M. Chadd, et al., *Avoiding Liability for Hazardous Waste: RCRA, CERCLA, and Related Corporate Law Issues*, 57 C.P.S. A-27 (1994).

[27] The General Accounting Office in its report entitled, *Federal Facilities: Consistent Relative Risk Evaluations Needed for Prioritizing Cleanups* stated that "[a]n incomplete inventory of contaminated federal facilities and a backlog of unevaluated facilities have limited the scope of priority-setting efforts. . . . Furthermore, no national guidance ensures that EPA's regions use a consistent approach in choosing which facilities to evaluate for inclusion on the NPL [National Priorities List] from the backlog of facilities awaiting this step." *Data Inadequate for EPA Identification of High-Priority Cleanups, GAO Reports*, 27 Env't Rep. (BNA) No. 13, at 648 (July 26, 1996).

the following "persons" are liable for response costs for hazardous substance releases: (1) current owners or operators of facilities from which a release occurs; (2) past owners and operators of facilities at the time of disposal; (3) persons who arranged for disposal, treatment or transport of wastes; or (4) persons who accepted hazardous substances for transport to a facility. Current owners are liable for hazardous waste cleanup costs whether or not they owned the site at the time of disposal or were responsible for the release of the hazardous material.[29] Past owners are liable if the hazardous waste was disposed of at the site at the time of ownership.[30] For a court to impose cleanup liability under CERCLA, a plaintiff must prove four elements, interestingly enough, is not required to prove causation. Once the plaintiff has proven a prima facie case, the burden falls on the defendant to disprove causation.[31] The elements include:

(1) The site in question is a "facility" as defined in 42 U.S.C. § 9601(a);
(2) The defendant is a "responsible person" under 42 U.S.C. § 9607(a);

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[28] 42 U.S.C. § 9607(a) (1994).

[29] *See, e.g.* New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985)(holding present owner liable for costs to cleanup hazardous material disposed on his property, even though he had not participated in the generation or transportation of the waste and had not caused the release); Emhart Indust., Inc. v. Duracell Int'l Inc., 665 F.Supp. 549, 574 (M.D. Tenn. 1987) (holding current owner is a "person" under CERCLA definition and is liable for response costs even though it did not own facility at time of disposal).

[30] *Shore Realty, id; Emhart, id.*

[31] Westfarm Assocs. v. Washington Suburban Sanitary Comm., 66 F.3d 669, 681 (4th Cir. 1995) ("Contrary to the rule followed in most areas of the law, the burden of proof as to causation in a CERCLA case lies with the defendant."); *In re* Bell Petroleum Servs. Inc., 3 F.3d 889, 893 n.4 (5th Cir. 1993) (noting that "in cases involving multiple sources of contamination, a plaintiff need not prove a specific causal link between the costs incurred and an individual generator's waste," citing Amoco Oil Co. Borden Inc. 889 F.2d 664 (5th Cir. 1989)).

(3) There was a release[32] or threat of release of hazardous substances;[33] and
(4) That such release caused the plaintiff to incur necessary costs consistent with the National Contingency Plan (NCP).[34]

For hazardous waste generators or transporters at a site they neither owned nor operated, the courts have applied a relatively simple causation connection for plaintiffs. The plaintiff need only show:

(1) a hazardous substance attributable to the PRP has been disposed of at the site;
(2) the site is known to contain the same type of hazardous substance disposed of by the defendant;
(3) there is a release or threatened release of a hazardous substance from the site; and
(4) the release or threatened release has caused the government to incur response costs.[35]

Although CERCLA does not expressly provide for strict liability, the courts have interpreted CERCLA to hold PRPs strictly liable without regard to fault under 42 U.S.C.

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[32] A release under CERCLA is defined as: "[A]ny spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant.)" 42 U.S.C. § 9601(22).

[33] A "hazardous substance" includes those substances designated as hazardous under any one of five federal statutes and cross-referenced in CERCLA. *See* Chadd, *supra* note 16 at A-28 n.17 (citing Federal Water Pollution Control Act (Clean Water Act) § 311(b)(2)(A); Resource Conservation and Recovery Act (RCRA) § 3007; Clean Water Act §307(a); Clean Air Act § 112; and Toxic Substances Control Act § 7).

[34] Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir. 1994) (enumerating elements of CERCLA liability); Environmental Transportation Systems v. Emsco, Inc., 969 F.2d 503, 506 (7th Cir. 1992) (enumerating the four-part test).

[35] Chadd, *supra* note 26 at A-31; United States v. Bliss, 667 F.Supp. 1298, 1309-10 (E.D. Mo. 1987); United States v. Stringfellow, 661 F.Supp. 1053, 1060-61 (C.D. Cal. 1987); Conservation Chem. Co., 619 F.Supp. 162, 235-36 (W. D. Mo. 1985) (noting

§ 9607(a)[36] for any response costs consistent with the National Contingency Plan (NCP).[37] Also, CERCLA does not explicitly provide for joint and several liability, but the courts have held that parties can be held jointly and severally liable. One approach, followed in *United States v. Chem-Dyne*, depends on whether the harm caused by the defendants is divisible.[38] To avoid joint and several liability, the defendant must prove the amount of harm it caused (or the volume of waste contributed to a site), is a reasonable basis upon which to apportion liability.[39] CERCLA does provide for a right of contribution of one PRP against another. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.[40]

Since CERCLA provides little guidance regarding apportionment, the courts have applied the "Gore Factors" derived from an unenacted amendment to CERCLA in 1980

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that is unnecessary to "fingerprint" a particular generator's waste to establish liability of that generator).

[36] *Kerr-McGee Chem. Corp.*, 14 F.3d at 326.

[37] United States v. Monsanto Co., 858 F.2d 160, 167 & n.11 (4th Cir. 1988) ("The overwhelming body of precedent . . . has interpreted [CERCLA] as establishing a strict liability scheme."), *cert. denied* 490 U.S. 1106 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (good overview of CERCLA at 1039-43).

[38] United States v. Chem-Dyne, 572 F.Supp. 802, 808 (S.D. Ohio 1983); *see also In re* Bell Petroleum Services, Inc., 3 F3d. 889, 894-902 (5th Cir. 1993) (holding that the *Chem-Dyne* approach is most appropriate among three different approaches described and followed by federal circuit courts).

[39] United States v. Rohm & Haas Co., 2 F.3d 1265, 1280 (3d Cir. 1993), *motion to amend denied, opinion clarified*, 833 F.Supp. 332 (E.D. Va. 1993) (following approach in United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992)).

[40] 42 U.S.C. § 9601(32)(1994) (defining liability as that in 33 U.S.C. § 1321 (1994)); GNB Battery Technologies, Inc. v. Gould, 65 F.3d 615, 620 (7th Cir. 1995); Kerr-McGee Chem. Corp., 14 F.3d at 325.

by then Senator Al Gore.[41] The primary factor is the harm each causes the environment, with a secondary factor being the degree of cooperation with governmental entities so as to affect timely cleanup of hazardous waste sites.[42] Nothing under CERCLA prevents any PRP from bringing an action for contribution in the absence of a civil action under 42 U.S.C. §§ 9606 or 9607.[43] In a private party contribution case, however, the party seeking contribution or indemnity must prove causation.[44] The amount of liability for the release of a hazardous substance[45] can consist of response costs incurred in two types of cleanup actions: (1) remedial action, or long-term or permanent containment or disposal programs; and (2) removal actions, or short term cleanup actions.[46]

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[41] The "Gore Factors" include: the ability to distinguish contribution to a hazardous waste release, amount and degree of toxicity of the hazardous waste, degree of PRP involvement, degree of care exercised by PRPs, and the degree of cooperation with the government officials. They were cited initially in United States v. A & F Materials, 578 Materials, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984); *see also* Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F.Supp. 1100 (N. D. Ill. 1988); Amoco Oil Co. v. Dingwell, 690 F. Supp. 78 (D. Me. 1988); *see* Chadd, *supra* note 11 at A-39.

[42] Evans, *supra* note 11 at 2111; One Wheeler Road Assoc. v. Foxboro Co., 1995 W.L. 7919371, at *9-*12 (D.C. Mass. Dec. 13, 1995) (applying Gore factors in a suit by a present property owner against a prior owner).

[43] Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1965-66 (1994) (noting that the amended CERCLA statute expressly authorizes contribution action under 42 U.S.C. § 9613 and impliedly under 42 U.S.C. § 9607); Kerr-McGee Chem. v. Lefton Iron & Metal, 14 F.3d 321, 326 (1994) (holding that a party may seek contribution from another PRP under 42 U.S.C. § 113(f)).

[44] Farmland Industries, Inc. v. Morrison-Wuirk Grain Corp., 987 F.2d 1335, 1339 (8th Cir. 1993).

[45] 42 U.S.C. § 9601(14) (1994) (hazardous waste defined).

[46] 42 U.S.C. §§ 9601(23),(24) (1994). The various types of costs can include: (1) all costs of removal or remedial action incurred by the United States Government, a state,

c. Using CERCLA to Hold the Government Liable Under World War II-era Government Contracts

"Don't you know there's a war on," was the oft-used phrase in the 1940s to justify the many dislocations of the times and the government's keen interest in controlling the operations of private industry.[47] During World War II the federal government, responding to the immediate need for critical war materials, instituted a number of intrusive restrictions on private business.[48] As a result, private companies were called upon to produce products at increased and accelerated rates. In the process, however, many of these companies generated and disposed of their industrial waste in a manner causing enormous harm to the environment.[49] Not until many years after the conclusion of the war did the nation come to understand the true cost of such practices on the environment and to the government purse.

Following the passage of CERCLA, various private parties were imposed upon to shoulder the environmental cleanup liability for the World War II contractor sites. Companies have attempted to seek contribution from other PRPs, including the federal government. The liability of the federal government has been raised in cases in which government contractors performed contracts at government-owned contractor-operated

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or an Indian tribe not inconsistent with the NCP; (2) any other necessary costs of response incurred by any other person consistent with the NCP; (3) damages for injury to, destruction of, or loss of natural resource; and (4) the costs of any health assessment or health affects study carried out pursuant to CERCLA. 42 U.S.C. § 9607(a)(4)(1994).

[47] FMC *Corp.* v. United States Dep't of Commerce, 786 F.Supp. 471 (E.D. Pa. 1992), aff'd, 29 F.3d 833, 845 (3d Cir. 1994).

[48] Katzman, *supra* note 2 at 1191.

[49] *Id.* at 1191-92.

facilities.[50] Another theory that was successfully used in one case caused the court to conclude that the federal government should be liable as an "owner, operator or arranger" according to 42 U.S.C. § 9607(a)(2),(3), despite the fact that the government did not own or literally operate an industrial site. Under the theory, the private party PRP claimed that the government had exercised such pervasive regulatory control over the operations of a privately-owned World War II-era factory so as to equate to de facto indirect management.[51]

FMC Corporation v. United States Department of Commerce,[52] involved a CERCLA action against an owner of a facility located at Front Royal, Virginia. The facility was constructed in 1937 by American Viscose, a company that owned and operated it as a textile rayon manufacturing plant until 1963. At that time FMC Corporation (FMC) purchased it the facility and operated it until 1976 when it sold the operation to Avtex Fibers--Front Royal, Inc.[53] Following the attack on Pearl Harbor in 1941, the expansionist Japanese military effectively cut off 90 percent of the American crude rubber supply.[54] The United States determined it needed synthetic rubber substitutes for its airplane tires, jeep tires and other war-related products. The War

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[50] *See* Mark J. Connor, *Government Owner-Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability?*, 21 MIL. L. REV. 1 (1991).

[51] *FMC Corp.*, 786 F.Supp. at 472.

[52] FMC Corp. v. United States Dep't of Commerce, 786 F.Supp. 471 (E.D. Pa. 1992), *aff'd*, 29 F.3d 833, 845 (3d Cir. 1994).

[53] American Viscose went out of business and Avtex was in bankruptcy reorganization at the time of the action against FMC Corp. *FMC. Corp.*, 29 F.3d at 836.

[54] *FMC Corp*, 786 F.Supp. at 472; Katzman, *supra* note 2 at 1200;

Production Board,[55] using the priorities ranking system, commissioned American Viscose to expand and convert its plant to manufacture the required high tenacity rayon. By the end of the war, the plant at Front Royal was producing one-third of all the high tenacity rayon yarn in the United States.[56]

One of the by-products of this production process was accumulation of carbon bisulfide, a chemical used in the manufacture of rayon. A total of 65,500 cubic yards of the hazardous waste had been disposed of in unlined basins during the war. In 1982, the EPA began cleanup operations and notified FMC of its potential liability under CERCLA.[57] Four years later, the EPA listed the Front Royal facility on its Superfund National Priorities List when carbon disulfide was detected in the groundwater. Beginning in 1988, FMC totally financed the site cleanup.[58] Thereafter in 1990, FMC filed suit for contribution under 42 U.S.C. § 9613(f) against the United States Department of Commerce, the successor to the Defense Plant Corporation that had originally been involved in the World War II-era contract. FMC alleged that as a result of the government's activities during World War II, the United States was jointly and severally liable with FMC as an "owner" and "operator" of the facility and as an "arranger for disposal" of hazardous waste at the Front Royal site.[59]

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[55] *See infra* note 207 and accompanying text.

[56] *FMC Corp.*, 29 F.3d at 835.

[57] *Id.*

[58] Katzman, *supra* note 2 at 1200-01.

[59] *FMC Corp.*, 29 F.3d at 836.

The District Court held that the government was liable as an owner, operator and arranger, and held the United States jointly and severally liable for FMC's response costs for hazardous waste releases.[60] The court based its conclusion on the following facts:

> (1) the government required American Viscose to stop making regular rayon and start producing high tenacity rayon;
> (2) the government mandated the amount and specifications of the rayon produced and the selling price;
> (3) the government owned the equipment used to make the high tenacity rayon and owned a plant used to make raw materials;
> (4) the government supervised the production process through the enactment of specifications and the placement of on-site supervisors and inspectors, it supervised the workers, and it had the power to fire workers or seize the plant if its orders were not followed; and
> (5) the government knew that generation of waste inhered in the production process, it was aware of the methods for disposal of the waste, and it provided the equipment for the waste disposal.[61]

On appeal, the Third Circuit affirmed that the government was an "operator" under CERCLA applying the "actual control test" whereby one corporation is liable for the environmental violations of another corporation if there is evidence that it exercised "substantial control" over the other corporation, through "active involvement in the activities" of the other corporation. The Third Circuit found the indicia of substantial government control to satisfy the test, concluding that the government determined "what product the facility would produce, level of production, price of the product, and to whom the product would be sold."[62] The resulting liability, according to the government,

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[60] *FMC Corp.*, 786 F.Supp. at 486-87.

[61] *FMC Corp.*, 29 F.3d at 838.

[62] *Id.* at 843.

put the United States cleanup contribution between $26 million and $78 million for a 26 percent allocated share.[63] In conclusion, the court observed:

> Our result simply places a cost of the war on the United States, and thus on society as a whole, a result which is neither untoward nor inconsistent with the policy underlying CERCLA.[64]

In analyzing the precedential impact of *FMC,* some observers have concluded the case was very fact specific pointing to the fact that the government was far more involved in the rayon tire program than the vast majority of other production programs implemented during World War II.[65] Nonetheless, the theory has been asserted in other cases including the Love Canal litigation.[66]

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[63] *Id.* at 838, 846.

[64] *Id.* at 846. The policy referred to is that of placing the burden of cleanup on responsible parties to serve as an incentive for the sound treatment and handling of hazardous substances. *Id.* at 840; *see also* Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074, 1081 (1st Cir. 1986) (articulating CERCLA policy, citing United States v. Reilly & Chem. Corp., 546 F.Supp. 1100, 1112 (D. Minn. 1982)).

[65] *FMC Corp.,* 786 F.Supp. at 484; Katzman, *supra* note 2 at 1232.

[66] Elf Atochem N. Am. v. United States, 914 F.Supp. 1166 (E. D. Pa 1996) (denying summary judgment holding issue of fact exists on government's control, case pending); United States v. Vertac Chem. Corp., 46 F.3d 803 (8th Cir. 1995), *cert. denied,* 115 S. Ct. 2609 (1995) (holding United States not liable because statutory/regulatory duty to allocate raw materials did not constitute possession or ownership); United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) *cert. denied,* 498 U.S. 1046 (1991) (holding there was management and control by the government); United States v. McLamb, 5 F.3d 69 (4th Cir. 1993) (holding sufficient management not found); Maxus Energy Corp. v. United States, 898 F.Supp. 399 (1995) (holding no basis to impose CERCLA liability as operator or arranger in this Agent Orange case); Rospatch Jessco Corp. v. Chrysler Corp., No. 4:93-CV-47, 1995 U.S. Dist. LEXIS 12692 (W.D. Mich. Aug. 8, 1995) (holding United States was not an operator, but reserved judgment on issue of owner of plating equipment, case pending); Katzman, *id.* at 1233.

2. Environmental Tort Liability

The poet, Robert Frost, observed that "good fences make good neighbors."[67] His maxim is aptly applied to the relationship between neighbors involved in environmental tort litigation. Unfortunately, the fences Robert Frost envisioned are woefully inadequate to "wall in" or "wall out"[68] the toxic and hazardous substances encountered in the last half of the Twentieth Century.

In addition to the statutory liability under CERCLA, state common law remedies are also applied in environmental or toxic tort actions. Although prior to enacting CERCLA, Congress had considered providing a private federal cause of action to individuals harmed by environmental pollution, the issue became too divisive and the proposal was stricken.[69]

The category of environmental or toxic torts is an evolving area of the law falling somewhere between the legal disciplines of tort and environmental law.[70] It has been described as a "new class of torts . . . target[ing] personal injuries caused by toxic substances in the environment."[71] The cases involve groundwater contamination, airborne contamination, exposure to pesticides, exposure to radiation, and exposures combining these and other factors.[72] The unique nature of environmental torts stems

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[67] ROBERT FROST, *Mending Walls* in THE POETRY OF ROBERT FROST 33-34 (Edward Latham ed., 1969).

[68] *Id.* at 34.

[69] H. R. 7020, 96th Cong. 2d Sess. 5(a) (1980); 126 Cong. Rec. 7490 (1980).

[70] Brennan, *supra* note 23 at 1,3.

[71] *Id.* at 1-2.

partly from the problems encountered in proving the cause of injury, e.g. chemicals released into the environment today literally taking years before the injury occurs or is realized.[73] The problems in successfully bringing an action in environmental tort has been described as follows:

> Injuries are latent in that the substances involved tend to be solvents or heavy metals that cause subtle neurological or metabolic injuries, or carcinogens that have long incubation periods before the disease manifests itself. Thus, the problems with proving causation in toxic tort litigation, and with the unpredictability of outcome that attends such problems, are exaggerated in environmental injury tort claims. Unlike product-based mass tort litigation, those injured by environmental toxins may be unaware of their exposure. Typically, toxins are dispersed in water or air and do not leave definite footprints to prove their presence. Finally, if injured persons become aware of such exposure and the causal connection between the exposure and their injury years after the latency period has expired, they may find litigation hampered by statute-of-limitation restrictions. . . . In combination, issues of exposure, causation, and latency periods make environmental torts extraordinarily burdensome.[74]

The release of hazardous substances is typically actionable under tort theories of negligence, trespass, nuisance, and more recently, strict liability.[75] A frequent scenario is the case filed by neighbors of "contaminated" property against the owner or operator of the property alleging the plaintiffs' property has become contaminated, that their property values have been reduced, and that they have suffered personal injury.[76]

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[72] *Id.* at 2 n.1.

[73] Shawn R. Farrell, Note, *Leo v. Kerr-McGee Chem. Corp.: Recognizing A Need For Congressional Reform in Toxic Tort Actions*, 7 VILL. ENVTL. L. J. 109,109 (1996).

[74] Brennen, *supra* note 23 at 5 n.11.

[75] Chadd, *supra* note 26 at A-115.

[76] *Id; see also* Sanders v. Ashland Oil Inc., No. 4-95-950, U.S. Dist. LEXIS (D. Minn. Dec. 21, 1995) (LEXIS, Envim library, Bnaenv file) (residents suing oil company alleging discharges of oil damaged their health and property bringing actions in negligence,

An example of an environmental tort suit in which the typical causes of action were plead is *Carroll v. Litton Systems, Inc.*[77] In *Carroll*, 29 North Carolina plaintiffs who obtained their drinking water from private wells sued the owners of a neighboring industrial plant that used trichloroethylene (TCE) as a degreasing solvent between 1967 to 1974. The defendant discovered the presence of TCE in the groundwater at the plant site and also in several private wells.[78] After the defendant entered into a consent order with EPA agreeing to perform remedial actions, the plaintiffs brought an action in federal court against the defendant asserting claims of negligence, strict liability, nuisance and trespass, in addition to a claims under CERCLA.[79] Plaintiffs' theory was that Litton caused TCE to contaminate plaintiffs' wells and plaintiffs, after consuming

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strict liability, and nuisance); *Suburban Residents Claim Petroleum Leaks, File CERCLA, RCRA Actions Against Ashland*, 26 Env't Rep. (BNA) 1765 (Jan. 19, 1996); Freier v. Westinghouse Electric Corp., No. 95-CV-0020E(F), U.S. Dist. LEXIS (W.D.N.Y. Jan. 10, 1995) (LEXIS, Envirn library, Bnaenv file) (residents suing 17 companies for personal injuries and wrongful deaths allegedly caused by negligent disposal of hazardous waste in adjacent landfill); *New York State Residents Seek $40 Million For Alleged Exposures To Toxic Chemicals*, 25 Env't Rep. (BNA) 1801 (Jan. 20, 1995); Cash Energy, Inc. v. Weiner, 1996 U.S. App. LEXIS 5820 (1st Cir. Mar. 29, 1996) (owner of property suing adjacent commercial landowner alleging defendant had contaminated groundwater with volatile organic compounds from industrial solvents bringing action in part in tort for negligence, nuisance and trespass; court affirming summary judgment against plaintiff for failure to prove damages); Westfarm Assocs. v. Washington Suburban Sanitary Comm., 66 F.3d 669 (4th Cir. 1995) (landowner suing local government agency-operator of sewer system alleging contamination of plaintiff's property by hazardous substance leaking from defendant's sewer pipe bringing action for economic damages in tort for negligence; court affirming jury verdict for negligence).

[77] No. 92-2219, 1995 U.S. App. LEXIS 2015, (4th Cir. Feb. 1, 1995), *cert. denied* 1995 U.S. LEXIS 5424 (U.S. Oct. 2, 1995); *see also Supreme Court Asked to Review Reinstatement of Suit Alleging Exposure to Trichloroethane*, 26 Env't Rep. (BNA) 343 (Jun. 16, 1995).

[78] *Carroll, id.* at *2-*3 & n.2.

[79] *Id.* at *3-*4.

the TCE in their drinking water for a period of 15 years, developed a variety of health problems known to be caused by TCE exposure.[80]

Following plaintiffs' case, the district court granted defendant's summary judgment motion. The court concluded that the negligence and strict liability claims required proof of causation of health problems, but the scientific evidence presented was inadmissible.[81] The Fourth Circuit, citing *Daubert v. Merrill Dow Pharmaceuticals, Inc.*,[82] agreed with the lower court on the negligence and strict liability claims that the testimony was inadmissible, though it reversed the summary judgment motion finding there was sufficient other evidence to show causation which should go to a trier of fact.[83] On the nuisance and trespass claims, the Fourth Circuit also concluded the lower court erred in granting the summary judgment motion, finding there was sufficient evidence even without the inadmissible evidence. The court, reviewing applicable state law, stated:

> To recover for nuisance, a plaintiff must show defendant reasonably interfered with his use and enjoyment of his property and that defendants conduct caused him "substantial injury." . . . Similarly, to recover compensatory damages for trespass, a plaintiff must demonstrate that

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[80] *Id* at *5. To prove their case, plaintiffs called several experts, including: (1) hydrologist who opined that the TCE had been transported from the defendant's plant to the wells by groundwater migration; (2) expert in the field of "chemodynamics," the study of chemicals in air, water, and soil, who testified about the "environmental half-life" of the TCE in the wells to determine how long it had been present; and (3) three physicians who testified about the health problems TCE is known to cause.

[81] *Id.* at *9.

[82] 509 U.S. 579 (1993) (holding that scientific evidence must be "reliable" to qualify as scientific knowledge which assists the trier of fact under Fed. R. Evid. 702).

[83] *Carroll*, 1995 U.S. App. LEXIS 2015, at *12-*18.

> defendant made an unauthorized entry on his land and that this entry caused him "actual damage."[84]

Carroll demonstrates the potential for environmental tort liability for personal injury and property damage. It also typifies the common law tort theories which may be alleged, as well as the problems of proof in such actions. Several recent typical cases involving common law tort theories in an environmental context are analyzed below.

a. Negligence

In a negligence action the plaintiff must prove that the tortfeasor's "conduct . . . falls below the standard established by law for the protection of others against unreasonable risk of harm."[85] To establish this, the plaintiff must prove the tortfeasor had a duty to conform to a standard of conduct, that the duty was breached, that there was a causal connection between the breach and the injury, and that the conduct was the proximate cause of injury.[86]

In analyzing the common law duty under Maryland law, the Fourth Circuit in *Westfarm Associates. v. Washington Suburban Sanitary Commission.*[87] The case involved alleged groundwater contamination by a local governmental sewage waste treatment agency. The Court cited relevant factors to consider in evaluating whether negligence occurred:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the

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[84] This case was reversed in part and remanded to the lower court for further action. *Id.*

[85] RESTATEMENT (SECOND) OF TORTS § 282 (1977).

[86] *See* PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984).

[87] Westfarm Assocs. v. Washington Suburban Sanitary Comm., 66 F.3d 669, 686 (4th Cir. 1995).

> defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[88]

In *Westfarm*, the court found the defendant local agency should have known of leaks in the sewer pipes and therefore, should have known that failure to inspect and repair it could foreseeably cause groundwater contamination to neighboring land.[89] The court then determined the agency was the proximate cause of the contamination, finding it knew the sewer contained cracks and that an industrial plant also connected to the sewer discharged hazardous chemicals into the sewer.[90] Thus, the court found the defendant local agency foreseeably should have known that the hazardous substance could migrate to the plaintiff's property, and that the defendant's failure to prevent the contamination was negligent.

b. Trespass

The tort of trespass encompasses an interference with a person's possessory interest in land whether intentional, negligent, or a result from ultrahazardous activity.[91]

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[88] *Id.* at 686. In analyzing the element of foreseeability, the court recognized the limitation of liability for unforeseeable consequences which was announced in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928) (landmark case setting limits of proximate cause depending on "risk to . . . others within the range of apprehension").

[89] *Westfarm*, *id.* at 686-87.

[90] *Id.* at 688.

[91] Chadd, *supra* note 26 at 115-116; PROSSER, *supra* note 86 at § 13; RESTATEMENT (SECOND) OF TORTS § 158 (1977).

A tortfeasor who pollutes the environment causing property damage to another is liable for an action in trespass.[92]

In *Scribner v. Summers*,[93] the Second Circuit addressed New York trespass law in an environmental context. In *Scribner*, the plaintiffs, owners of property adjacent to a steel-treatment company, alleged the defendant company contaminated plaintiffs' property. The plaintiff proved that the defendant company improperly disposed of sludge which contained barium chloride, a hazardous substance. The barium chloride subsequently leached onto plaintiffs' property.[94] Under New York law, a property owner is liable for trespass when the trespasser "intend[s] the act which amounts to or produces the unlawful invasion."[95] The trespasser may be liable if he had "good reason to know or expect that subterranean and other conditions were such that there would be passage from defendant's to plaintiff's land."[96] The Second Circuit concluded the defendant was liable in trespass because it took its barium-tainted furnaces outside, demolished them and washed them down with water on a site in close proximity to plaintiff's property (which was located downhill from defendant's property).[97]

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[92] Philadelphia v. Stephan Chem. Co., 544 F.Supp. 1135 (E. D. Pa. 1982) (holding that action in trespass permissible when one disposes of waste on another's property).

[93] No. 95-7739, 1996 U.S. App. LEXIS 11568 (2d Cir. May 21, 1996).

[94] *Id.* at *1-*2, *5.

[95] *Id.* at *6-*7 ("The intrusion itself 'must at least be the immediate or inevitable consequence of what [the trespasser] willfully does, or which he does so negligently as to amount to willfulness.'").

[96] *Id.* at *7.

[97] Id. at *8-*9, *12.

c. Nuisance

There are two types of common law nuisance: private nuisance--an unreasonable interference with another's private use and enjoyment of land; and public nuisance--an unreasonable interference with a right of enjoyment common to the general public, e.g. interference with public health or safety.[98] Actionable nuisance has included air or water pollution, noise, hazardous waste disposal, or other forms of environmental pollution that interfere with the personal or property rights of others.[99]

In *Scribner,* plaintiffs also brought an action in private nuisance.[100] The court described a private nuisance under New York law as one which:

> threatens one person or a relatively few, an essential feature being an interference with the use or enjoyment of land. It is actionable by the individual person or persons whose rights have been disturbed.[101]

The plaintiff must establish the defendant invaded the interest in the private use and enjoyment of land and such invasion is "(1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities."[102] The court concluded the defendant's conduct was a private nuisance in that:

> (1) there were high levels of barium contamination on Scribner's property, . . . (2) [defendant] knew that contamination was substantially certain to

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[98] Chadd, *supra* note 26 at 116; PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 86 at § 87, 90; RESTATEMENT (SECOND) OF TORTS § 821B, D.

[99] Chadd, *id.; see e.g.*, New York v. New Jersey, 256 U.S. 296 (1921) (holding water pollution can be a nuisance but not on the evidence presented).

[100] 1996 U.S. App. LEXIS 11568 at *12-*13.

[101] *Id.* at *12.

[102] *Id.*

> result from its conduct, . . . based on its demolition and cleansing practices, as well as the mov[ement of] water into a swale on [defendant's] land, but near the boundary with plaintiffs . . . which was located downhill from [defendant's] property; (3) [defendant's] on-site disposal and cleansing practices from 1986 to 1990--coupled with its knowledge that barium is a hazardous waste--were unreasonable; (4) the contamination interfered with Scribners' use and enjoyment of their land at the very least because the Scribners are faced with the inconvenience of having the hazardous waste removed from their property, . . . and (5) [due to defendant's] improper cleaning and demolition of the furnaces, [barium] was allowed to migrate off site onto plaintiffs' property.[103]

This case clearly demonstrates the viability of the private nuisance defense for migration of hazardous waste onto neighboring property.

d. Strict Liability

The RESTATEMENT (SECOND) OF TORTS § 519 recognizes strict liability against one who causes an abnormally dangerous activity. It states in pertinent part:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.[104]

The criteria to determine what constitutes abnormally dangerous activity is described as follows:

- existence of a high degree of risk of some harm to the person, land, or chattels of others;
- likelihood that the harm that results will be great;
- inability to eliminate the risk by the exercise of reasonable care;
- extent to which the activity is not a matter of common usage;
- inappropriateness of the activity to the place where it is conducted; and

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[103] *Id.* at *13-*14.

[104] RESTATEMENT (SECOND) OF TORTS § 519 (1977).

- extent to which its value to the community is outweighed by its dangerous attributes.[105]

Various states have recognized strict liability as a cause of action where damage results from the handling of hazardous substances.[106]

The issue of strict liability was discussed in the toxic tort case of *Daigle v. Shell Oil Company.*[107] That case arose from the activities at the United States Army's Rocky Mountain Arsenal in Colorado. This site has been termed "one of the worst hazardous waste pollution sites in the country."[108] The Army constructed and began using Basin F in the 1950s.[109] Hazardous waste had leaked from Basin F into the surrounding environment for many years before 1988 when the EPA required a remedial action plan to clean up the site.[110] The Army and Shell Oil Company contracted with a private contractor to transfer the liquid hazardous waste from Basin F to on-site storage tanks and lined surface impoundments, to move contaminated solids to a lined and capped waste pile, and to place a clay cap, top soil and vegetation over soils remaining on the

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[105] Chadd, *supra* note 26 at A-116 n.21; *Id.*§ 520 (1977).

[106] New Jersey Dep't of Environmental Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (N.J. 1983) (holding that defendant could be held strictly liable for injuries suffered by neighboring landowners as a result of defendant's storage and disposal of mercury, an abnormally dangerous activity).; Kenney v. Scientific Inc., 497 A.2d 1310, 1323-24 (N.J. Super. L. 1985) (holding generators of toxic waste who dispose of it at a landfill are strictly liable under state law).

[107] 972 F.2d 1527 (10th Cir. 1992).

[108] United States v. State of Colorado, 990 F.2d 1565, 1569 (10th Cir. 1993).

[109] *Daigle*, 972 F.2d at 1531.

[110] *Id.* at 1532.

basin.[111] The plaintiffs, neighboring residents and landowners, alleged that the transfer of Basin F's contents, which occurred within one-and-a-quarter miles of a residential neighborhood, was an ultrahazardous activity giving rise to strict liability.[112] The court dismissed Shell's argument that movement of hazardous waste was not ultrahazardous activity under Colorado law, and concluded:

> [W]e see no reason why Colorado courts would not apply the Restatement to a new situation such as the ninety-three acre toxic lake at Basin F. . . . [W] e think that Plaintiffs have alleged facts that may establish that Shell engaged in an ultrahazardous activity or, to use the proper term under the Restatement (Second), an abnormally dangerous activity.[113]

Thus, strict liability, in the common law tort sense of the term, has also become a potential environmental tort theory. The common law tort theories, along with the liability under CERCLA, impose potentially high amounts of financial liability on PRPs.

B. Two Case Studies of Environmental Liability for World War II-Era Government Contracts

Two companies, Ford Motor Company and General Dynamics, currently face environmental liability described in the last section. Both companies seek to apply an alternate theory based on contractual indemnification in order to force the United States government to assume the companies' individual CERCLA liability, and in the case of General Dynamics, its tort liability. If successful, there will undoubtedly be other similarly-situated PRPs that will attempt to apply the same theory.

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[111] *Id.*

[112] *Id.* at 1543.

[113] *Id.* at 1544.

The theory, distinct from that of CERCLA contribution, seeks to hold the federal government liable for the cost of cleanup for environmental damage based on indemnification clauses contained in government contracts from the World War II-era. The United States Air Force is the agency defending against liability in both cases. The cases involve an aircraft production contract and a modification center contract, both of which were terminated for convenience by the government at the end of the World War II. What follows in this chapter is a discussion of the nature of the environmental liability under each of those contracts.

1. Ford Motor Company and the Willow Run Site in Michigan

In September 1941, the federal government, through the Army Air Forces with the Defense Plant Corporation (DPC),[114] contracted with Ford Motor Company (Ford) under a cost-plus-fixed-fee contract to manufacture and deliver 795 complete B-24E bombers at the Willow Run, a site to be built and operated by Ford.[115] The Willow Run bomber plant, named after a nearby stream, was located about three miles east of Ypsilanti, and 35 miles west of Detroit, Michigan.[116] The site, which had been partially used by Ford as a boys camp and also for farming by local residents, was chosen

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[114] The DPC was a New Deal-era federal agency authorized to provide federal money for construction of new facilities and conversion or expansion of existing facilities to help meet defense needs. Katzman, *supra* note 2 at 1199; *see infra* note 206 and accompanying text.

[115] INDUSTRIAL PLANNING PROJECT, LOGISTICS PLANNING DIVISION, ARMY AIR FORCES, CONSTRUCTION AND PRODUCTION ANALYSIS, FORD-WILLOW RUN, at viii (1946); *see infra* note Chapter II, Part C.2.

[116] INDUSTRIAL PLANNING PROJECT, *id.* at 13; *see infra* notes 301-04 and accompanying text.

because it was the only tract of land large enough which could be acquired for an airport under one ownership without lengthy condemnation proceedings.[117]

Actual clearing of the timber from the farmland acreage began on March 28, 1941, with a groundbreaking ceremony held the following month. Construction of the plant bearing the same of the nearby stream began immediately, and was completed the following April, 1942.[118] The main building at the Willow Run site was a gigantic L-shaped structure covering 67 acres--one of the largest aircraft plants under one roof during World War. Although Chrysler's engine plant in Chicago was actually the world's largest factory, Ford's Willow Run plant became the "premier symbol of American industrial power at war." Charles Lindbergh, Ford's aviation consultant in 1942, described the plant as "a sort of Grand Canyon of the mechanized world."[119]

Ford had begun construction of the Willow Run plant in April 1941. In June, Ford conveyed the property to DPC, which in turn leased it back to Ford to complete the construction and operation,[120] which was the usual arrangement with the DPC.[121]

In 1942, Ford built a sludge lagoon formed by constructing an earthen dam at the south end of a natural ravine. Between 1942 and 1945, sludge from the acid-cyanide plating wastewater treatment plant was deposited in the lagoon. Following the

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[117] INDUSTRIAL PLANNING PROJECT, *id.* at 13.

[118] ALAN CLIVE, STATE OF WAR 21 (1979); *see infra* note 302.

[119] *Id.* at 30.

[120] WARREN B. KIDDER, WILLOW RUN: COLOSSUS OF AMERICAN INDUSTRY, HOME OF HENRY FORD'S B-24 "LIBERATOR" BOMBER 91 (1995); *see infra* note 303 and accompanying text.

[121] Katzman, *supra* note 2 at 1199; *see infra* note 206 and accompanying text.

war, sludge from the municipal wastewater treatment plant was added to the lagoon until 1964.[122]

In summarizing the course of its performance of the contract in its report to the War Department Price Adjustment Board, Ford described its achievements as follows:

> The Ford B-24 bomber program occupies a unique spot in the history of American wartime production.
>
> . . . .
>
> [I]t took time to work out all problems involved in the manufacture and assembly of the 465,472 separate parts which went into the B-24. But the time was not unreasonable when one considers the magnitude and complexity of the job. In the early part of 1941 the site where the great factory now stands was still an open field. By mid-1942 a tremendous plant had been built and the first planes were in the air. In 1943 production rose to substantial proportions, and in 1944 reached the bomber-an-hour pace originally envisioned by Mr. Ford. In 1945 the Company produced all the planes required of it by the Army Air Forces and in doing so utilized only a fraction of its productive potential.[123]

Ford continued to build bombers at the Willow Run plant until May 1945 when the last plane from the plant was completed and delivered to the Army Air Forces the following month. Thereafter, the surplus materials were disposed of as Ford received instructions from the government. Ford was directed to vacate the plant on November 1, 1945, so that the new contractor, Kaiser-Frazer Corporation, could manufacture automobiles for the government under another contract.[124] Kaiser-Frazer subsequently purchased the plant and operated it until 1953 when it sold it to General Motors

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[122] *Bids Near for Willow Run PCB Fix*, 9 SUPERFUND WEEK (Pasha Publications, Inc., Arlington, Va.), Jan. 27, 1995, at 6-7.

[123] FORD MOTOR COMPANY, 2 REPORT FOR WAR DEPARTMENT PRICE ADJUSTMENT BOARD 3 (1946).

[124] *Id.* at 18.

Corporation.[125] General Motors then manufactured automobile transmissions at its Hydramatic Transmission Plant. During this time sludge continued to be pumped from the waste water treatment plant to the sludge lagoon. After 1964, however, no more sludge was pumped into the lagoon. Ford sold the sludge lagoon to the University of Michigan in 1950, the latter conveying the property to Wayne County in 1977. The Willow Run Airport was acquired by the University of Michigan in 1947 and 1949 from the United States for use in part for the University's research project with the United States Air Force and for continued operation as a public airport.[126]

In 1979 the Michigan Department of Natural Resources (DNR) discovered contaminated soil at the Willow Run Sludge Lagoon (WRSL) site. The soil contained polychlorinated biphenyls (PCBs) and heavy metals including cadmium, chromium, copper cyanide, lead, and mercury. In 1987 the EPA proposed the WRSL site for inclusion as an NPL site.[127] The following year, the EPA sent special response action notices to Ford and six other parties under 42 U.S.C. § 9622(e) allowing them to conduct a remedial investigation and feasibility study (RI/FS) at the WRSL. The parties included: General Motors, Ypsilanti Township, Wayne County, the University of

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[125] In July 1945, Henry Kaiser, a wealthy West Coast businessman in the construction and shipbuilding industries, and Joseph Frazer, a successful Detroit automotive supplier, combined forces to create the Kaiser-Frazer Corporation. In Sept. 1945, they leased the Willow Run Plant from the Reconstruction Finance Corporation, and moved into the plant in Nov. 1945. Cars built by the Kaiser-Frazer Corp. never caught on, with the company capturing only five percent of the American market. The company sold the Willow Run plant to General Motors in 1953, and abandoned passenger car production altogether in 1955. CLIVE, *supra* note 118 at 224 & ch. 7, n.20.

[126] Chrysler Corp. v. Township of Sterling, 410 F.2d 62, 74 (6th Cir. 1969) (tax case dealing with real property assets owned by the University of Michigan including the Willow Run Airport).

Michigan, and the Ypsilanti Community Utilities. Although the Department of Justice was sent a special notice on behalf of the Department of the Treasury and Department of Defense, it was not named as a PRP.[128]

In August 1988, Ford and General Motors entered into a consent order with EPA to conduct the RI/FS. After the RI/FS was completed and submitted to EPA, the agency determined in 1993 that it would conduct an engineering evaluation/cost analysis report. The report focused on the removal of the contaminated soil at the Willow Run Creek Site (WRCS), an area surrounding, but not including the WRSL. The EPA conducted the evaluation and analysis in 1994 in order to evaluate the health and environment risks from site contaminants and to explore the possible cleanup alternatives.[129]

The PRPs proposed a plan, accepted by EPA, which consisted of removal of some 350,000 cubic yards of contaminated sediment from the Willow Run site to a level of 1 milligram of PCBs per kilogram of sediment.[130] The levels measured at the WRSL site ranged from between 2,000 to 8,000 mg/kg. The projected cost of the cleanup is $70 million, including construction of the landfill and post-cleanup operation and maintenance requirements. Ford and General Motors voluntarily agreed to clean up the

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[127] *See* 52 Fed. Reg. 2492 (1988).

[128] *See* Superfund Enforcement Tracking System (SETS), EPA-I.D. MID981089246, Willow Run Sludge Lagoon, (Oct. 1995) (LEXIS, Envirn library, PRP file, search for records containing "WILLOW RUN"); *Willow Run Contamination Evaluation Begins*, 8 SUPERFUND WEEK (Pasha Publications, Inc.), Jan. 14, 1994, at 1.

[129] *Willow Run Contamination Evaluation Begins, id.* at 5.

[130] *Lagoons: PCB-Contaminated Sludges From 1960s Bound For Landfill Under Michigan Plan*, 20 SLUDGE (Business Publishers, Inc., Silver Spring, Md.), July 4, 1995, at 114.

site and consequently it was not listed on the NPL. Also, the EPA agreed to transfer cleanup supervision of the Willow Run Creek Site to the State of Michigan.[131]

The PRPs entered into a Consent Judgment with the Michigan DNR in 1995. In the Consent Judgment, the PRPs agreed to implement the Remedial Action Plan and a Natural Resources Damages Mitigation Plan for the Willow Run Creek Area site.[132] According to the Consent Judgment, the remediation, restoration and completed cap on the landfill construction are to be finished by December 31, 1997.[133]

Following the Consent Judgment, Chrysler Corporation filed a lawsuit against the PRPs seeking a declaratory judgment under CERCLA, 42 U.S.C. §§ 9607 and 9613 to determine the liabilities of all PRPs.[134] Ford and General Motors asserted that Chrysler is the successor in interest to the former Kaiser-Frazer Corporation, a previous owner and operator of the former bomber plant between 1945 and 1953.[135] As a result, Ford and General Motors assert that Chrysler is also liable for the Willow Run response costs. Chrysler admitted that it was the successor in interest to Kaiser Manufacturing Corporation (KMC), but denied KMC ever "owned" or "operated" the former bomber

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[131] *Bids Near For Willow Run PCB Fix*, supra note 122 at 6.

[132] Consent Judgment at 2, Kelley v. General Motors, No. 95-79987-CE (Mich. 30th Jud. Cir. Mar. 24, 1995).

[133] *Id.* at 13.

[134] Complaint, Chrysler Corp. v. Ford Motor Co., *complaint filed*, No. 95-CV-12112DT (E.D. Mich. May 24, 1995).

[135] *Id.* at 9.

plant or ever "arranged" for disposal or transport of hazardous substances at the Willow Run site.[136] The case is still pending.

2. General Dynamics and the Tucson International Airport Area Superfund Site

Within two months of the United States' entry into World War II, Consolidated Aircraft Corporation (Consolidated),[137] the fourth largest aircraft manufacturer in the country,[138]contracted with the Army Air Forces for the operation of a Modification Center at the Municipal Airport at Tucson, Arizona.[139] Modification centers like the one at Tucson helped accelerate the flow of planes to the armed forces. As changes in aircraft occurred, due to the changes in combat demands, modification centers were

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[136] *Id.* at 10.

[137] Consolidated Aircraft Corporation was later known as Consolidated-Vultee Aircraft Corporation, and ultimately as General Dynamics, its successor in interest, after their merger in 1954. *See* Defendant's Answer, Counterclaim and Third-Party Complaint, at 3, 9, 13, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012 (D. Ariz. 1996) (CIV 94-355-TUC-ROS).

[138] GERALD D. NASH, WORLD WAR II AND THE WEST 9 (1990).

[139] The contract superseded a Letter Contract Special form dated April 14, 1942. The work on the contract actually began on February 1, 1942. Consolidated had actually been working on "an extensive and continuous program of production and modification of Model B-24 heavy bombardment airplanes . . . involv[ing] the use of contractor's plants located at San Diego, California, Tucson, Arizona, Downey, California and Fort Worth, Texas. *See* Cost-Plus-Fixed-Fee Modification Center Contract, at 2, 11, No. W 535 AC-26999, Army Air Forces, War Dep't (Oct. 5, 1942) (hereinafter "Consolidated Contract"); Supplemental Settlement Agreement to Fixed Price and Cost-Plus-A-Fixed-Fee Contracts for Supplies, at 2, No. W 535 AC-26999, Army Air Forces, War Dep't (Nov. 14, 1945).(on file with the Environmental Litigation Division, Air Force Legal Services Agency, Arlington Va).

needed to make those changes. They were used rather the original factories such as Willow Run, in order to avoid disrupting the production process.[140]

Under the terms of the contract, Consolidated was to operate a temporary and then, upon government construction, a permanent center to be used for:

> the modification, completion, alteration, overhaul, repair, maintenance, pre-flight testing, flight testing, and storage of, and for the performance of any and all other services required for or upon, aircraft of the Government or United Nations designated as Contractor's models, and for use as a dispersal point for such aircraft from Contractor's plants, ...[141]

The Army Corps of Engineers built all the necessary facilities for the Modification Center, and Consolidated then performed the terms of the contract.[142] Modification work consisted mainly of changes to the nose and belly gun turrets of the B-24 Liberator bombers manufactured at Consolidated's Fort Worth and San Diego plants. Other planes modified included the P-51 Mustang fighter and the B-29 Superfortress bombers.[143] Approximately 3,500 employees worked at Consolidated's Tucson Modification Center until shortly after V-J Day in September 1945.[144] At that time the

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[140] NASH, *supra* note 138 at 72-73.

[141] Consolidated Contract, *supra* note 139 at 2. During World War II the Army Air Forces built 28 such modification centers for the "modification completion, repair, maintenance, testing, and storage of aircraft." *See* Defendant's Answer, Counterclaim and Third-Party Complaint, at 16, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1966 U.S. Dist. LEXIS 8012 (D. Ariz. 1996).

[142] Defendant's Answer, Counterclaim and Third-Party Complaint, at 17, Tucson Airport Auth. v. General Dynamics Corp., *id.*

[143] John J. Rampe, Results of the Tucson Airport Area Remedial Investigation, Phase I, Volume III: An Evaluation of the Potential Sources of Groundwater Contamination Near the Tucson International Airport, Tucson, Arizona 23 (Nov. 1985) (unpublished report, on file with EPA Region IX, San Francisco, Ca.) (hereinafter "*Rampe Report*").

[144] Consolidated-Vultee Aircraft Corp., 3 Cont. Cas. Fed. (CCH) 885, 886 (1945); Defendant's Answer, Counterclaim and Third-Party Complaint, at 3, Tucson Airport

contract was terminated and the parties entered into a settlement agreement.[145] Consolidated continued to lease the site until 1948, when the site was enlarged and turned into an airport.[146] During the course of their contract, Consolidated employees may have dumped solvents, fuels and chromium onto the ground.[147] During the performance of the contract, workers needed to strip the camouflage paint using lacquer thinner near the runways. Also metal parts were anodized and heat treated by immersing them in hot baths of concentrated salt solutions and followed by chrome plating. Degreasing of hydraulic and oxygen lines of modified aircraft was also performed.[148]

After Consolidated's lease terminated, various other aircraft companies leased the hangar area at the Tucson Airport including Grand Central Aircraft Company (1950-

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Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1966 U.S. Dist. LEXIS 8012 (D. Ariz. 1996).

[145] Supplemental Settlement Agreement, *supra* note 139.

[146] Rampe, *supra* note 143 at 23.

[147] A subsurface investigation prepared for the EPA in the late 1980s disclosed soil contamination caused by trichloroethylene (TCE) (less than 5 ppb), dichloroethylene (DCE), a chemical breakdown of TCE (ranging from 16 to 281 ppb), benzene, used as a solvent, especially lacquer thinner, and also in gasoline, and phenol (at approximately 3,000 ppb). CH2M Hill, Final Draft, Assessment of the Relative Contribution to Groundwater Contamination from Potential Sources in Tucson Airport Area, Tucson, Arizona, at 3-6 (Aug. 1989) (unpublished report, on file with EPA Region IX, San Francisco, Ca.). Chromium, a chemical used in electroplating and also a componate of zinc chromate used as a paint primer in World War II-era aircraft was also found in another investigation of the area. *See* Rampe, *supra* note 143 at 20. Contamination of the groundwater near the Tucson Airport is believed to have occurred through percolation of waste water containing contaminants to the water table. CH2M Hill, *id.* at 3-18.

[148] Rampe, supra note 143 at 23-27. The *Rampe Report* concluded, however, that "the evidence actually implicating Consolidated in polluting the groundwater was largely

1954), Douglas Aircraft Company (1954-1958), and Hughes Tool Company (1958-1966), the United States Air Force (for two six-week periods from 1966-1969), and various tenants engaged in light industrial activities since 1969.[149] Among the PRPs, Consolidated was considered to be only a minor contributor to the ground water contamination.[150]

In the early 1980s, while Hughes Aircraft Corporation was leasing a site near the former modification center (known as "Air Force Plant 44") from the United States Air Force, the Air Force discovered that the Tucson groundwater near the site was contaminated with trichloroethylene (TCE), considered by EPA to be a possible carcinogen. Specifically, the Air Force found levels of TCE as high as 27,000 parts per billion (ppb) at Air Force Plant #44.[151] In fact, there were indications as early as the 1950s that groundwater was being contaminated when elevated levels of chromium, a chemical used in electroplating, was detected in municipal wells near Air Force Plant #44.[152] Until 1976, wastewater and spent solvents were discharged into unlined ditches or waste pits and ponds. At that time lined wastewater holding ponds were constructed

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circumstantial . . . and is based largely on the uncorroborated recollections of a single person." Rampe, *id.* at 28.

[149] Daniel B. Stephens & Assocs., Inc., Final Existing Data Report, Tucson International Airport RI/FS, Volume I: EDR Text, at 3-1 to 3-2 (Feb. 1993) (unpublished report, on file with EPA Region IX, San Francisco, Ca.).

[150] CH2M Hill, *supra* note 147 at 3-10.

[151] Claudia MacLachlan, *Nightmare on Calle Evelina; Community Profile; Tucson, Arizona,* NAT'L L. J., Sept. 21, 1992, at S7.

[152] At that time some drinking wells were affected, but a full investigation was not completed. Above-ground pollution sources were attempted to be controlled, but the effects of very low levels of organic pollutants in the drinking water were not fully appreciated. Rampe, *supra* note 143 at 6.

for the wastewater discharges. However, before the precautions were taken, wells in the area provided drinking water for over 47,000 people.[153] Hughes and other military contractors had used the TCE as a degreasing agent and then allegedly disposed of the substance in unlined ponds at the plant site.[154] Under EPA regulations, TCE is not to exceed 5 ppb in water, but concentrations exceeding 300 ppb were found in the groundwater near the Air Force plant.[155] In 1981, the City of Tucson began closing all municipal wells that had contaminants exceeding state health levels.[156] Consequently, in 1983, EPA listed the site on the NPL.[157]

It was not long before environmental tort suits began to be filed. In 1985, seven Tucson families filed a lawsuit against Hughes Aircraft Corporation claiming family members had suffered illness or death by unwittingly drinking TCE and chromium-tainted water. Hughes in turn then sued the Tucson Airport Authority.[158] In 1991, Hughes agreed to pay $85 million to over 1,620 plaintiffs to settle the *Valenzuela*

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[153] Site Description, Tucson Int'l Airport Area, EPA I.D. #AZD980737530, EPA, Apr. 1995, at 1.

[154] MacLachlan, supra note 151 at S7; *see also* Smith v. Hughes Aircraft Co., 10 F.3d 1448, 1450 (9th Cir. 1993).

[155] MacLachlan, *supra* note 151.

[156] *Site Description*, *supra* note 153 at 2.

[157] Tucson Int'l Airport Area, CERCLIS, EPA-ID: AZD988737530, Vista Information Solutions, Inc. (Dec. 1995) (LEXIS, Envirn library, Site file, search for records containing "AZD988737530").

[158] Valenzuela v. Hughes Aircraft Co., CIV 85-903-TUG-WDB, *complaint filed,* 1985 (D. Ariz.); Defendant's Answer, Counterclaim and Third-Party Complaint, at 24, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012 (D. Ariz. 1996); *see also Dateline Tucson,* UPI, Jan. 23, 1987, available in LEXIS, Regnws Library, Allnws File.

lawsuit.[159] After the *Valenzuela* case settled, another group of individuals living near the site filed a class action alleging injuries from the TCE contamination. Other cases were also filed in the United States District Court in Tucson against Hughes. Hughes, in turn, filed third-party actions against each of the PRPs for contribution.[160]

In 1988, the EPA notified seven entities that they were PRPs for response costs at the Tucson NPL site. The PRPs are: Tucson Airport Authority (operator of the airport); the City of Tucson (owner of the airport property); McDonnell Douglas Corporation (previously known as Douglas Aircraft Company), Hughes Aircraft, and General Dynamics (successor in interest to Consolidated-Vultee Aircraft Corporation) (all current or former site tenants and operators at the airport); the Arizona National Guard and the United States Air Force (generators of hazardous substances and arrangers for disposal of such substances at the airport).[161]

In 1990, the EPA issued a proposed consent decree which was agreed to by all of the named-PRPs, except General Dynamics. Under the proposed consent decree, the PRPs agreed to construct a groundwater extraction and treatment system at a cost of $12-15 million.[162] Under the Consent Decree, the PRPs were to agree to implement

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[159] *Hughes Aircraft Agrees to Pay $85 Million for Ground Water Contamination in Arizona*, 21 Env't Rptr. (BNA) No. 44, at 1939 (Mar. 1, 1991).

[160] Yslava v. Hughes Aircraft Co., 845 F.Supp. 705 (D. Ariz. 1993) (Plaintiffs sought recovery for past and future medical monitoring under CERCLA and state common law); *see* Defendant's Answer, Counterclaim and Third-Party Complaint, at 24, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1966 U.S. Dist. LEXIS 8012 (D. Ariz. 1996).

[161] *Tucson Superfund Cleanup Settlement Announced*, PR Newswire, Sept. 27, 1990; *available in* LEXIS, Regnws Library, Allnws File; *Dateline San Francisco*, UPI, Jan. 25, 1989, *available in* LEXIS, Regnws Library, Allnws File.

EPA's remedial action plan consisting of the construction and operation of a groundwater extraction and treatment system so that the groundwater would meet Federal and state cleanup levels and then be fed back into Tucson's drinking water system.[163] Additionally, the PRPs were to reimburse EPA $2.3 million for its oversight costs. The remedial action was estimated to be operated for 25 years.[164] All but General Dynamics agreed to the Consent Decree in 1991.[165]

The following year in 1992, EPA issued another RI/FS order for the PRPs to investigate soil contamination on or near the airport site and to analyze potential cleanup remedies.[166] The remedial investigation was completed in 1995, with TCE being the prime contaminant detected, and the feasibility study is expected to be complete by the end of 1996.[167] In 1994, the Tucson Airport Authority filed a complaint for contribution under 42 U.S.C. § 9607 against General Dynamics. General Dynamics filed an answer , a counterclaim and a third party complaint against the United States alleging that the United States is responsible for defending General Dynamics, and has assumed any claims against the company under the terms of the settlement of the

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[162] PR Newswire, *id.*

[163] 55 Fed. Reg. 42080 (1990).

[164] Bill Contoy, *Superfund Action Cold Stall Lending in Scottsdale,* BUSINESS J.-PHOENIX & VALLEY OF THE SUN at 1, Feb. 4, 1991, *available in* LEXIS, News Library, Wires File.

[165] *Tucson Superfund Cleanup Settlement Approved by Federal Court*, PR Newswire, Jun. 21, 1991, *available in* LEXIS, Regnws Library, Allnws File.

[166] *EPA Orders Cleanup For Tucson Site*, J. OF COMMERCE, July 14, 1992 at B-2, *available in* LEXIS, News Library, Wires File.

[167] *Tucson Airport Soil RI Completed*, 9 SUPERFUND WEEK (Pasha Publications, Arlington, Va.), Dec. 1, 1995, at 3.

Modification Center contract. This theory is explained in more detail in Chapter III, part C.2, *infra*.[168]

C. Summary

After public attention was focused on the damage to the health and the environment from the Love Canal, Congress acted swiftly to enact CERCLA. This statute set up what has become the mammoth apparatus to impose strict, retroactive, joint and several liability for the comprehensive cleanup of the nation's hazardous waste sites. At the same time thousands of plaintiffs have brought lawsuits relying on traditional tort theories applied to environmental law for the personal injury and property damage caused by past hazardous waste disposal practices. As the investigations of the numerous sites were done, it became apparent that some of the sites resulted from disposal of hazardous wastes begun decades ago, long before the dangers of dumping hazardous waste into the environment became known. Some of these hazardous waste sites included ones used by private industry in the performance of their government military contracts in support of the United States' World War II efforts.

As the costs of cleanup began to mount into the hundreds of millions of dollars, it is not surprising that the responsible parties have begun bringing claims for contribution under CERCLA for PRPs, as well as under other theories. This chapter has discussed the bases for liability under CERCLA and environmental tort theories. The *FMC* case illustrates the successful attempt to hold the United States liable as a responsible party

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[168] Defendant's Answer, Counterclaim and Third-Party Complaint, at 20-24, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1966 U.S. Dist. LEXIS 8012 (D. Ariz. 1996).

under CERCLA because of its involvement in the military contract constituted actions of an "owner, operator and arranger" under CERCLA. The chapter has also presented two case studies in which environmental liability has been imposed on contractors as a result of their World War II-era government contract performance. The next chapter will discuss World War II-era government contracting focusing on the indemnification clauses and cost-reimbursement principles which form the basis for a theory requiring the United States to assume liability for environmental cleanup costs.

CHAPTER II

INDEMNIFICATION CLAUSES AND COST REIMBURSEMENT PRINCIPLES IN WORLD WAR II-ERA GOVERNMENT CONTRACTS

The essential elements for PRPs attempting to require the United States to assume CERCLA cleanup liability under World War II-era government contracts are the indemnification clauses and the principles for cost reimbursement included in those contracts. This chapter first discusses the historical background of World War II-era government contracting, focusing on three World War I developments that impacted government contracts during World War II. Secondly, the chapter presents three aspects of World War II-era government contracting that affected the form and procedure of war contracts. Finally, the chapter details the B-24 bomber contracts at Ford's Willow Run plant and Consolidated's Tucson Modification Center focusing on the indemnification clauses and cost reimbursement principles included in those contracts.

A. The Impact of World War I Contracting Developments on World War II-Era Government Contracts

The industrial mobilization for World War II was greatly influenced by the United States' experience in World War I. Several developments, key to the World War I mobilization, impacted World War II efforts.

1. Planned Industrial Mobilization

During World War I, America orchestrated a planned industrial mobilization after Congress granted President Woodrow Wilson unprecedented power following passage

of the National Defense Act of 1916.[169] Additionally, after Congress declared war on April 6, 1917, it created the War Industries Board (WIB).[170] In March 1918, President Wilson elevated the WIB from the Council of National Defense, a cabinet advisory board created after the Act in 1916, and made it a powerful board directly responsible to the President.[171] President Wilson also appointed Bernard Baruch, a Wall Street financier, as chairman of the WIB, a position that became one of an "economic dictator" acting as the "general eye of all supply departments in the field of industry."[172] The WIB controlled industrial planning and coordinated economic resources for the war effort including everything from railroads to fuel to raw materials.[173] The WIB became one of

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[169] Ch. 134 § 120, 39 Stat. 213 (1916). This act authorized the president "in time of war or when war is imminent" to place orders that would "take precedence over all other orders and contracts." It also authorized the president to set up a Board of Mobilization of Industries Essential for Military Preparedness. JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 284-85 (1992). The National Defense Act of 1916 incorporated the recommendations of the Army War College Study entitled, "Mobilization Industries and Utilization of the Commercial Industrial Resources of the Country for War Purposes in Emergency." The study recommended: (1) that the president be empowered to place an order with any firm for any product usually produced or capable of being produced by such firm; (2) that the contractor be required to comply with all such orders and give precedence over all other orders and contracts; (3) that the price be fair and include a reasonable profit; and (4) that a nonpolitical board or mobilization of industries essential for military preparedness be created. *Id.* at 282-83.

[170] President Wilson announced the creation of the WIB on July 28, 1917. Its purpose was to "furnish needed assistance to the Departments engaged in making war purchases" and became the key civilian agency for World War I industrial mobilization. It sought to act as a clearinghouse for the war industry needs of the government by determining the most effective means and methods of increasing production. ROBERT D. CUFF, THE WAR INDUSTRIES BOARD: BUSINESS-GOVERNMENT RELATIONS DURING WORLD WAR I, at 1-2, 109 (1973); *see also* BERNARD M. BARUCH, AMERICAN INDUSTRY IN THE WAR: A REPORT OF THE WAR INDUSTRIES BOARD 20-21 (1941).

[171] NAGLE, *supra* note 169 at 294-95.

[172] CUFF, *supra* note 170 at 146.

the most ambitious attempts to organize and control American industry in the history of the United States. The focal point of the WIB's power was its authority to administer priorities.[174] Patterned after the WIB, the War Production Board created in 1942 played a central role in the War mobilization effort during World War II. Bernard Baruch also played a key role as an advisor, particularly in the planning for post-war contract terminations.

2. Cost-Plus-Fixed-Fee Contracts

A second development during World War I was the use of cost-plus-fixed fee (CPFF) contracts. Rising prices and unpredictable labor supply caused many contractors to refuse to enter into contracts on a fixed-price basis because the risk of loss was too great. As a result, the Government dispensed with formal advertising for many contracts and began concluding contracts through negotiation on a cost-plus-a-percentage-of-cost basis.[175] War mobilization planners quickly recognized that this type of contract encouraged carelessness and padding that created higher costs and profits. Consequently, the government developed and substituted the CPFF contract.[176] The CPFF contract reduced the risk for contractors by reimbursing them for their costs, but

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[173] NAGLE, *supra* note 169 at 281.

[174] According to Baruch, priorities administration "depended the allocation of men, money, materials and all other resources on the basis of their use toward the quickest winning of the war." Bernard M. Baruch, *Address on Economic Mobilization at Army War College, February 12, 1924, Bernard M. Baruch Papers*, Princeton University, Princeton, N.J., Public Papers, Vol. 1, cited in CUFF, *supra* note 170 at 191, 265.

[175] Rockwell Int'l Corp., ASBCA No. 46544, B.C.A. 96-1 ¶ 28,057 (1995) (reviewing history of cost-type contracts); F. Trowbridge Vom Baur, *Fifty Years of Government Contract Law*, 29 FED. B. J. 305, 312 (1970).

[176] NAGEL, *supra* note 169 at 300-01.

profit was limited to a fixed fee based on their estimated cost determined prior to the start of the contract.[177]

Nonetheless, government contractors were greatly criticized for their profiteering during World War I. The "merchants of death" theory was advanced espousing the notion that industrialists had engineered the United States' entry into World War I for their own profit.[178] Following the War there was also a widespread belief that government contracts created an excessive number of millionaires.[179] From the 1918 Armistice until the attack on Pearl Harbor, Congress introduced over 200 bills to prevent or limit wartime profits.[180] In 1920, the House committee investigating wartime expenditures recommended abolition of the cost-plus type of contract completely, even during wartime, but it was not included in the National Defense Act of 1920.[181] A decade later Congress did pass the Vinson-Trammel Act[182] after an investigation into the costs and profits of Navy Department contracts with aviation manufacturing companies.[183] The Act limited profits to 10 percent of the total contract price over

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[177] *See infra* Part B.2.b.

[178] NAGLE, *supra* note 169 at 325, 349. The theory's popularity culminated in a 1934 best-selling book, *Merchants of Death: A Study of the International Armament Industry*, by Helmuth C. Engelbrecht and Frank C. Hanighen. The book, as well as other similar books and articles, aroused the American public and Congress to investigate the munitions industry and the "evils" of private arms manufacture. Hearings were held from Sept. 1934 to Feb. 1936. *Id.* at 369, 562.

[179] One account estimated the number at 23,000. *Id.* at 349.

[180] *Id.*

[181] *Id.* at 350.

[182] Ch. 95 § 3(b), 48 Stat. 503 (1934).

$10,000 (subject to audit) for naval vessels and aircraft.[184] These concerns about profits affected the rules regarding the use of CPFF contracts during World War II.

3. Contract Termination Procedures

A final development from the World War I experience which impacted the manner of war procurement during World War II was the experience with contract termination procedures. At the close of World War I, the War Department created the Board of Contract Adjustment.[185] The lesson learned from the Board's functioning was that it was "too little too late." The problem facing the government the day after the Armistice on November 11, 1918, was the fact that it had 24,281 contracts and agreements with a total commitment of $6 billion still in existence and covering all war activities of the government.[186]

During most of World War I little thought had been given to the termination of contracts after the war's end. In 1917, Congress enacted legislation that gave the President the authority to terminate contracts. It provided:

> The President hereby is authorized . . . (b) To modify, suspend, cancel or requisition any existing or future contract for building, production, or purchase of ships or material.
> . . . .

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[183] NAGLE, *supra* note 169 at 363. *See infra* notes 240-43 and accompanying text for a discussion of the development of the Vinson-Trammel Act.

[184] *Id.* at 364.

[185] The Board was to "hear and determine all claims, bouts or disputes" arising from War Department contracts. *Id.* at 323.

[186] David A. Goldman, *Termination of War Department Contracts At The Option of the Government*, 42 MICH. L. REV. 733, 734 n.4 (1944).

> Whenever the United States shall cancel, modify, suspend or requisition any contract, . . . it shall make just compensation therefor, to be determined by the President.[187]

Initially, however, there was no uniform termination program. Although the Secretary of War mandated the drafting of a uniform termination article for War Department contracts, due to lateness of the article, individual offices had already begun using their own forms. Consequently, little uniformity emerged.[188]

One of the problems with many war contracts was the fact that they were signed by subordinates as proxies, rather than contracting officers. This was done because of the need to speed up procurement during the war.[189] The Comptroller General ruled that settlement of such contracts were invalid.[190] The Secretary of War thereafter required contracts be formally executed until they could be terminated. Protests of this policy prompted passage of the Dent Act in 1919.[191] The Dent Act allowed the Secretary of War to settle any express or implied agreement that had been entered into in good faith with any government officer or agent during World War I prior to November 12, 1918.[192] The government paid just compensation including the value of the contract

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[187] Urgent Deficiency Appropriations Act of June 15, 1917, ch. 29, 40 Stat. 182 (1917) (repealed by Act of June 5, 1920, ch. 250, § 2, 41 Stat. 988 (1920); OFFICE OF THE GENERAL COUNSEL, BUREAU OF NAVAL PERSONNEL, NAVY CONTRACT LAW 99 (1949).

[188] OFFICE OF THE GENERAL COUNSEL, *supra* note 187 at 100.

[189] OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF THE NAVY, NAVY CONTRACT LAW 244 (2d ed. 1959).

[190] 25 Comp. Dec. 398, 404 (1918).

[191] Act of Mar. 2, 1919, ch. 94, 40 Stat. 1272 (1919).

[192] JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 1074 (3d ed. 1995).

on cancellation, but the courts held that payment of anticipatory profits was prohibited.[193] The problem many contractors faced was the lack of working capital which had been spent on war contracts and the construction of new facilities. The sudden termination of war contracts burdened the contractors with war inventory, buildings and unpaid debts for special machinery used in production of war materiel. Many contractors were forced into bankruptcy.[194] This problem was a key factor in the development of the letter of intent and early planning for termination of contracts during World War II.

B. Government Contracting During World War II

1. Control of Wartime Contracting

In the period immediately preceding World War II, government contracting procedures consisted of a maze of uncoordinated legislation developed over a hundred-year period. Taken as a whole, the laws inhibited efficient and expeditious government procurement.[195] For example, there were rules requiring purchase of shoes, brooms and brushes from the Leavenworth Federal Penitentiary, as well as another requiring brooms and mops from non-profit agencies for the blind. One statute required the purchase of steel for ship construction from domestic sources, while

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[193] *See* Russell Motor Car Co. v. United States, 261 U.S. 514, 523 (1923) cited in Stephen N. Young, Note, *Limiting the Governments Ability to Terminate for its Convenience Following Torncello*, 52 GEO. WASH. L. REV. 892, 895 (1984); David Fain & Richard F. Watt, *War Procurement: A New Pattern in Contracts*, 44 COL. L. REV. 170 n.96 (1944); OFFICE OF THE GENERAL COUNSEL, *supra* note 189 at 245.

[194] N. R. Caine, *The Termination of Government Defense Contracts*, 22 TAXES 98 (1944).

[195] OFFICE OF THE GENERAL COUNSEL, *supra* note 189 at 6.

another statute allowed purchase of foreign supplies after first advertising in New York for 30 days. Generally, purchases were required to be by formal advertising and sealed bid, but there were various exceptions to that rule including the purchase of preserved meats, pickles, butter, cheese, flour, bread.[196]

One of the first items of business for Congress after the bombing of Pearl Harbor on December 7, 1941, was the passage of the First War Powers Act.[197] The primary purpose of the Act was the "promotion of the national defense in time of great emergency, [with] contractors [being] the incidental beneficiaries of the Act."[198] The effect of the First War Powers Act was to put wartime buying on a similar free footing as private enterprise.[199] Section 201 of Title II of the Act provided:

> The President may authorize any department or agency of the Government exercising functions in connection with prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, *to enter into contracts and into amendments or modifications of contracts* heretofore or hereafter made and to make advance, progress and other payments thereon, *without regard to the provisions of law* relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war.[200] (emphasis added)

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[196] *Id.* at 6-7.

[197] First War Powers Act, 1941, ch. 593, 55 Stat. 838, 839, 50 U.S.C. App. § 601-05, 611, (repealed 1966), 616 (omitted), 618 (repealed 1947), 619-20 (transferred to 50 U.S.C. App. §§ 32-37), 621-22 (repealed 1966). The First War Powers Act, 1941, was signed on December 18, 1941, just 10 days after its introduction in Congress.

[198] Fogarty v. United States, 176 F.2d 599, 603 (8th Cir. 1949).

[199] OFFICE OF THE GENERAL COUNSEL, *supra* note 189 at 7.

[200] First War Powers Act, 1941, § 201,.50 U.S.C. App. § 611 (repealed 1966).

In yet still another remarkably short time, President Roosevelt issued Executive Order 9001 on December 27, 1941, delegating powers granted by the the First War Powers Act to the War and Navy Departments and the Maritime Commission.[201] By the authority of Executive Order 9001, the military departments could relieve a contractor from bad commitments, and could amend, modify or reform contracts without consideration or mutuality of mistake. The Executive Order provided:

> [The Departments] may modify or amend or settle claims under contracts heretofore or hereafter made . . . and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the War Department, the Navy Department, or the United States Maritime Commission, respectively, the prosecution of the war is thereby facilitated.[202]

Despite the clear easing of contract restrictions, Executive Order 9001 did include a number of requirements, including: (1) a prohibition of racial discrimination was to be included in all contracts; (2) the allowance of advance payments only upon close scrutiny when they promoted the national interest; (3) a proscription against commissions for contract agents; (4) a prohibition against cost-plus-percentage-of-cost-contracts; (5) the maintaining of existing ceilings on profits and fees (e.g. fees in CPFF contracts were limited to seven percent); and (6) the continued applicability of labor laws protecting contractor employees.[203] Nonetheless, the First War Powers Act, as

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[201] NAGLE, *supra* note 169 at 427.

[202] Executive Order No. 9001 (Dec. 27, 1941), 3 C.F.R. Cum. Supp. 1054 (Compilation 1938-1943).

[203] OFFICE OF THE GENERAL COUNSEL, *supra* note 189 at 8.

implemented by Executive Order 9001, provided a virtually complete emancipation from peacetime procedural limitations on contracting.[204]

One of the lessons learned from World War I was the need to have absolute control over industry to ensure military and essential civilian production was unencumbered. In addition to control, synchronization was needed. President Roosevelt began to put new agencies in place directed by "economic czars" including the Reconstruction Finance Corporation (RFC), the Office of Production Management (OPM), the War Production Board (WPB), and eventually the Office of War Mobilization (OWM).[205] The RFC was established in the Summer of 1940 for the purpose of lending money to or buying stock in corporations organized to promote the national defense, or to create such corporations. In particular, the act setting up the RFC allowed the organization of the Defense Plant Corporation (DPC) to loan working capital to manufacturers and finance facility expansion.[206] The WPB was vested with the broadest powers to "exercise general direction over the war procurement and production program with the WPB set as the central coordinating point for war procurement, all federal agencies."[207]

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[204] *Id.* at 9.

[205] NAGLE, *supra* note 169 at 406-07.

[206] *Id.* at 419. Other RFC subsidiaries included: the Metals Reserve Company, Defense Supplies Corporations, Petroleum Reserves Corporation, Rubber Reserve Company, U.S. Commercial Company, War Emergency Pipelines, Inc., and the War Insurance Corporation. *Id.* at 420.

[207] Executive Order No. 9024, (Jan. 14, 1942), 3 C.F.R. Cum. Supp. 1079 (Compilation 1938-1943); OFFICE OF GENERAL COUNSEL, *supra* note 187 at 8; *see also* Johns-Manville v. United States, 13 Cl. Ct. 72, 88 (1987), *vacated*, 855 F.2d 1571 (Fed. Cir. 1988) ("The WPB controlled what could and could not be produced, the sequence of

In an effort to begin buying large quantities of materiel following the German army's invasion of the Low Countries and France in May of 1940, President Roosevelt went to Congress requesting an air force of 50,000 planes and $1 billion for the Army and Navy.[208] He called for an aircraft industry with an annual capacity of 50,000 planes per year--an eightfold increase of what it was then producing.[209] In the months that followed the President requested additional appropriations totaling over $17 billion.[210]

President Roosevelt also revived the Advisory Commission under the cabinet committee known as the Council of National Defense, a remnant of World War I and the National Defense Act of 1916.[211] This seven-member advisory commission, referred to as the National Defense Advisory Commission (NDAC), or the Defense Commission, was charged to start mobilizing industrial resources for the impending war.[212] It consisted of advisors in charge of industrial materials, labor, agriculture, transportation, price stabilization, and consumer interests.[213] The NDAC invited Bernard Baruch, the World War I head of the War Industries Board, to advise it based on his

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production, the securing of scarce materials from abroad, and the allocation of scarce materials.")

[208] BRUCE CATTON, THE WAR LORDS OF WASHINGTON 21 (1948).

[209] OFFICE OF THE GENERAL COUNSEL, *supra* note 187 at 411.

[210] *Id.* at 411-12.

[211] Ch. 134, § 120, 39 Stat. 213 (1916), *see supra* note 169; Brian E. Waddell, Economic Mobilization for World War II and the Transformation of the American State 143 (1993) (unpublished Ph.D. dissertation, City University of New York).

[212] CATTON, *supra* note 208 at 23.

[213] *Id.*

experience in World War I.[214] In 1941, the NDAC was replaced by the Office of Production Management, headed by William S. Knudsen, a former Ford Motor Company employee, and later President of General Motors. After the attack on Pearl Harbor, the OPM was replaced by the War Production (WPB), headed by Donald Nelson. It was in the WPB that President Roosevelt concentrated the war mobilization powers conferred on him through the authority of the First War Powers Act. The WPB eventually became responsible for reviewing all contracts in excess of $500,000.[215]

In June 1940, Congress passed legislation establishing the defense contract priorities system requiring deliveries to the Army or Navy to "take priority over all deliveries for private account or for export."[216] The priorities system also required that manufacturers who needed raw materials for war contracts and subcontracts could acquire them ahead of civilian manufacturers.[217]

Congress went still further in September 1940, when it passed the Selective Training and Service Act of 1940,[218] a part of which gave War and Navy Department contracts precedence over all other orders and contracts with nonmilitary parties. It also gave the War and Navy Departments the right to seize a contractor's plants if the

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[214] OFFICE OF THE GENERAL COUNSEL, *supra* note 187 at 412-13.

[215] CATTON, *supra* note 208 at 24; Waddell, *supra* note 211 at 160, 205; OFFICE OF THE GENERAL COUNSEL, *id.* During 1940 and 1941, due to Knudsen's efforts to encourage industry to start making weapons, Chrysler began mass producing tanks and anti-aircraft guns and Ford agreed to build the B-24 Liberator bomber at Willow Run. CATTON, *Id.*

[216] An Act to Expedite National Defense, ch. 440, § 2, 54 Stat. 676 (1940).

[217] NAGEL, *supra* note 169 at 418; CATTON, *supra* note 208 at 89, 111.

[218] Ch. 720, 54 Stat. 892 (1940).

contractor refused to manufacture requested products or materials, or furnish them at a reasonable price as determined by the government. The contractor also could be charged with a felony and face up to three years in prison and a $50,000 fine. This provision was identical to the respective provision in the National Defense Act of 1916.[219]

All of these efforts by the Congress and the Executive Branch helped foster the environment whereby military contractors became what President Roosevelt referred to as the "Arsenal of Democracy."[220] The mobilization plan, under the direction of President Roosevelt's war planners, began working in 1941 like an engine picking up steam. James Nagel describes the significance of this massive controlled government mobilization effort in terms of its impact on government contracting:

> World War II represents the ultimate effort in government contracting: it cost the most money, involved the most people, and entailed the most technological advances, culminating in the atomic bomb. The production potential seen but not fulfilled in World War I was achieved and surpassed. The symbol of this period is a production line; virtually everything the government bought came in quantities considered unrealistic in 1939. . . . [T]he techniques of mass production excelled, . . . [and] [t]he quantities demonstrated what can be done when money is not a constraint. . . . During the war, the nation bought more of everything than it ever had before.
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> The army's contracting effort surpassed the navy's and represented the greatest single agency purchasing operation in U.S. history.
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> The combined value of total war production for the army, including its air forces, during this period has been estimated at approximately $180

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[219] NAGEL, *supra* note 169 at 420-21.

[220] *Id.* at 404; *see infra* note 293 and accompanying text.

> billion. Moreover, these figures do not include the army's contracts terminated before completion, which ran from $40 billion to $50 billion. . . . To achieve its massive quantities, the government absolutely controlled industry to ensure military and essential civilian production. The government ruled the shipyards and factories and the manufacture of every important product used in them. It determined when, and how many, employees were hired, their wages, and basic worker health and safety standards.[221]

To accomplish the production required to meet the World War II challenge, the government needed to adapt its contracting procedures.

2. World War II Government Contracting Procedures

The passage of the First War Powers Act set the stage for a much more unhampered set of procedures for government contracting during World War II. The enormous scale, complexity, and novelty of war procurement during World War II allowed for development and extensive use of the letter of intent and the CPFF contract. The letter of intent allowed for immediate work on the contract, while the CPFF contract had greater flexibility than the customary fixed-price contract, but without the disadvantages of cost-plus-percentage-of-cost contracts used temporarily during World War I.[222] The main challenge for contracting officers was to start production with a minimum of delay, while at the same time facing a number of problems including: (1) most manufacturers were unfamiliar with government contracting procedures; (2) war equipment items were new; and (3) cost estimation was very difficult.[223] The letter of intent and CPFF contracts helped contracting officers overcome these challenges.

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[221] *Id.* at 404-06.

[222] OFFICE OF THE GENERAL COUNSEL, *supra* note 189 at 345.

[223] Fain and Watt, *supra* note 193 at 130.

a. Letter of Intent

One of the first innovations which was used extensively during World War II was the letter of Intent. After negotiations reached the point where an order was certain, the letter of intent formally advised a contractor that a government department intended to place an order for production of specified articles or construction of facilities.[224] The letter of intent was followed by the contracting officer placing of an actual order in the form of a formal contract. This procedure avoided delay because when the prospective contractor accepted the letter, a contract was actually created.[225]

The letters authorized the purchase in anticipation of the order, and the government agreed to reimburse the contractor for costs incurred resulting from the letter of intent. If an order did not follow, the government was bound by the terms of the letter regarding reimbursement. The use of letters of intent avoided the problem encountered in World War I when orders were made and work done without any formal written contract. After the World War I Armistice, the lack of written contracts necessitated the passage of the Dent Act authorizing payment and termination of these oral contracts.[226] The letter of intent contained reference to a termination for convenience clause providing for the terms of contract settlement.[227]

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[224] Thus, the letter of intent was really a written confirmation of an earlier indication that an order might be placed. *Id.* at 131.

[225] R. PRESTON SHEALEY, WAR SUPPLEMENT TO THE LAW OF GOVERNMENT CONTRACTS 2 (1943).

[226] *See supra* notes 191-93 and accompanying text.

[227] SHEALEY, *supra* note 225 at 87.

The letter of intent was successful mainly because upon completion of negotiations as to item, quantity, price and delivery, initial work by the contractor could begin immediately. Thereafter, the principal contract provisions were worked out in additional time-consuming negotiations.[228]

A variation of this form of contract was the letter purchase order. It differed from the letter of intent in that it was actually written as a definitive contract in the form of an order binding upon the contractor by his acceptance. The contractor was directed to begin and was authorized to obligate up to a maximum set amount of money.[229] Another variation was the bid-proposal-notice-of-award type of contract. It was essentially a request for a proposal which became binding on the parties when the government accepted the bid proposal.[230]

b. Cost-Plus-Fixed-Fee Contracts

Based on the negative experience with the cost-plus-percentage-of-cost contracts during World War I, their use was prohibited in World War II.[231] The CPFF contract was substituted for contracting situations where there was unusually great uncertainty or there was a need for frequent changes in scheduling.[232] During World

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[228] Fain and Watt, *supra* note 193 at 133.

[229] *Id.* at 134.

[230] *Id.*

[231] *Id.* at 143. The First War Powers Act specifically provided that "nothing herein shall be construed to authorize the use of the cost-plus-percentage-of-cost system of contracting." Goldman, *supra* note 186 at 737-38.

[232] *Id.*

War II war procurement was constantly changing as one contemporary commentator noted:

> Everyday new weapons or processes are devised and existing ones redesigned and modified and improved; every day the relative scarcities of critical materials change; every day the quantities of some items on order are drastically altered and the production of others as suddenly stopped Clearly procurement contracts must be sufficiently flexible to take care of these urgent changes.[233]

Consequently, contractors, otherwise unwilling to accept uncertain contingencies and inevitable difficulties of a fixed price contract, were more willing with a CPFF contract. The CPFF contract was expressly sanctioned by the Congress in 1940.[234] The CPFF contract gave contractors protection and guaranteed a profit, though their profit ratio was lower due to a lower financial risk.[235]

Cost reimbursement contracts, including the CPFF contract, were widely used during World War II, accounting for approximately $60 billion of contracts let between 1941 and 1946.[236] Other cost-reimbursement contracts included cost or cost-sharing contracts and the cost-reimbursement portion of time-and-materials contracts.[237] The CPFF provided for the contractor to be reimbursed for the total allowable costs incurred from contract performance, plus a percentage of estimated cost as a fee. The fee was

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[233] *Id.* at 165-66.

[234] Act of July 2, 1940, ch. 508, § 1, 54 Stat. 712 (1940) (former 50 U.S.C. App. § 1171 (a),(b) was repealed six months after the termination date of World War II, which occurred on Dec. 31, 1946, by Presidential Proclamation No. 2714, 61 Stat. (Pt. 2) 1048).

[235] Goldman, *supra* note 186 at 738.

[236] Note, *Determination of Cost in Military Procurement Cost-Plus-A-Fixed-Fee Contracts*, 65 HARV. L. REV. 1035 (1952).

fixed when the contract was entered into and was not subject to change unless changes in the scope of the contract were ordered with the main uncertain element being the future allocable costs of the contract.[238]

An important aspect of CPFF contracts was the cost principles and the determination of allowable and allocable costs included in the contracts. Under World War II-era CPFF contracts, the contracting officer had the duty to determine such costs following cost standards incorporated by reference into the contract. The two most widely used standards during World War II were Treasury Decision (TD) 5000, § 26.9 and the War Department and Navy Departments *Explanation for Principles for Determination of Costs Under Government Contracts*, informally known as the *Green Book*.[239]

Originally, TD 5000 was promulgated to measure excess profits under the Vinson-Trammel Act.[240] In August 1940, the Treasury Department, jointly with the Navy

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[237] *Id.* at 1035 n.1.

[238] *Id.* at 1035-36. The fixed fee was not to exceed seven percent according to Executive Order No. 9001. *See supra* note 202. The fixed fee amount was later reduced to six percent for contracts entered into after Sept. 9, 1942, for construction and installation of buildings, utilities, and appurtenances at military posts. *See* Act of June 5, 1942, ch. 340, § 8, 56 Stat. 314 (terminated 1946); Goldman, *supra* note 186 at 738 n.15.

[239] 26 C.F.R. § 26.9 (1940 Supp.); Note, *supra* note 236 at 1036. TD 5000 and the *Green Book* are reproduced in an excellent monograph covering early cost principles. *See* John Cibinic, Jr., *Cost Determination*, GOVERNMENT CONTRACTS MONOGRAPH NO. 8, (Apps. I) at 141-158 (1964).

[240] *See supra* note 182. Under the Vinson-Trammel Act, the Treasury Department issued a regulation for determining the cost of performing a contract. The regulation, however, contained only a few sentences and generated various questions. In 1936, Congress extended the Vinson-Trammel Act profit limitation to contracts for the Merchant Marine and allowed the limitation to be applied based on total prices of all

and War Departments, issued TD 5000, a revised regulation for the Vinson-Trammel Act.[241] Two months later, following the beginning of the German bombing of the Battle of Britain, the United States began its plans to increase purchases of war munitions. Government planners believed, however, that the shipbuilders and aircraft manufacturers would be reluctant to enter into contracts because of the Vinson-Trammel Act profit limitations. To alleviate this concern, Congress enacted legislation suspending the Vinson-Trammel Act, but imposed a war-time excess profits tax upon corporate income.[242] This put all of industry, civilian or military, on an equal footing.[243]

Even though the Vinson-Trammel Act had been suspended, TD 5000 continued to be applied. Many government agencies incorporated that decision into CPFF contracts as a source of cost principles.[244] The War and Navy Departments issued the

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contracts entered into by a contractor during a taxable year. Congress again amended the Vinson-Trammel Act in 1939 imposing a 12 percent profit limit upon both Navy and Army aircraft contracts. *See* National Defense Act, ch. 35, § 14, 53 Stat. 555, 650 (1939). After the fall of France to the Nazis in June 1940, Congress changed the percentages again and made them applicable only to contracts exceeding $25,000. *See* Act of June 28, 1940, ch. 440, § 2(b), 54 Stat. 676 (1940). The regulation was titled, *Excess Profits on Contracts for Naval Vessels and Army and Navy Aircraft*, but was widely used in cost reimbursement contracts.

[241] *See* 1940-2 C.B. 397 (Navy and Army); 5 Fed. Reg. 2788 (1940). TD 5000 was signed July 29, 1940 by John L. Sullivan, Acting Secretary of the Treasury, August 2, 1940, by Henry L. Stimson, Secretary of War, August 6, 1940, by Frank Knox, Secretary of the Navy. *See* Goldman, *supra* note 186 at 739 n.16.

[242] Second Revenue Act of 1940, ch. 757, sec. 201, §§ 401, 506, 54 Stat. 974, 975, 1003, 1008 (1940).

[243] NAGLE, *supra* note 169 at 421.

[244] *See, e.g.* Northrop Aircraft Inc. v. United States, 127 F. Supp. 597, 600 (Ct. Cl. 1955); Bell Aircraft Corp. v. United States, 100 F. Supp. 661, 695 (Ct. Cl. 1951), *aff'd*, 343 U.S. 860 (1952) (*per curiam* by equally divided court); North American Aviation, Inc. v. United States, 67 F. Supp. 1007, 1015 (Ct. Cl. 1946).

Green Book, which followed the principles of TD 5000, to assist its personnel to determine costs under their war procurement contracts.[245]

For costs to be allowable and therefore reimbursable they must have been proximately related to proper performance of the CPFF contract.[246] CPFF contracts provided government contracting officers and contractors alike with a useful tool for war procurement. Purchasing by CPFF eliminated the need for detailed specifications, removed substantial risk for contractors to produce new types of war materials, and were especially geared for government-owned, contractor-operated plants like those operated by Ford and Consolidated. Despite their wide usage, CPFF contracts were criticized because they lacked financial incentives for productive efficiency and they had administrative and auditing burdens for both parties.[247] One commentator noted, however, that there was no conclusive evidence to conclude that CPFF contracts were any more inefficient than fixed-price contracts.[248]

c. Termination of War Contracts

> With the titanic struggle moving slowly but surely toward a flaming climax, it is becoming clear that the speedy conversion from war to peace, at the proper time, is a matter of almost as imperative necessity as was the speedy conversion from peace to war.[249]

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[245] *See supra* note 239.

[246] Note, *supra* note 236 at 1040; *see* Lockheed Aircraft Corp., War Dep't B.C.A. No. 1375, 4 Con. Cas. Fed. (CCH) ¶ 60391 (1947) (relation must be "susceptible of recognition").

[247] Note, *supra* note 236 at 1049.

[248] *Id.* at n.116, 117.

Well before the allied march across the Rhine and the bombing of Hiroshima, the war planners were looking ahead to the mammoth task of the reconversion of American industry to a peacetime economy.[250] The keystone of the "New Economy of Peace" was private industry's full employment of America's 56 million workers.[251] The United States had learned of the pitfalls caused by long, drawn-out litigation of contract claims following World War I, resulting in uncompensable losses due to early cancellation of government contracts.[252] There were two fears of inadequate preparation for termination of contracts at the war's end: (1) the effect on labor and high unemployment it might cause; and (2) the effect on capital, including serious financial loss, business disorganization, and a flood of bankruptcies.[253]

War planners had actually been contemplating termination of war contracts at the beginning of the war. The need for early termination was necessary in order to have flexibility in the war procurement program because of strategic changes,

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[249] Donald S. Frey, *Unrecoverable Losses In Wartime Operations*, 24 B. U. L. REV. 57, 69 (1944).

[250] By 1944 American industry was producing $90 billion for war purposes under government contracts, roughly one-half of the total national production to the war effort. *Id.* at 69 n.40. Two-thirds of all persons employed in manufacturing were engaged in war work. SPECIAL COMM. ON POST-WAR ECONOMIC POLICY AND PLANNING, POST-WAR ECONOMIC POLICY AND PLANNING, H.R. REP. NO. 1443, 78th Cong., 2d Sess. 3 (1944).

[251] Frey, *id.* at 57.

[252] *Id.* at 59. Of 25,000 War Dep't contracts terminated in World War I and involving settlement questions, over 3,000 were litigated before the Court of Claims. Erwin E. Nemmers, *Comparative Study of Termination Articles in Government War Contracts,* 1945 WIS. L. REV. 41, 43 (1945).

[253] Maurice L. Cowen, *Vital Legal Aspects of War Contract Terminations: A Practical Approach*, 40 ILL. L. REV. 29, 29-30 (1945).

development of new projects, invention of new items, technological improvements, unexpected changes in military requirements, and reallocation of scarce raw materials.[254] The need for termination was described as follows:

> [G]lobal war is not static. Weapons needed to conquer a hard and ruthless enemy in Africa may not be suitable to invade successfully the "Fortress Europa." The realities of terrain demand new modes of transport; the cunning of the enemy makes weapons obsolete; experience may reveal the need for new devices; drafting board theories may prove to be battlefield failures. For these reasons and others, as of October, 1943, the War Department had terminated more than 8,5000 prime contracts with a face value of approximately $6 [billion] or more than the total amount of the undelivered portions of all contracts of the War Department as they existed on the morning after the Armistice of November 11, 1918.[255]

The authority for the government to terminate contracts stemmed from the First War Powers Act that conferred power on the President "to enter into contracts and into amendments of contracts."[256] This was interpreted to include the power to agree upon terms and conditions of partial performance and, upon termination, to agree to pay for partial performance.[257] The basis for this opinion relied on the 1875 United States Supreme Court case of *United States v. Corliss Company*, involving a terminated Civil War government contract.[258] This analysis led to the theory of the negotiated lump-sum

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[254] 10 C.F.R. § 88.15-101 (1943 Supp.) (Procurement Regulation 15); Harry LaBrum, *Recent Developments in Termination of Government War Contracts,* 15 PA. B. ASS'N Q. 229, 230 (1944).

[255] Goldman, *supra* note 186 at 734.

[256] Ch. 593, 55 Stat. 838, 50 U.S.C. App. § 611, (repealed 1966); *see* 10 C.F.R. § 88.15-104 n.1 (1943 Supp.), *supra* note 197.

[257] Goldman, *supra* note 186 at 750.

settlement and to a vigorous program to conform to this policy. To implement this policy, the War Department issued *Procurement Regulation 15* and the *Termination Accounting Manual.*[259] These regulations allowed for war contracts to be amended to include standard termination articles.[260] They also allowed contracts to be terminated and settled by the contracting officer by a separate supplemental agreement.[261]

In Spring 1943, President Roosevelt recommended to Congress that they begin consideration of postwar reconversion. The Senate and House each established a Committee on Postwar Economic Planning.[262] Congressional hearings were held in the Fall of 1943 on various bills to deal with the issue of post-war contract settlements and termination claims. Business and government representatives testified on the details of existing termination settlement procedures and the need for improvements.[263] The Comptroller General challenged the War Department's authority to make final and

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[258] 91 U.S. 321 (1875)(holding that the government may terminate a government contract for convenience and the settlement and compensation for partial performance is binding on the government); *see id.* at 747-50.

[259] 10 C.F.R. Pt. 88.15 (1943 Supp.) (titled *Procurement Regulation 15, Termination of Fixed Price Supply Contracts for the Convenience of the Government*, hereinafter "PR"). The *Termination Accounting Manual* (hereinafter "TAM") applied to termination of lump-sum supply contracts and fixed price supply contracts under CPFF prime supply contracts. *See* 10 C.F.R. § 88.15-109 (1943 Supp.).

[260] Goldman, *supra* note 186 at 750-51.

[261] *See* 10 C.F.R. § 88.15-310(5) (1943 Supp.).

[262] HERMAN M. SOMMERS, PRESIDENTIAL AGENCY: THE OFFICE OF WAR MOBILIZATION AND RECONVERSION 175 (1950).

[263] James E. Murray, *The Contract Settlement Act of 1944*, 20 N. U. L. Q. REV. 125, 129 (1944). James Murray was a United States Senator from Montana who, along with Senator Walter F. George from Georgia, sponsored legislation in Feb. 1944 that ultimately became the Contract Settlement Act of 1944, *see infra* note 274.

conclusive settlements without review by the General Accounting Office (GAO).[264] He testified at the congressional hearings against a proposal that allowed for final settlement without GAO audit. He argued that the interests of the United States were not protected in any bill which required a contracting officer's mandatory final and conclusive termination settlement within 30 days without a GAO audit.[265]

Two developments occurred before passage of a contract settlement bill. First, on January 8, 1944, James Byrnes, Director of the Office of War Mobilization, issued a new *Uniform Termination Article* for fixed price supply contracts, and a *Statement of Principles for Determination of Costs.*[266] Although it did not apply to CPFF contracts, it was important because it retained the doctrine of the contracting officer effecting a final settlement by negotiation, including a reasonable allowance for profit. It provided uniform language and was intended to lead to speedy and fair settlements.[267] James Byrnes ordered all procurement agencies to use the new article to the fullest extent practicable in all new war contracts and to give contractors the opportunity to have the article included in all existing contracts.[268]

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[264] Goldman, *supra* note 186 at 752.

[265] Goldman, *supra* note 186 at 753-54. The Comptroller General was Lindsay C. Warren who testified before the House Military Affairs Committee on Oct. 18, 1943. *Id.* at 757.

[266] The War Dep't had already been using a uniform termination article in fixed price supply contracts since 1941. There was a need to make the termination article and procedures uniform for all agencies and contractors. *Id.* at 761.

[267] David A. Goldman, *The War Contract Settlement Act of 1944*, 23 MICH. ST. B. J. 515, 517-18 (1944).

[268] Goldman, *supra* note 186 at 762.

The second development occurred in November 1943, when James Byrnes appointed Bernard Baruch as director of the special unit for War and Post-War Adjustment Policies.[269] He headed the unit along with his close associate, John Hancock, Chairman of the Joint Contract Termination Board.[270] Baruch and Hancock issued a widely-acclaimed, 120-page *Report on War and Post-War Adjustment Policies* to Byrnes on February 15, 1944.[271] One finding of the Baruch Report opposed the GAO's position on comprehensive audits before final payment. It found that such a procedure would "quibble the nation into a panic."[272] The report generally agreed with the proposal introduced in the Murray-George bill with a few variations.[273]

In June, Congress enacted the Contract Settlement Act of 1944, approved by President Roosevelt on July 1, and effective July 21.[274] The Act's co-authors recognized the divergent sides of the debate between the GAO and the War Department, but sided with the later following the Baruch-Hancock recommendations in setting forth the Act's twin fundamental principles:

> (1) Businessmen shall be paid speedily the fair compensation which is due them for the termination of their war contracts; and

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[269] UNITED STATES OFFICE OF WAR MOBILIZATION AND RECONVERSION, FIRST REPORT: PROBLEMS OF MOBILIZATION AND RECONVERSION 13 (1945).

[270] Goldman, *supra* note 186 at 762.

[271] SEN. DOC. NO. 154, 78th Cong., 2d Sess. (1944); SOMERS, supra note 262 at 176.

[272] Goldman, *supra* note 267 at 515.

[273] LaBrum, *supra* note 254 at 247.

[274] 41 U.S.C. §§ 101-125 (1994). It was introduced as Senate Bill 1718 on February 11, 1944, by Senators Murray and George, with its companion bill in the House was introduced on May 10, 1944.

> (2) The Government, when paying out such fair compensation, should be carefully protected against waste and fraud.[275]

The Act also relied on the *Uniform Termination Article* recommended by Baruch and Hancock and on the applicable cost principles for cases not settled by agreement.[276]

One of the key provisions of the Act was the finality of settlements.[277] Section 3(m) of the Act defined "final and conclusive" as:

> such settlement, finding or decision [which] shall not be reopened, annulled, modified, set aside, or disregarded by any officer, employee or agent of the United States, or in any suit, action or proceeding, except as provided in the act.[278]

Section 6(c) of the Act provided that termination claims were to be settled by agreement, or by determination of the amount due without agreement. If the settlement was arrived at by agreement, such agreement was to be final and conclusive except:

> (1) to the extent that the parties may have otherwise agreed in the settlement, (2) for fraud, (3) upon renegotiation to eliminate excessive profits under the Renegotiation Act . . . or (4) by mutual agreement made before or after payment.[279]

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[275] SENATE COMM. ON MILITARY AFFAIRS, CONTRACT SETTLEMENT ACT OF 1944, S. REP. NO. 836, 78th Cong., 2d Sess. 2, *reprinted in* 1944 U.S.C.C.A.N. 1161-73 (1944).

[276] COMM. ON THE JUDICIARY, SETTLEMENT OF CLAIMS ARISING FROM TERMINATED WAR CONTRACTS, H. R. REP. 1590, 78th Cong., 2d Sess. 31 (1944).

[277] When a settlement was made, it was to be final and conclusive except for fraud or upon renegotiation to eliminate excessive profits under the Renegotiation Act. H. R. REP. NO. 1443, *supra* note 250 at 7.

[278] 41 U.S.C. § 103(m) (1994).

[279] 41 U.S.C. § 106(c) (1994).

One commentator concluded that the purpose of the provision, when considered with other provisions, was to avoid subsequent reopening of settlements by the GAO, thus making final settlement similar to private agreements.[280]

The authority to indemnify contractors was included in § 20(a)(3) of the Act. Specifically, it conferred authority on the contracting agency when settling any termination claim, "to agree to assume, or indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement."[281] This provision, and the respective clause in the settlement agreement, provides contractors with the basis for seeking indemnification for post-settlement third party claims, such as those of Ford and General Dynamics for current environmental cleanup costs.

The Act also provided for the contracting agencies to establish methods and standards for determining fair compensation for the termination of war contracts, including cases in which claims could not be settled by agreement.[282] In November 1944, *Procurement Regulation (PR) 15* and the *Technical Accounting Manual (TAM)*[283] were reissued as the combined regulations of the War and Navy Departments titled the *Joint Termination Regulation, Including Joint Termination Accounting Manual*, or the JTR.[284]

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[280] Louis M. Brown, *Termination of War Contracts: Some Observations on the Contract Settlement Act of 1944*, S. CAL. L. REV. 1, 9-10 (1944).

[281] 41 U.S.C. § 120(a)(3) (1994).

[282] 41 U.S.C. § 106(b),(d) 1994).

[283] *See supra* note 259.

[284] 10 C.F.R. Pts. 841-849 (1945 Supp.); The *Joint Termination Accounting Manual* applied to fixed-price supply contracts. The *Termination Manual (TM) 14-1000,*

Appeals were provided for termination claims not settled by agreement. Where a contractor contested the agency determination, it could appeal to the Appeal Board of the Office Contract Settlement or bring suit against the United States in the Court of Claims (now called the United States Court of Federal Claims) or any appropriate District Court.[285] The Act was silent on any Statute of Limitations. Rather, the limitation was on the claim being based on a terminated war contract.[286]

In October 1944, the Office of War Mobilization and Reconversion was established by Congress, replacing the OWM with added jurisdiction over the Office of Contract Settlement.[287] After passage of the Contract Settlement Act and through the Fall of 1944, approximately 4,000 contracts were canceled each month, totaling $1.5 billion. By January 1, 1945, the undelivered value of outstanding contracts was estimated at $65 billion.[288] The average time lag between termination and final settlement was four months compared to eight months after World War I.[289]

The transition from war to peace for contract terminations was smooth and speedy. Herman Somers writes:

> By the end of 1945, 83 percent of canceled contracts had been settled and about 50 percent of the total claims involved. By mid-1946 the

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Administrative Audit Procedures for Cost-Plus-Fixed-Fee Supply Contracts, was issued for use with CPFF contracts. 10 C.F.R. § 841.114-2 (1945 Supp.); *see also* Edmund W. Burke, *War Contract Termination: The Contract Settlement Act of 1944*, 23 CHI.-KENT L. REV. 107, 154 (1945).

[285] 41 U.S.C. § 113(b) (1994).

[286] 41 U.S.C. § 103(h) (1994).

[287] HAROLD G. VATTER, THE U.S. ECONOMY IN WORLD WAR II 83-84 (1985).

[288] OFFICE OF WAR MOBILIZATION AND RECONVERSION, *supra* note 269 at 54.

[289] *Id.* at 56.

> agency had virtually completed its task. Its successful operation, though in a limited field, represented a too-rare example of how advance planning and preparation can be made to pay dividends.[290]

As a result of the expeditious and efficient handling of contract terminations, the Contract Settlement Act and the JTR were effective in averting the chaos caused by demobilization which had occurred following World War I. James Nagel writes:

> The regulation's effectiveness was proven on V-J Day when, within five minutes of the announcement of Japan's surrender, previously prepared telegrams were dispatched directing the procurement districts to terminate war contracts. Within two days, 60,000 contracts, totaling $7.3 billion, had been canceled. Similar actions, although not as large, had occurred three months earlier on V-E Day. In all, the government terminated $20 billion in contracts and minimized litigation. The orderly termination process helped avoid a general post-war depression.[291]

Two of the thousands of settlement agreements included those with Ford and Consolidated. In the next two sections are discussions about the contract terms, the performance, and the settlement agreements with those two contractors.

C. Ford Motor Company's Contract for B-24 Bombers at Willow Run

1. Ford's Military Contracts

Ford Motor Company first engaged in war contracting during World War I. Though a pacifist, Henry Ford agreed to place his company at the government's disposal without profit. Ford's first World War I contract was to manufacture 2000 chassis to be equipped as ambulances. During World War I Ford also made steel helmets, ammunition boxes, airplane engines, tanks and even tractors to assist the

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[290] SOMERS, *supra* note 262 at 180.

[291] NAGLE, *supra* note 169 at 463.

British with their food shortage. Ford's most famous contract was for a 200-ton, 204-foot long submarine.[292]

It was during World War II that Ford's war effort made it the pride of the nation. Following the Spring and Summer of 1940 when the Germans overwhelmed the Low Countries and France and began a bombing campaign against the British, President Roosevelt delivered his famous Fireside Chat in which he appealed to American industry to become the "Arsenal of Democracy." President Roosevelt stated:

> In a military sense Great Britain and the British Empire are today the spearhead of resistance to world conquest. And they are putting up a fight which will live forever in the story of human gallantry.
>
> . . . .
>
> We are planning our defense with the utmost urgency and in its vast scale we must integrate the war needs of Britain and the other free nations which are resisting aggression.
>
> . . . .
>
> Guns, planes, ships, and many other things have to built in the factories and the arsenals of America.
>
> . . . .
>
> We must be the great arsenal of democracy.[293]

2. The Willow Run Contracts

Ford Motor Company responded immediately to the President's challenge. Although Ford had already contracted with the Army in 1939 to develop Jeeps, and

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[292] *Id.* at 309-311.

[293] FDR'S FIRESIDE CHATS 170-72 (Russell D. Buhite & David W. Levy eds., 1992). Shortly after this Fireside Chat, President Roosevelt delivered his famous "Four Freedoms Speech" in his annual message to Congress on Jan. 6, 1941. In it he reiterated his call for an increase in armament production. *See Four Freedoms*

Ford was already involved in follow-on projects to develop the M4 tank, anti-aircraft gunnery and amphibious vehicles, its biggest contract was to build the B-24 Liberator at Willow Run.[294] Henry Ford, now in his late seventies, had opposed U.S. aid or arms to Britain and France in 1939, and cared little for President Roosevelt. Ford boldly declared, nonetheless, on May 28, 1940, that the Ford Motor Company stood ready to "swing into a production of a thousand airplanes of standard design a day."[295]

On January 8, 1941, Charles F. Sorensen, a member of Ford's Board of Directors and Director of Production, flew to San Diego, California along with Dr. George Mead from the National Defense Advisory Council[296] to meet with Reuben F. Fleet, President of Consolidated Aircraft Company, developers of the B-24 bomber.[297] Consolidated was unable to mass produce the plane without significant enlargement of their factory. Because of its west coast location, however, the United States Army Air Corps felt it was vulnerable to attack.[298] After analyzing the facility, Sorensen went back to his hotel room and conceived of the plant that would adapt the mass production

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Speech, Franklin D. Roosevelt, 1941, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663 (Facts-On-File, Inc., ed. 1995).

[294] PETER COLLIER & DAVID HOROWITZ, THE FORDS: AN AMERICAN EPIC 177, 181 (1987). Due primarily to the B-24 contract, Ford Motor Company became the third largest defense contractor in World War II. General Motors was the largest; Curtiss-Wright, the Wright brothers' Ohio plane-making company was second. Detroit prided itself on being the "arsenal of democracy" due in large part to Ford's various contracts. ROBERT LACY, FORD: THE MEN AND THE MACHINE 386-87, 390 (1986).

[295] LACY, *id.*

[296] Dr. Mead was Director of Procurement for the Aeronautical Section, National Defense Advisory Council. *See supra* notes 211-13 and accompanying text.

[297] KIDDER, supra note 120 at 47.

[298] *Id.*

assembly line concept to aircraft production. The following day, with Edsel Ford's concurrence, Sorensen told George Mead that Ford Motor Company was prepared to manufacture the B-24 as long as it could manufacture the complete airplane, not just assemblies.[299]

On February 21, 1941, Ford Motor Company received a Letter of Intent to build 1200 bombers to be shipped to Consolidated's Tulsa and Fort Worth plants for assembly.[300] Ford received verbal consent to manufacture complete airplanes on May 1, 1941. A Letter of Intent for 800 planes followed on June 5, 1941.[301] On April 18, 1941, groundbreaking at the Willow Run factory site began. Albert Kahn was the architect of the plant, and called it "the most enormous room in the history of man."[302] Ford Motor Company carried on the planning and construction until June 25, 1941, when the Defense Plant Corporation (DPC) assumed ownership and responsibility for the Willow Run project. Ford entered into a lease arrangement with the DPC to manage construction and factory operations on their behalf.[303]

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[299] Edsel Ford had also accompanied Sorensen and Mead, and was then the President of Ford Motor Company, having taken leadership from his father. Upon return to Michigan, Henry Ford also authorized the proposal. *Id.* at 51, 54-5.

[300] *Id.* at 66.

[301] *Id.* at 66-7.

[302] *Id.* at xiii. Kahn designed the structure in an L shape to meet Henry Ford's wishes to keep the plant entirely within the Washtenaw Country, a conservative pro-Republican community with lower taxes. LACY, supra note 294 at 391. Henry Ford also required that the stream of Willow Run itself would not be diverted. Rather, it was allowed to flow through a concrete conduit beneath the plant across the factory site. *Id.*

[303] KIDDER, *Id.* at 91.

The sewage and water treatment facilities which many years later were to become the subject of EPA scrutiny, were designed by a Detroit firm. The sewage disposal plant for activated sludge was built south of the main factory near the banks of Willow Run.[304]

On April 16, 1942, less than a year after construction had begun, the first center wing was completed.[305] The total cost of the building and equipment was $103 million.[306]

Ford Motor Company had three contract orders at Willow Run. Under the Douglas Aircraft Company subcontract (W 535-ac-18722), Ford was to produce 954 "knock-down" bombers (i.e. for assembly by the prime contractor); under the Consolidated subcontract (W 535-ac-18723) Ford was to produce 939 "knock-down" planes; and under the prime contract with the government (W 535-ac-21216) Ford was to manufacture 8709 planes, for a total of 10,602 planes.[307] The subcontracts were signed on May 20, 1941, and the prime contract (for 795 complete bombers) was signed September 26, 1941.[308]

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[304] *Id.* at 95. The water treatment plant was 71 feet by 70 feet and covered an area of 18,000 square feet. *Id.* at 307. Also at the Willow Run plant was a cyanide plant with three reaction plants, the only one it its kind in the country. It also had a Detrex Solvent Machine which used trichlorethylene and washed stock up to 10 feet long. *Id.*

[305] *Id.* at 67.

[306] *Id.* at 273.

[307] *Id.*

[308] *Id.* at 235-6.

The first Ford-assembled plane was completed on May 15, 1942 and was accepted by the Army on September 30, 1942.[309] In March 1944, the Willow Run plant manufactured a record 462 B-24 bombers at a rate of one bomber every 63 minutes. That rate was exceeded the following month when 455 planes were manufactured in 450 hours, or an airplane every 59 minutes.[310] The last plane to come off the assembly line was plane number 8685 on June 25, 1945.[311]

Ford did experience several problems early on, however. Equipment arrived behind schedule and tooling proceeded slowly during the first production year. There was a lack of transportation and adequate housing for the plant workers that made a stable retention of the workforce difficult. Employment at the plant peaked at 42,331 in June 1943. In the following two years employment declined substantially as Ford decentralized subassembly work to other plants and concentrated on final assembly work at Willow Run.[312]

Nonetheless, the Willow Run bomber plant became a significant asset during the war. In the same fashion Henry Ford had applied the elements of mass production in 1912-1913 in producing automobiles at his Highland Park, Michigan plant, Ford Motor Company's Willow Run Plant achieved the distinction of continuous production of one B-24 bomber per hour.[313] The true significance of Willow Run, however, was the

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[309] *Id.* at 238, 240.

[310] *Id.* at 138, 189.

[311] *Id.* at 229, 231.

[312] CLIVE, at 31.

[313] IAP, Inc. v. Mercedes-Benz of N. Am., Inc., 571 F.Supp. 262, 265 (D.N.J. 1983).

impressive fact that not only were so many planes produced per hour, but they left the "product line in functional capacity suitable for their useful lives."[314]

3. The Contract Clauses

The Ford prime contract number W 535-ac-21216 was a cost-plus-fixed-fee supply contract. It called for Ford to deliver 795 B-24E heavy bombardment airplanes (bombers) and spare parts and data.[315] The estimated cost of the initial contract was $218,625,000 with a fixed fee of $13,117,5000, or six percent of the estimated cost.[316]

Article 3 of the contract specified the terms of consideration. This clause provided that cost would be determined by TD 5000, § 26.9. Ford refers to this article in support of current claims for cost reimbursement for environmental cleanup costs. Article 3(b) provided:

> (b) For purposes of determining the amounts payable to Contractor under this contract, allowable items of cost will be determined by the Contracting Officer in accordance with regulations for the determination of the cost of performing a Government contract as promulgated by the Treasury Department in section 26.9 of Chapter I of Title 26 of Code of Federal Regulations, as contained in T. D. 5000 and approved by the Secretary of War August 2nd, 1940, it being understood and agreed, without limiting the generality of the foregoing that:
>
> . . . .
>
> (3) Upon completion or termination of this contract all costs of rehabilitation of Contractor's plant and equipment, including rearranging facilities within a department, necessary in order to restore Contractor's plant to condition for use in the ordinary operation of Contractor's

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[314] *Id.* at 266.

[315] Contract No. W 535-ac-21216, Sept. 26, 1941, at 2 (on file at the Air Force Materiel Command Law Office, Wright-Patterson Air Force Base, Ohio). The airplanes were to conform to Consolidated Aircraft Corporation's specification report dated March 18, 1941. *Id.*

[316] *Id.* at 4.

business, excluding, however, all such costs in any plant or plants made available under an Emergency Plant Facilities Contract, a Defense Plant Corporation Lease or similar contract or lease, shall be allowable items of cost hereunder; Provided, That prior to the making of any changes in the plant of the Contractor for which a rehabilitation charge will subsequently be claimed, the Contractor shall notify the Contracting Officer of the proposed changes and shall furnish the Contracting Officer such information concerning the proposed changes as the Contracting Officer may direct.

. . . .

(5) The costs of depreciation, maintenance, repairs and renewals of, and of insurance on or in connection with, all the facilities needed and used for the performance of this contract, shall be allowable items of cost hereunder, except to the extent that provision is made, apart from this contract, for the payment of such costs by Defense Plant Corporation or by the Government or otherwise than by the Contractor.

. . . .

(8) Costs (or readily separable items thereof) commonly termed "overhead" or "burden" or "indirect expenses" attributable wholly to divisions or units of facilities used by Contractor and used exclusively in producing the articles called for in this contract may be charged direct to this contract, without the necessity of applying rules for the allocation thereof;

. . . .

(10) In addition to normal wastage, scrap, and corrective labor under usual manufacturing conditions, all excessive wastage, scrap, and corrective labor, reasonably incident to work under existing abnormal conditions, shall be allowable items of cost hereunder;

. . . .

(13) Premiums paid by the contractor, but not in excess of a total amount approved by the Contracting Officer, for insurance of the Contractor against liability imposed upon the Contractor by law for damages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, and/or against liability imposed upon the Contractor by law for damages because of injury to or destruction of property, including the loss of use thereof, that may result from accident and arise out of the operation, use, maintenance or existence of any of the airplanes or spare parts manufactured hereunder,

including premiums for the defense by the insurer of any litigation in respect thereto, shall be allowable items of cost hereunder; . . . .[317]

TD 5000, § 26.9 included as an element of contract cost, general expenses that included expenses of distribution, servicing, and administration, defined as follows:

> (g) Expenses of distribution, servicing, and administration.--Expenses of distribution, servicing, and administration, which are treated in this section as a part of general expenses in determining the cost of performing a contract or subcontract (see paragraph (b) of this section), comprehend the expenses incident to and necessary for the performance of the contract or subcontract, which are incurred in connection with the distribution and general servicing of the contracting party's products and the general administration of the business, such as--
>
> (1) Compensation for personal services of employees.--The salaries of the corporate and general executive officers and the salaries and wages of administrative clerical employees and of the office service employees such as telephone operators, janitors, cleaners, watchmen, and office equipment repairmen.[318]

Article 9 of the contract provides the terms for termination of the contract for convenience of the government. It provided in pertinent part:

> (b) Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:
>
> (1) The Government shall *assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract*; and the Contractor shall, as a condition to receiving the payments mentioned in this Article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of assuring to the Government, so far as possible, the rights and benefits of the Contractor under such obligations or commitments.

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[317] *Id.* at 4-6.

[318] 26 C.F.R. § 26.9(g) (1940 Supp.)

> (2) The Government shall reimburse the Contractor for all costs incurred by the Contractor in the partial performance of this contract as determined in accordance with Article 3 and not previously reimbursed.
>
> . . . .
>
> (5) The obligation of the Government to make any of the payments required by this Article shall be subject to any unsettled claims for labor or material or any claim the government may have against the Contractor.
>
> (c) Upon the making of said payments all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever, except that all rights and obligations of the respective parties under the articles, if any, of this contract applicable to Patent Infringements and Reproduction Rights shall remain in full force and effect.[319] (emphasis added)

These contract clauses form the basis of the theory for Ford's current claim for indemnification and reimbursement of environmental cleanup costs that is discussed in more detail in Chapter III.

D. Consolidated Aircraft's Modification Center Contract in Tucson, Arizona

1. The Development of Consolidated Aircraft Corporation

In 1918, then Major Reuben Fleet was recommended by Colonel Henry "Hap" Arnold to head the fledgling airmail program. The Air Service program failed after just a few months and Major Fleet went on to become an army contracting officer. In 1922 he left the Army and founded Consolidated Aircraft Corporation the following year.[320] Over the years several other aircraft manufacturers joined it through a complex series of mergers, reorganizations, and acquisitions. During World War II it became

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[319] Contract No. W 535-ac-21216, *supra* note 315 at 14, 15(a).

[320] NAGLE, *supra* note 169 at 328-30, 355.

Consolidated-Vultee Aircraft Corporation, or Convair. In 1954, the company merged with General Dynamics to become the General Motors of the aircraft industry.[321]

When World War II commenced, Consolidated was among the largest companies in the aircraft industry along with Douglas, Lockheed, North American (all in southern California) and Boeing in Washington and Kansas.[322] By 1942, Consolidated had merged to become Consolidate-Vultee and helped form the Aircraft War Production Council with other West Coast aircraft manufacturers to discuss mutual problems and share knowledge.[323]

2. Tucson Modification Center Contract

Consolidated Aircraft contracted with the Army Air Forces, first by a Letter Contract Special Form on April 14, 1942, and later by a Modification Center Contract on October 5, 1942, to "establish, organize, operate and provide personnel for a Modification Center" at the Municipal Airport at Tucson Arizona.[324] The contract was a CPFF contract with an estimated cost of $2,597,000 and a fixed fee of $155, 820, or six percent.[325]

Article 3 of the contract provided for consideration and the government agreed to pay Consolidated's costs. In particular, Article 3(b) defined allowable costs, as in the Ford Willow Run contract, and incorporated TD 5000 into the contract by reference.

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[321] *Id.* at 355.

[322] *Id.* at 435.

[323] *Id.* at 456.

[324] Contract No. W 535-ac-26999, Oct. 5, 1942 (on file with the Environmental Litigation Division, Air Force Legal Services Agency, Arlington, Va.).

The language is similar to the Ford contract, but is not identical. Article 3(b) provides in part:

> (b) [A]llowable items of cost will be determined by the Contracting Officer in accordance with regulations for the determination of the cost of performing a contract . . . [and] the following shall be considered as allowable items of cost hereunder;
>
> . . . .
>
> (7) Cost of such bonds and insurance as the Contracting Officer may approve or require, and costs and expenses incurred in the defense and/or discharge of such claims of others on account of death or bodily injury of persons or loss or destruction of or damage to property as may arise out of or in connection with the performance of the work under this contract; provided that such reimbursement shall not include any amount for which the Contractor is indemnified or compensated by insurance or otherwise, or any amount for which it would have been so indemnified or compensated except for the failure of the Contractor to procure or maintain bonds or insurance in accordance with the requirements of the Contracting Officer. . . .
>
> . . . .
>
> (11) All losses and expenses actually sustained or incurred by the Contractor in the performance of this contract not compensated for by insurance or otherwise, and not proximately caused by the fault or negligence of the Contractor, provided however, that willful negligence, willful misconduct, or failure to exercise good faith by any of Contractor's personnel (other than Contractor's officers, directors and employees having supervision of the Center and its major operations) shall not be deemed to be the fault or neglect of the Contractor, except in cases where Contractor has failed to exercise reasonable care in the selection of employment of individual workers involved, or where such persons have been retained after Contractor has had reason to believe that such persons are not reliable and trustworthy.[326]

Article 9 contained the termination provisions. Article 9(a) provides in pertinent part:

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[325] *Id.* at 5.

[326] *Id.* at 6-7.

(a) [S]hould conditions arise which make it advisable or necessary in the interest of the Government that work be discontinued under this contract, the Government may terminate this contract by a notice in writing from the Contracting Officer to the Contractor. . . .

(b) Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

(1) The government shall *assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract, . . .*

(2) The Government shall reimburse the Contractor for all expenditures made in accordance with Article 3 and not previously reimbursed.

(3) The Government shall reimburse the Contractor for such further expenditures as the Contractor may incur after and because of the termination or expiration of this contract. Such expenditures shall include, without limiting the generality of the foregoing, expenditures for the protection of Government property, and accounting services in connection with the settlement of this contract as may be approved by the Contracting Officer.

. . . .

(c) Upon the making of said payments all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever except that all rights and obligations of the respective parties . . . in respect of costs, expenses, and liabilities which may thereafter be imposed on, or incurred by, the Contractor, without its fault or neglect, which are then undetermined or incapable or determination as to either existence, validity or amount, shall remain in full force and effect (except to the extent that responsibility therefor may have been assumed by the government under or pursuant to the provisions of subparagraph (1) of paragraph (b) of this Article).[327]

On June 30, 1944, the government suspended work on the Modification Center Contract. On November 9, 1945, Consolidated and the government entered into a Settlement Agreement purportedly settling the rights and responsibilities of the parties

arising out of the contract. The settlement Agreement incorporated Article 9 of the contract.[328]

The claim by General Dynamics focuses on the assumption of liability by the government under Article 9. The theory is discussed in more detail in Chapter III.

E. Summary

The government learned from its successes and its mistakes during World War I in contracting for war materiel. Those lessons were applied two decades later as the nation mobilized for World War II. President Wilson's control of industry for the national defense under the National Defense Act of 1916, was followed by President Roosevelt with the First War Powers Act. The trial and error of the cost-plus-percentage of cost contract and its replacement with the CPFF contract set the standard for the latter's extensive use of negotiated contracts in World War II. Finally, the failure after World War I with the contract termination procedure was carefully remedied prior to the close of World War II of the Contract Settlement Act of 1944 and the Joint Termination Regulation.

Both the Ford Willow Run B-24 production contract and the Consolidated Modification Center contract contain indemnification language and cost reimbursement clauses upon which the respective companies are currently relying for indemnification and reimbursement from the government. The theories of those claims are discussed in Chapter III.

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[327] *Id.* at 14-15.

[328] Tucson Airport Authority v. General Dynamics Corp., 922 F. Supp. 273, No. CIV-94-355-TUC-ROS, 1996 U.S. Dist. LEXIS 8012 at *6 (D. Ariz. Apr. 9, 1996).

CHAPTER III

INDEMNIFICATION AS A THEORY OF RECOVERY FOR CURRENT ENVIRONMENTAL CLEANUP COSTS

A. Indemnification Theory

Indemnify is defined generally as: "(1) to make good a loss that someone has suffered because of another's act or default; (2) to promise to make good such a loss; or (3) to give security against such a loss."[329] To illustrate, using New York law as an example, indemnity can arise in three ways: (1) by a contract in which an indemnification agreement explicitly describes the terms of the agreement;[330] (2) by implication when a special legal relationship creates an implied right of indemnification, and (3) when a person has discharged a duty owed by him, but as between himself and another, should have been discharged by the other.[331] When the United States is a

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[329] BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 436 (1995) ("Etymologically, the word derives from *indemnis* (= harmless) combined with *facere* (= to make). Thus, *indemnify* has long been held to be perfectly synonymous with *hold harmless* and *save harmless*. *See* Brentnal v. Holmes, 1 Root (Conn.) 291, 1 Am. Dec. 44 (1791)"); *see also* American Transtech Inc. v. U.S. Trust Corp., 1996 U.S. Dist. LEXIS 10006, at *28-*29 (S.D.N.Y. July 16, 1996) ("Indemnification is a cause of action which allows the party who is held legally liable to shift the entire loss to another, as opposed to contribution where two or more parties share the loss.")

[330] Haynes v. Kleinewefers & Lembo Corp., 921 F.2d 453, 456 (2d Cir. 1990) ("When a claim is made that a duty to indemnify is imposed by an agreement, that agreement must be strictly construed so as not to read into it any obligations the parties never intended to assume."); Monaghan v. SZS 33 Assocs., 1995 U.S. Dist. LEXIS 2735, *8 (S.D.N.Y. Mar. 8, 1995) ("A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and surrounding facts and circumstances.'").

party to a government contract containing an indemnity clause, the contract clause is interpreted according to appropriate federal standards.[332]

In order to claim indemnification under a World War II-era government contract terminated under the Contract Settlement Act, the party seeking indemnification would need to prove the clause in the contract explicitly provided for indemnification and was not otherwise discharged by a release in the settlement agreement. As is discussed in Part B, *infra*, a critical requirement is that the expense for which indemnification is sought was a cost otherwise reimbursable under the contract (i.e. did the expense arise out of performance of work under the contract?). Thus, under the theory of indemnification, if the contractor can prove there is a duty to reimburse under the contract, and that duty had not been released, nor otherwise expired because of the passage of time, then under the theory, the contractor should be able to enforce the terms of the indemnification.

B. Statutory and Regulatory Authority for Indemnification Under the Contract Settlement Act of 1944

1. Contract Settlement Act

The Contract Settlement Act provides in § 20(a)(3), in its general provisions clause, that the contracting agency shall

> [have authority] in settling any termination claim, to agree to assume or indemnify the war contractor against any claims by any person in connection with termination claims or settlement.[333]

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[331] Gerald M. Levine, *Spreading Costs for Cleaning Up Contaminated Property: Contribution and Indemnification Under CERCLA*, 63 N.Y. ST. B. J., July-Aug. 1991, at 41, 43.

[332] Global Assocs., 88-2 B.C.A. (CCH) ¶ 20,723 (1988), at 104,719.

[333] 41 U.S.C. § 120(a)(3) (1994); *see supra* note 281 and accompanying text.

The legislative history of the Act provides no clarification regarding the provision.[334] There is also no evidence that this broad grant of powers to indemnify has ever been litigated.[335] Presumably, it was included to support the overall purpose of the Act to "facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit" and "to assure . . . contractors . . . [a] speedy and final settlement of claims."[336]

2. Joint Termination Regulation

The Joint Termination Regulation (JTR), promulgated by the War and Navy Departments in 1944 to implement the Act, reiterated that expeditious settlements was one of the basic policies of the Act. The JTR provided that one of the objectives of war contract terminations was to "make a fair and prompt settlement with the war contractor to compensate him for the work done and the preparations made for the terminated part of the contract."[337] It also emphasized that "[u]niformity of procedures [would] facilitate the prompt and equitable settlement of war contracts."[338]

For CPFF contracts, as with fixed-price contracts, the policy of the War and Navy Departments was that "settlement of a terminated [CPFF] contract [was to] be complete

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[334] SENATE COMM. ON MILITARY AFFAIRS, CONTRACT SETTLEMENT ACT OF 1944, S. REP. NO. 836, *supra* note 275.

[335] Frank P. Grad, *Contractual Indemnification of Government Contractors*, 4 ADMIN. L. J. AM. U. 433, 461 (1991).

[336] 41 U.S.C. § 101(a),(b) (1994).

[337] 10 C.F.R. § 841.133 (1945 Supp.).

[338] 10 C.F.R. § 841.137 (1945 Supp.).

and final."[339] The JTR authorized the contracting officer to proceed with the final settlement agreement after receipt of the final audit status letter. Despite the general policy of final settlements and releases, there was provision for exceptions and reservations. The final settlement agreement was to include all government and contractor claims except for costs "which are the subject of . . . [a]n exception which is shown to be outstanding in a final audit status letter . . . and which remains uncleared."[340] In negotiating final settlements the JTR provided for reservations as follows:

> Where rights of the Government and of the prime contractor are to be reserved and are not to be affected by the settlement agreement, the agreement should specify the extent of such reserved rights. For example:
>
> . . . .
>
> (c) Rights and liabilities of either party under . . . covenants of indemnity, ...[341]

The authors of the JTR anticipated that there would be post-settlement litigation under CPFF contracts, for both parties, such as for labor or tax issues, which would affect reimbursable costs. The settlement agreement was to expressly except such items from the settlement release.[342]

The JTR included form articles to be used for settlement agreements for CPFF contracts after complete termination. The final settlement agreement for termination

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[339] 10 C.F.R. § 845.562.1(1) (1945 Supp.).

[340] 10 C.F.R. § 845.563.6(a)(a) (1945 Supp.).

[341] 10 C.F.R. § 847.743-6 (1945 Supp.).

[342] 10 C.F.R. § 847.743-9 (1945 Supp.)

claims were to conform to the prescribed forms.[343] Article 4(c) provided in pertinent part:

> Upon payment of said sum of $ ___ (a) . . . all rights and liabilities of the parties under the Contract and under the Act, . . . shall cease forthwith and be forever released *except*: [The following list of excepted rights and liabilities is intended to cover those which should most frequently be excepted and which should in any event be scrutinized at the time a settlement agreement is signed.]
>
> . . . .
>
> (3) *Claims* by the Contractor against the Government which are *based upon responsibility of the Contractor to third parties and which involve costs reimbursable under the Contract, but which are not now known to the Contractor.*
>
> . . . .
>
> (7) All rights and liabilities of the parties under the articles, if any, in the Contract applicable to . . . *covenants of indemnity*, ...[344]

In addition, Article 5 provides further guidance regarding third party liabilities:

> (1) In addition to the payment of the sum provided for in Article 4, the government *will reimburse the Contractor payments made in discharging claims* described in subparagraph (1) and (3) of said article.
>
> (2) Even though neither the existence nor the amount of any claim referred to in subparagraph (3) of Article 4 may now be known to the Contractor, *reimbursement for payments made by the Contractor in discharge of any such claim* shall include, along with wages and salaries otherwise reimbursable, all additional amounts determined (either by approval of the Contracting Officer or by litigation as hereinafter provided) to be due and payable for overtime compensation and allowances under local, state or Federal laws in connection with such wages and salaries.
>
> (3) The Contractor shall promptly notify the Contracting Officer of any claims of the type described in subparagraph (3) of Article 4 which are asserted subsequent to the execution of this Agreement: In the event of the assertion of any such claim against the Contractor, he shall, if

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[343] 10 C.F.R. § 847.142-3 (1945 Supp.)

[344] 10 C.F.R. § 849.983-1 (1945 Supp.).

requested by the Contracting Officer, promptly and diligently proceed in good faith to assemble all data and information relative to such claim. *The expenses incurred by the Contractor in the performance of this duty shall be reimbursable under the Contract.*

(4) If the Contracting Officer shall determine that the best interests of the Government require that the contractor initiate or defend litigation in connection with *claims of third parties arising under the Contract* or by virtue of its termination, the Contractor will proceed with such litigation in good faith and *the costs and expenses of such litigation*, including judgments and court costs, allowances rendered or awarded in connection with suits for wages, overtime or salaries, and other items, and reasonable attorneys' fees for private counsel when the Government does not furnish Government counsel, *shall be reimbursable under the Contract.* The term "litigation" shall include suits at law or in equity and proceedings before any Governmental agency having jurisdiction over the claim.[345] (emphasis added)

Nonetheless, despite these exceptions for agreed upon reservations, the settlement agreements were otherwise to be final and conclusive. The policy of the War and Navy Departments was that final settlements should be reopened only in unusual cases, otherwise the Act's objective of finality of settlements would be thwarted.[346]

The language in the settlement agreement article demonstrates that reimbursement for costs resulting from then unknown third party claims and covenants of indemnity were recognized and expected to occur. The language in the article fails to make clear, however, what the limitations of the claims might be. It is also unclear from the JTR language whether there was a limit to the time for reservations or whether it was for an indefinite time period. The language in the JTR form articles 4(c) and 5 do

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[345] *Id.*

[346] 10 C.F.R. § 847.748-1,2 (1945 Supp.).

make it clear that for the third party claims to be reimbursable, they must have involved "costs reimbursable under the contract."[347]

3. Procurement Regulation 15

The language in the War Department's *Procurement Regulation (PR) 15* after which the JTR was patterned, is substantially similar to the reservation and indemnity language in the JTR. In fashioning a final settlement agreement, the contracting officer and the contractor were to:

> execute a final settlement agreement in the form of a supplemental agreement to the contract [section reference omitted]. Such supplemental agreement will set forth the amount of such final payment of cost reimbursement and of the fixed fee, will state the terms of any adjustment of the fixed fee, will state that all Government property under the contract and theretofore undisposed of has been delivered to the Government, will list such property or will incorporate a list thereof by reference, will embody a general release by the contractor and the Government of all claims against each other, and *will state in detail all the exceptions to said release (see, for list of such possible deductions, exceptions and reservations, § 88.15-537(b)).*[348] (emphasis added)

The exceptions "which are not to be affected by the settlement" listed at § 88.15-537(b) include "[t]he rights of either party under . . . covenants of indemnity."[349] PR 15 also provided for third party claims when it stated:

> Where there is substantial risk of later litigation (e.g. actions under the Wages and Hours Act, State taxes) *affecting reimbursable costs* under the terminated contract, *such items may be expressly excepted from the releases* if the contract provisions with respect to releases (either as originally set forth in the contract or as inserted by amendment) authorize such exceptions.[350]

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[347] 10 C.F.R. § 849.983-1 (1945 Supp.); *see supra* note 344 and accompanying text.

[348] 10 C.F.R. § 88.15-655 (1943 Supp.).

[349] 10 C.F.R. § 88.15-537(b) (1943 Supp.).

In the form Termination Articles of PR 15, the following termination language is included:

> (2) Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:
>
> (a) The Government shall *assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract*, and the Contractor shall, as a condition to receiving the payments mentioned in this Article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations or commitments.
>
> (b) The Government shall *reimburse the Contractor for all expenditures made in accordance with Article 3* and not previously reimbursed.[351]

Although "full and complete settlement" was contemplated, the CPFF contract final settlement agreement form in PR 15 includes the following reservation language in Article 4(2): "All rights and liabilities of the parties hereto under the articles, if any, in the contract applicable to . . . covenants of indemnity, . . .[may be reserved]."[352] The language regarding risk of later litigation in 10 C.F.R. § 88.15-656 (1943 Supp.) was not included in this form settlement agreement article.[353]

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[350] 10 C.F.R. § 88.15-656 (1943 Supp.).

[351] 10 C.F.R. § 88.15-905(2)(a),(b) (1943 Supp.).

[352] 10 C.F.R. § 88.15-934 (1943 Supp.).

[353] 10 C.F.R. § 849.983-1, art. 5 (1945 Supp.).

C. Requirement for a "Reimbursable Cost"

For the third party claims to be reimbursable, they must have involved "costs reimbursable under the contract."[354] There were several methods for determining reimbursable costs under CPFF contracts.

1. Technical Manual 14-1000

The JTR included the Joint Termination Accounting Manual as Appendix A. It specified at paragraph 4, however, that the manual was not applicable to CPFF contracts. Rather, it stated that the War Department Technical Manual (TM) 14-1000, *Administrative Audit Procedures for Cost-Plus-A-Fixed-Fee Supply Contracts,* was applicable.[355] TM 14-1000 was originally issued according to a memorandum approved by the Under Secretary of War on May 27, 1942, and was applicable for then existing and future CPFF contracts.[356] The purpose of an administrative audit was described in TM 14-1000 in the following terms:

> The purpose of the administrative audit of [CPFF] supply contracts is to ascertain that the claims for reimbursement made by the contractor are in accordance with the provisions of the contract, and that they are substantiated by his records and other supporting evidence. The auditor should consider the following aspects of every cost claimed: Is the item of cost allowable under the terms of the contract, has it been actually

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[354] 10 C.F.R. § 849.983-1 (1945 Supp.), *supra* note 344 and accompanying text.; *see also* 10 C.F.R. § 88.15-905(2)(a) ("Government shall assume . . . all obligations . . . the contractor may have in accordance with the provisions of this contract.", *supra* note 351.

[355] 10 C.F.R. § 841.114-2 (1945 Supp.).

[356] WAR DEPARTMENT, TECHNICAL MANUAL 14-1000: ADMINISTRATIVE AUDIT PROCEDURES FOR COST-PLUS-A-FIXED-FEE SUPPLY CONTRACTS, at iv (1946) (repealed 1955).

incurred, and in the case of a direct charge to the contract, has it been paid by the contractor?[357]

The manual notes that the allowability of costs are also governed by the provisions of the contract defining cost and also TD 5000, where the contracts incorporated TD 5000 into the definition of cost.[358] The manual also describes the procedures for settlement of completed CPFF contracts. The general plan of settlement was provided as follows:

> d. When substantially all determinable costs have been presented and the contracting officer and contractor have agreed upon a settlement date, the auditor, upon notification in writing by the contracting officer, will prepare a closing statement as a basis for the settlement agreement.
>
> . . . .
>
> f. It is recognized that particular types of claims not yet determinable may be excluded under the terms of the settlement agreement. When claims of these types subsequently arise, they should be presented in accordance with the requirements of the individual service involved.[359]

More particularly, the manual provides the following procedure for additional liabilities:

> Where the settlement agreement excludes particular items or types of items which are contingent in nature or for any other reason are indeterminable at the settlement date, it is essential that a complete statement be prepared by the contractor covering all available information which is pertinent to the items excluded and which may be of value to the Government in determining proper payment at any later date.[360]

Chapter 6 of the TM 14-1000 sets forth cost interpretations with instructions for War Department accounting personnel. The basic premise on cost interpretations is

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[357] *Id.* at 1.

[358] *Id.* at ¶ 5.

[359] *Id.* at ¶ 147.

that the specific terms of the contract governs. Thereafter, the cost interpretations may be given consideration where the contract is silent, vague or ambiguous on the respective matter.[361] The interpretations were meant to be consistent with TD 5000, § 26.9.[362]

2. Treasury Decision 5000, § 26.9

The elements of cost of performing a government contract were defined in TD 5000, § 26.9 as:

> [T]he sum of (1) the direct costs, including therein expenditures for materials, direct labor and direct expenses incurred by the contracting party *in performing the contract* or subcontract, and (2) the proper proportion of any indirect costs . . . *incident to and necessary for the performance of the contract or subcontract.*[363]
> (emphasis added)

The remainder of § 26.9 lists the various elements and sub-elements of cost, including: factory cost, other manufacturing cost, miscellaneous direct expenses, indirect engineering expenses, expenses of distribution, servicing and administration, and guarantee expenses.[364]

In determining costs to effect a settlement of a CPFF contract, the particular contract usually would list the allowable reimbursable costs. Frequently, TD 5000, § 26.9 was incorporated by reference in the definition of cost found in the consideration

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[360] *Id.* at ¶ 163.

[361] *Id.* at ¶ 183-84.

[362] *Id.* at ¶ 185.

[363] 26 C.F.R. § 26.9(a) (1940 Supp.).

[364] *Id.* at § 26.9(b)-(h) (1940 Supp.).

article.[365] Thus, the contract cost definitions and the provisions of TD 5000 established the framework to determine if a given cost in a reserved claim was allowable.

3. The "Green Book"

The "Green Book" was the short name given to the pamphlet issued by the War and Navy Departments in April 1942. It was formally titled: *Explanation of Principles for Determination of Costs Under Government Contracts.*[366] The purpose of the pamphlet was to "present in basic outline the principles according to which cost may be determined" under War and Navy Department supply contracts. It specifically recognized TD 5000 as the source of cost principles for those contracts, incorporating that standard by reference. The Green Book stated its object was to:

> State in principle which costs may be admissible . . . , which costs may be inadmissible, and which costs may be subject to limitations as to their admissibility.[367]

The Green Book outlined the items of cost, stating the overall cost principle as follows:

> The total cost under a contract is the sum of all costs *incurred* by the contractor *incident to* and *necessary for the performance of the contract* and properly *chargeable* thereto.[368] (emphasis added)

Thus, the Green Book, in establishing general principles was in accord with TD 5000, § 26.9 regarding the basic requirement that all costs be incident and necessary to contract performance.

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[365] *See* PR 15, 10 C.F.R. § 88.15-651(h)(1943 Supp.).

[366] CIBINIC, *supra* note 192 at 146; *see supra* note 239 and accompanying text.

[367] *Id.*

D. Case Law in Support of Indemnification

1. Comptroller General Decisions

Prior to the creation of the War Department Board of Contract Appeals (WDBCA)[369] in 1942, when a contractor desired to appeal a final decision of a contracting officer, he could present an appeal to the head of the department, and then either present a claim to the General Accounting Office, or to the courts.[370] After CPFF contracts were sanctioned by the Act of July 2, 1940,[371] the Comptroller General issued several opinions regarding reimbursement of costs under CPFF contracts.

The Comptroller General's decisions from the World War II-era seemed to intermingle the government's duty to indemnify the contractor with issues of cost reimbursement. One of the first Comptroller General's opinions dealt with a clause in a CPFF contract providing for reimbursement for loss or damage to a contractor's equipment caused by the negligence of a government employee.[372] The contract for rehabilitation of a rail net at Raritan Arsenal, New Jersey, provided for reimbursement for premiums for insurance and for losses and expenses not covered by insurance sustained "in connection with the work" and found to be "just and reasonable."[373] The

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[368] *Id.* at 147.

[369] *See infra* notes 385-88 and accompanying text.

[370] OFFICE OF THE GENERAL COUNSEL, *supra* note 187 at 102; *see also* 18 Comp. Gen. 826, 1939 U.S. Comp. Gen. LEXIS 91, at *9-*10 (1939) (holding that upon contracting officer's termination of contract, contractor could present claim to GAO or courts (citing United States v. Corliss Steam Engine Co., 91 U.S. 321 (1877))).

[371] Ch. 508, 54 Stat. 712 (1940) (repealed 1946), *see supra* note 234.

[372] 20 Comp. Gen. 632, 1941 U.S. Comp. Gen. LEXIS 101, at *2 (1941).

Comptroller General approved reimbursement concluding in general about CPFF contracts:

> [T]he contract basically contemplates that the actual cost of the whole work and the risk thereof are to be assumed by the Government; that is, that the contractor is to come out whole, regardless of contingencies, in performing the work in accordance with the contract and the directions and instructions of the contracting officer.[374]

The Comptroller General concluded that the essence of CPFF contracts is that the government assumes the risks in consideration of a small fixed fee, and thereby, the government, in effect, guarantees the contractor against loss.[375]

This broad language supporting reimbursement was not unlimited, however. The Comptroller General later held that the government's assumption of risk under CPFF contracts has limits:

> [It] does not mean that the Government is to assume the risk of the contractor's own fault or folly, or that the contractor is to come out whole regardless of careless conduct of the work or other disregard of his contractual duties.[376]

The Comptroller General held that a contractor "may not be reimbursed for losses where his failure to perform his contractual duties and obligations is a proximate cause of the loss."[377] He held that reasonable care in the hiring and retention of competent

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[373] *Id.* at *6-*8.

[374] *Id.* at *13.

[375] *Id.* at *14-*15.

[376] 21 Comp. Gen. 149, 1941 U.S. Comp. Gen. LEXIS 240, at *8 (1941). The Comptroller General stated that cost reimbursement is fact specific based on rights and obligations under the contract. *Id.* at *4. The claim involved lost tools, damaged and destroyed equipment and buildings of the contractor. It had the same clauses regarding insurance and losses not covered by insurance that were included in the contract reviewed in 20 Comp. Gen. 632 (1941), *id.* at *12, *supra* note 372.

employees is necessary before reimbursement for negligent loss caused by such employees will be allowed.[378]

In two other decisions, the Comptroller General articulated the key test in determining cost reimbursement. The test was whether the expense was necessary to perform the contract work. Based on this test, the Comptroller General allowed transportation and housing expenses for transferred contractor employees at a remote work site.[379] He also allowed the cost of operating a cafeteria at a remote Defense Plant Corporation site near Houston, Texas, holding that the cafeteria was "incident to and necessary for the performance of the contract."[380]

The Comptroller General determined various costs were not reimbursable because they were not "reasonably necessary [for the] performance of the contract work," including: the cost of deputizing plant guards as deputy sheriffs;[381] the cost of back pay approved by the contracting officer for reinstated employees discharged for

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[377] *Id.* at *21.

[378] *Id.* at *19-*20. In 22 Comp. Gen. 892, 1943 U.S. Comp. Gen. LEXIS 100, at *9-*10 (1943), the Comptroller General distinguished his opinion in 21 Comp. Gen. 149 (1941), by stating it had no objection to a contract clause reimbursing insurance premiums that also covered liability to third parties for acts of the contractor's employees, even though exercise of due care in hiring and retention could have avoided liability.

[379] 21 Comp. Gen. 466, 1941 U.S. Comp. Gen. LEXIS 335, at *15 (1941) ("[A]n expense incurred by the contractor, not otherwise specifically provided for, must be shown to be reasonably incident to the performance of the work and to serve a useful purpose in fulfilling the contract requirements.").

[380] 23 Comp. Gen. 867, 1944 Comp. Gen. LEXIS 128, at *4 (1944).

[381] 22 Comp. Gen. 183, 1942 U.S. Comp. Gen. LEXIS 220, at *22 (1942).

alleged union activities;[382] and for unearned wages erroneously paid by a subcontractor.[383]

One commentator summarized five general rules of cost reimbursability gleaned from World War II-era Comptroller General decisions in absence of specific contract language:

> The item of cost incurred must (1) be "reasonably incident" to work, (2) not "presumed (to be) included in the fixed fee," (3) "serve a useful purpose in fulfilling contract requirements," (4) not result from the absence of due care by Contractor management and (5) the contractor may not be reimbursed for any cost incurred "in contravention of the law."[384]

2. War Department Board of Contract Appeals

As the number of war procurement contracts increased dramatically with the United States' entry into World War II, the Secretary or Under Secretary of War could no longer personally consider the contract appeals that followed. On August 8, 1942, the War Department Board of Contract Appeals (WDBCA) was created, similar to the War Department Board of Contract Adjustment created at the end of World War I.[385] The WDBCA was appellate in nature and its jurisdiction was under the contract authorizing the appeal to a representative of the Secretary of War. As such, its

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[382] 22 Comp. Gen. 349, 1942 U.S. Comp. Gen. LEXIS 270, (1942) (holding contracting officer's authority is not unlimited).

[383] 22 Comp. Gen. 948, 1943 U.S. Comp. Gen. LEXIS 118, *10 (1943) (holding that payments made to contractor's cost-plus subcontractor for unearned wages erroneously paid by the subcontractor to its employees was not allowed as a "loss or expense" because contractor had failed to maintain competent and careful employees (i.e. subcontractor)).

[384] W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION § 16.17(c) (1986).

decisions were binding on the parties.[386] The disputes article used in war procurement contracts made the decision of the WDBCA conclusive only as to factual matters.[387] The WDBCA issued written opinions including findings of fact, decision, and an appropriate order for disposition. A number of cases dealt with claims for indemnity and cost reimbursement under CPFF contracts.[388]

In *Pan American Airways, Inc.,*[389] the WDBCA analyzed an indemnity clause in various Pan American contracts. The contractor was seeking reimbursement for various payments to employees for costs incurred. The contract had a clause which stated:

> [T]he Government shall indemnify and hold the Contractor harmless against any loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind whatsoever arising out of or connected with the performance of this contract, unless such loss, expense or damage should be shown by the Government to have been caused directly by bad faith or willful misconduct on the part of some officer or officers of the Contractor acting within the scope of his or their authority and employment.[390]

The contractor claimed that even if the contracting officer disallowed certain costs, they would become losses and expenses directly attributable to the work under

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[385] Hugh C. Smith, *The War Department Board of Contract Appeals*, 5 FED. B. ASS'N J. 74, 74-75 (1943).

[386] *Id.* at 75.

[387] There were a few exceptions under a separate clause included in some contracts which also covered questions of law. *Id.* at 77.

[388] *Id.* at 81. As of Nov. 1, 1943, the WDBCA had received 413 appeals, and had disposed of 244 cases. *Id.* at 82.

[389] 3 Cont. Cas. Fed. (CCH) 278 (1945).

[390] *Id.* at 280.

the contract. The WDBCA rejected this open-ended interpretation of the indemnity clause as untenable. The Board held that it was "the intent of the contracts . . . that the Government would bear all expense of the project and to this end would reimburse appellants for all reasonable costs and expenses incurred."[391] The Board interpreted the indemnity clause to mean the government agreed to reimburse "losses and expenses incident to the performance of the work in accordance with the provisions of the contracts and not losses and expenses incurred . . . as a result of acts in disregard of such provisions."[392] Thus, the government would indemnify the contractor if the costs were reasonable, were in accord with the contract provisions, and were incident to the performance of the contract work.

In another case, *Douglas Aircraft Company, Inc.* (hereinafter "Douglas"),[393] the appellant contractor sought reimbursement for payment to an employee for damage to the employee's car that occurred on the contractor's property when it hit a traffic sign which had fallen on the road and was not visible to traffic. The contract had a clause that defined allowable items of costs to include:

> [The] cost and expenses incurred in the defense and/or discharge of such claims of others on account of death or bodily injury of persons or loss or destruction of or damage to property as may arise out of or in connection with the performance of the work under [the] contract.[394]

The clause also provided there would be no recovery if the contractor was or would have been indemnified by insurance. The Board held the clause did not require

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[391] *Id.* at 286.

[392] *Id.*

[393] 3 Cont. Cas. Fed. (CCH) 811 (1945).

the contractor to prove a "legal liability," but it did have the burden of showing the damage occurred out of or in connection with contract performance. Also, the contractor had to have a reasonable cause to believe the third party had a cause of action for damage against the contractor.[395] Therefore, under this clause, the contractor was indemnified for non-insurable losses "arising out of" contract performance.

The WDBCA considered two other appeals by Douglas in which the issue of costs being "incident to and necessary to the performance of the contract" was raised. The cases are of interest in part because they used language similar to that found in both the Ford and Consolidated contracts. The Douglas contracts included "Article 3 - Consideration" in which TD 5000, § 26.9 was incorporated by reference. In one case, Douglas appealed a denial by the contracting officer to reimburse the cost of circular stickers with the company's logo on them for use by employees.[396] The Board held the cost should be reimbursed because the use of the stickers was to assist employees in labeling their tools and to promote employee loyalty and morale. As such, the proper proportion of indirect costs were "incident to and necessary for the performance of the contract." under TD 5000, § 26.9(a)(2).[397]

In another case, attorneys fees in defense of a tort action filed against Douglas by one of its employees were not considered necessary to the performance of the

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[394] *Id.* at 812.

[395] *Id.*

[396] Douglas Aircraft Co., Inc., 3 Cont. Cas. Fed. (CCH) 731 (1945).

[397] *Id.* at 733.

contract.[398] In that case an employee filed a tort action against a fellow employee and Douglas after the plaintiff's tool chest was broken into and his patented blueprints were stolen by the fellow employee. The contract included special definitions of cost items in Article 3 including subparagraph (1) covering the following cost:

> [C]ost and expenses incurred in the defense and/or discharge of such claims of others on account of death or bodily injury of persons or loss or destruction of or damage to property as may arise out of or in connection with the performance of the work under this contract.[399]

The Board held the lawsuit was not instituted as a result of bodily injury, death, or property damage involving a member of the public or an employee, therefore subparagraph (10) was inapplicable. The Board also held that TD 5000, § 26.9 contained no special provision covering the cost of defending lawsuits growing out of, or occurring during, the performance of a contract. If the cost was reimbursable at all, it needed to fall under the general rule of §26.9(b) covering indirect costs incident to and necessary for performance of the contract.

Douglas cited the broad language of the Comptroller General's decision regarding CPFF contracts.[400] The Board rejected Douglas' argument that the defense of the lawsuit arose out of the contract performance, holding the circumstances of the tort had no relationship to performance of the contract, but only coincidentally occurred while the contact was being performed.[401] The Board concluded:

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[398] Douglas Aircraft Co., Inc., 3 Cont. Cas. Fed. (CCH) 126 (1944).

[399] *Id.* at 128.

[400] 20 Comp. Gen. 632 (1941), *see supra* note 372 and accompanying text.

[401] *Id.* at 129.

> [Attorneys fees were actually] overhead expenses, compensation for which, in the absence of a specific provision to the contrary, is to be assumed to be included in the fixed fee and thus not to be reimbursed as part of the cost of the work.[402]

3. Appeal Board of the Office of Contract Settlement

The Contract Settlement Act, § 13 established the Appeal Board of the Office of Contract Settlement (ABOCS) charged with hearing and deciding appeals under the Act.[403] The ABOCS only had jurisdiction over terminated war contracts, hearing a total of 280 appeals from 1945 to 1953. A party could appeal the ABOCS decision by appealing to the United States Court of Claims or the United States District Court (for claims of $10,000 or less).[404]

The ABOCS did not specifically decide any cases interpreting the indemnity provision of § 20(a)(3) of the Contract Settlement Act.[405] The issue was discussed indirectly, however, in claims where the issue of release in settlement agreements was presented. The issue arose in cases where contractors sought reimbursement for excess unemployment compensation taxes following World War II.

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[402] *Id.* (citing MS Comp. Gen. No. B-36008, 2 Sept. 1943; and Central Constr. Corp. v. United States, 63 Ct. Cl. 290, 296 (1927)).

[403] 41 U.S.C. § 113 (d) (1994); GENERAL SERVICES ADMINISTRATION, 5 DECISIONS OF THE APPEAL BOARD, OFFICE OF CONTRACT SETTLEMENT AND A HISTORY OF THE APPEAL BOARD 271 (1953).

[404] *Id.* at 271-72. A total of 39 claims were appealed to the courts, and in only seven cases did the court differ with the ABOCS decision. *Id.* at 273.

[405] A review of the indexes from the five-volume set of reported cases reveals no citations to § 20(a)(3); *see supra* note 333.

In *United States Rubber Company v. Department of the Army*,[406] the contractor was denied reimbursement for unemployment compensation taxes in 1945 prior to the settlement agreement. Following the settlement, the Court of Claims held that such claims would be allowable.[407] The government agreed the cost was reimbursable, but that it was barred by the terms of the settlement agreement release. The release included an exception for "covenants of indemnity." The contract contained a clause in which the government agreed generally to:

> [I]ndemnify and hold the contractor harmless against any loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind whatsoever arising out of or connected with the performance of the work.[408]

The contract also had a specific clause in which the contractor was to be reimbursed for "disbursement on account of personnel." The Board held that:

> Since the parties have described the liability for the instant claim with particularity, that liability cannot also be found under the general clause even thought in the absence of the specific clause the general would have covered it. (*Mutual Life Insurance Co. v. Hill,* 193 U.S. 551.) We therefore hold that the claim is not a right under the contract article applicable to "covenants of indemnity" and that it is not saved by any exception in the release.[409]

Thus, the Board concluded that the release exception for "covenants of indemnity" would have allowed the indemnity clause to survive the settlement agreement, if there had not been more specific language which was not included in the release.

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[406] 5 App. Bd. OCS (No. 313) 87 (1951).

[407] Federal Cartridge Corp. v. United States, 77 F.Supp. 380 (Ct. Cl. 1948); *see infra* notes 424-28 and accompanying text.

[408] 5 App. Bd. OCS at 90.

[409] *Id.* at 91-92.

In *Stewart-Warner Corporation v. Department of the Army*,[410] the contractor sought reimbursement for similar "excess taxes." The issue was whether the so-called "unknown claims" clause exception to the release would allow for reimbursement. The clause stated:

> Claims by the Contractor against the Government which are based upon the responsibility of the Contractor to third parties and which involve costs reimbursable under the Contract, but which are not now known to the Contractor."[411]

The Board held that the future excess taxes were an "unknown responsibility which was excepted from the settlement agreement by the "unknown claims" clause. It reasoned that the possibility of excess taxes depended upon many variable factors, none of which could have been determined with "reasonable certainty" when the settlement agreement was signed.[412]

A case which held the release was final was *National Gypsum Company v. Department of the Army*,[413] relying on the fact that the release language was specific as to anticipated taxes in certain future years, but failed to list a certain year. The Board held that the "unknown claims" clause failed to save the omitted year because the taxes

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[410] 5 App. Bd. OCS (No. 358) 60 (1950).

[411] *Id.* at 61.

[412] *Id.* A similar result was reached in Hercules Powder Co. v. Dep't of the Army, 5 App. Bd. OCS (No. 342) 24 (1950) (holding unknown claims clause satisfied because excess tax depended on too many variables undeterminable at time of settlement agreement). The Board in *Hercules* also held that the unknown claims clause does not apply only to unknown claims presently existing, but also to future claims. *Id.* at 28.

[413] 5 App. Bd. OCS (No. 337) 43 (1950).

could have been anticipated (and treated as known) in the same way taxes were estimated for the excepted years.[414]

The burden of proof in a claim regarding the release clause was held to be upon the party relying on it. Thus, when the government had to show the asserted claim was covered by the release, it also had to show that the claim was not within the exception.[415]

The Board also held that a party may seek a reformation of the settlement agreement based on a mutual mistake, but the party seeking such reformation had the burden to prove that (1) the parties would have made a different settlement had they known the true facts; and (2) the parties assumed the liability did not exist and entered into the settlement agreement based on that assumption. The matter of the mistake must have been a basic assumption of the settlement, otherwise the party seeking reformation was considered to have taken "the risk that it was not liable to pay [the expense], and the claim for reimbursement of such cost was therefore released."[416]

The Board also decided a number of cases dealing with cost reimbursement under terminated war contracts. In a leading early decision, *Studebaker Corporation v. War Department,*[417] the ABOCS established its jurisdiction to determine cost

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[414] *Id.* at 47.

[415] Maryland Sanitary Mfg. Corp. v. Dep't of the Army, 3 App. Bd. OCS (No. 264) 238, 248 (1949).

[416] *Id.* at 219. *See also* Nassau Boat Basin, Inc. v. War Dep't, 1 App. Bd. OCS (No. 112) (1947) (holding the government was not at fault for contractor's failure to include a cost in the settlement agreement and for which there was no reservation claimed). *Accord* Coat Corp. of Am. v. War Dep't, 2 App. Bd. OCS (No. 108) 37 (1947) (holding no mutual mistake for omission of cost in settlement agreement).

reimbursement claims. In that case, the Board allowed a claim for legal fees and expenses incurred on a completed part of a terminated CPFF contract, refusing to follow the Comptroller General's position that legal fees are not a reimbursable cost under CPFF contracts.[418]

The ABOCS interpreted the TD 5000 language regarding the reimbursability of costs "incident to and necessary for the performance of the contract" in various cases. In *Hudson Motor Car Company v. Navy Department,*[419] the Board held that expenses of employees who organized a band at the contractor's plant were reimbursable, the Board held that they were "employees' welfare expenses" instead of nonreimbursable entertainment expenses. The Board noted:

> The fact that music in a war plant in time of war contributes to employee's welfare and consequently to war production is too well established to require demonstration.[420]

The Board concluded that the words "necessary for the performance" in TD 5000 should not be construed literally in determining the intent of the draftsmen of TD 5000.[421]

These cases indicate the ABOCS relied on the principles articulated in the Comptroller General's decisions, WDBCA opinions, as well as TD 5000 and TM 14-1000 for their analysis. The ABOCS, however, was not reluctant to act independently,

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[417] 1 App. Bd. OCS (No. 51) (1946).

[418] *Id.* at 17-18; *see also* Douglas Aircraft Co., Inc., 3 Cont. Cas. Fed. (CCH) 126 (WDBCA relying on the Comptroller General's position against allowing attorney's fees as costs in litigation), *supra* notes 398-402 and accompanying text.

[419] 2 App. Bd. OCS (No. 110) 21 (1947).

[420] *Id.* at 25.

according to their own charter, in determining whether costs were "necessary for contract performance" and were otherwise intended to be reimbursable.

4. United States Court of Claims

The Court of Claims had jurisdiction to hear claims arising out of the Contract Settlement Act under § 13(b).[422] The Claims Court decided over 100 cases referencing the Contract Settlement Act, but no case ever interpreted § 20(a)(3) regarding indemnity.[423] Several cases did address the issues of releases in the settlement agreements and reimbursable costs.

In the case of *Federal Cartridge Corporation v. United States*,[424] the Court of Claims decided a claim by a small-arms manufacturer seeking reimbursement under a War Department contract. The contractor was required to pay excess Minnesota state Social Security taxes because its payroll exceeded a certain limit as a result of its war contract.[425] The CPFF ordnance contract provided for reimbursement under the standard indemnity clause language in which the government agreed to:

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[421] *Id.*

[422] 41 U.S.C. § 113(b) (1994) ("Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim . . . he may, at his election -- (1) appeal to the Appeal Board . . . ; or (2) bring suit against the United States for such claim . . . in the United States Claims Court or in a United States District Court.").

[423] This includes the Claims Court successors: the Court of Claims from 1982 to 1992, and the Court of Federal Claims from 1992 to the present. Search of LEXIS, Genfed library, Claims file (July 22, 1996), produced 119 hits of the phrase "Contract Settlement Act," with over 70 percent of the cases decided before 1960.

[424] 77 F. Supp. 380 (Ct. Cl. 1948); *see supra* note 407 and accompanying text.

[425] *Id.* at 378-79.

> [H]old the [c]ontractor harmless against any loss, expense . . . , or damage of any kind whatsoever arising out of or in connection with the performance of the work under the contract.[426]

The Court held that the contractor was to be reimbursed in full because the excess tax was an expense "incident to carrying out [the] contract, and under its plain terms."[427] Although the claim was not based on the Contract Settlement Act, it set a precedent for a number of Contract Settlement Act claims decided by the ABOCS in 1949 and 1950 on similar issues with state "excess taxes."[428]

One of the claims relying on *Federal Cartridge* was *United States Rubber Company v. United States.*[429] The ABOCS originally heard the claim in 1951 and held against the contractor. The Board relied on the *Green Book* principles in determining costs as was provided for in the Navy Department ordnance contract. The Board concluded that the excess North Carolina state unemployment taxes were not "properly chargeable" to the CPFF contract because they occurred well after contract termination

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[426] *Id.* at 388.

[427] *Id.* at 389.

[428] *See supra* notes 406, 410, 413, and accompanying text; *see also* Hercules Powder Co. v. Department of the Army, 3 App. Bd. OCS (No. 274) 186 (1949); Stewart-Warner Corp. v. Department of the Army, 3 App. Bd. OCS (No. 280) 192 (1949); Hercules Powder Co. v. Department of the Army, 3 App. Bd. OCS (No. 275) 196 (1949); E. I. du Pont de Nemours & Co., Inc. v. Department of the Army, 3 App. Bd. OCS (No. 272) (1949); Atlas Powder Co. v. Department of the Army, 3 App. Bd. OCS (No. 278) 206 (1949); Hotpoint Inc. v. Department of the Army, 4 App. Bd. OCS (No. 297) 8 (1949); Northwest Airlines, Inc. v. Department of the Army, 4 App. Bd. OCS (No. 282) 20 (1949); E. I. du Pont de Nemours and Co. v. Department of the Army, 4 App. Bd. OCS (No. 347) 226 (1950); Certain-Teed Products Corp. v. Department of the Army, 4 App. Bd. OCS (No. 317) 157 (1950).

[429] 5 App. Bd. OCS (No. 324) 166 (1951), *rev'd*, 160 F.Supp. 492 (Ct. Cl. 1958).

and therefore, were not in the "performance of the contract."[430] The contractor then filed suit with the Court of Claims.

The Court addressed two issues: (1) whether the release provisions of the final settlement barred the contractor's recovery; and (2) if not, whether excess taxes claimed were reimbursable costs under the contract.[431] The Court noted the settlement agreement contained the "unknown claims" clause and held that the clause did not bar subsequent claims because the contractor lacked knowledge of the information required to determine whether a tax was owed in later years.[432] The Court cited a memorandum of the War and Navy Departments that interpreted the "unknown claims" clause under the JTR. It stated:

> [I]t is the position of the War and Navy Departments that a claim will not be considered as "known to the contractor" within the meaning of this provision where such claim against the Government is *based upon a claim of a third party* against the contractor and where (a) the claim of the third party *arose in connection with performance of the contract* as distinguished from its termination and (b) the claim of the third party *has not been asserted against the contractor up to the time of the settlement* agreement. This interpretation is not intended to indicate the only cases which may properly be considered as falling within the exception, but merely to indicate that at least under the circumstances stated the claim will not be considered as "known to the contractor" at the time of settlement.[433] (emphasis added)

This opinion indicates that the claim must have arisen during contract performance and had not been asserted until after settlement. It did not answer the question whether a claim could have *arisen* after the settlement and yet still be considered to have arisen in

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[430] 5 App. Bd. OCS at 169-70.

[431] 160 F.Supp. at 495.

[432] *Id.* at 496.

connection with performance of the contract. The Courts opinion on the issue of cost reimbursability indicates that this was possible so as to allow a claim to fall within the exception.

The Court went further and reversed the ABOCS decision holding that the excess taxes were reimbursable discounting the "properly chargeable" limitation as inapplicable in this case. The Court held that the taxes were "incident to and necessary for" contract performance. The Court reasoned:

> It cannot be questioned that performance of the contract necessitated the hiring of adequate personnel, that payment of tax contributions on their taxable wages was necessitated by the laws of the State, and that contract termination made necessary the discharge of employees and produced the consequential effect on plaintiff's reserve account giving rise to a condition depriving plaintiff of the lower tax rates in 1948 and 1949 that it otherwise would have enjoyed. *The causal effect* of the contract in producing, through successive stages, the result complained of cannot be denied and *is not diluted by the intervention of time.* The payment of excess taxes was a derivative necessity, one which *resulted as a direct consequence of having taken action which was necessary to perform the contract.*[434] (emphasis added)

This language is helpful precedent when applying the cost principles to other post-settlement expenses such as environmental cleanup costs, that, it can be argued, resulted from performance of the contract.

A third case, *Houdaille Industries, Inc. v. United States,*[435] with similar issues was filed with the Court of Claims after the ABOCS was abolished on January 13, 1953.[436] The contractor in this case also was subjected to excess unemployment taxes that it

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[433] *Id.* at 500.

[434] *Id.* at 499-500.

[435] 151 F. Supp. 298 (Ct. Cl. 1957).

[436] Act of July 14, 1952, ch. 739, 66 Stat. 627 (1952).

incurred from its government contract operations following the contract termination on November 21, 1945. The CPFF contract was for the operation of a plant for the production of "highly secret [classified] materials" under direction of a contracting officer of the Manhattan Project.[437] The contract included a reimbursement clause which stated:

> The cost of losses or expenses not compensated by insurance or otherwise . . . actually sustained by the Contractor in connection with the work and found . . . to be just and reasonable unless reimbursement therefor is expressly prohibited.[438]

The government argued that the taxes should not have been reimbursed because they were incurred after the contract had expired. The Court held this argument was without merit and followed the ABOCS decisions in *Certain-Teed* and *Hercules*[439] in extending the *Federal Cartridge* holding when it stated:

> The expenses arose on account of plaintiff's operation under the contract and the fact that the amount of the expenditures could not be determined until after performance under the contract had been fulfilled makes them no less reimbursable.
>
> . . . .
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> [S]o long as the expenditure arose on account of the contractor's performance under the contract, and the expenditure is not otherwise excluded from payment by other provisions, the mere fact that liability cannot be determined until after the termination or completion date of the contract is no reason to penalize the contractor to the extent of its subsequent payments which are attributable to the Government contract.[440]

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[437] 151 F. Supp. at 301-02.

[438] *Id.* at 304-05.

[439] Certain-Teed Products Corp. v. Department of the Army, 4 App. Bd. OCS (No. 317) 157 (1950); Hercules Powder Co. v. Department of the Army, 3 App. Bd. OCS (No. 274) 186 (1949), *see supra* note 412.

The Court of Claims decisions seem to be in accordance with the ABOCS decisions in allowing claims to be reimbursed which were unknown at the time of the settlement agreement and release and which otherwise were "incident to and necessary for" contract performance. None of the cases, however, dealt with claims which arose decades after termination such as in the Ford and Consolidated cases.

E. The Indemnification Theory As Applied

1. Ford's Indemnification Theory

On January 20, 1994, Ford Motor Company notified the United States Air Force (hereinafter "Air Force") that Ford had been named as a PRP in 1988 by the EPA under CERCLA and given the opportunity to participate in a remedial investigation and feasibility study (RI/FS).[441] The letter also notified the Air Force that Ford had received notice in July 1993, that the EPA was planning to conduct an engineering evaluation/cost analysis and design report in order to implement a removal action at the Willow Run Creek Site.[442] Ford stated that the EPA action was based on environmental contamination to the Willow Run Sludge Lagoon (WRSL) and to Tyler Pond. The WRSL had allegedly received sludge from the waste water treatment plant (WWTP) located at the Willow Run bomber plant leased to Ford by the Defense Plant Corporation for manufacture of B-24 bombers under CPFF contract no. W535-ac-

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[440] 151 F. Supp. at 312.

[441] Letter from Kathy J. Hofer, Senior Attorney, Office of the General Counsel, Ford Motor Company, to Successor to Contracting Officer, Army Air Forces Material Command (Jan. 20, 1994) (on file with Air Force Materiel Command Law Office, Wright-Patterson Air Force Base, Ohio).

[442] *Id.* at 3.

21216 during World War II.[443] Tyler Pond allegedly received treated waste water that had been discharged from the WWTP, a sanitary WWTP, and waters from the bomber plant storm drains and sewer.[444]

Ford cited language which was a variation of the "unknown claims" clause from the JTR.[445] The letter also referenced Article 9 of the Ford contract regarding termination containing the indemnity language prescribed in the termination articles of PR 15.[446] Ford discussed its theory of indemnification in a separate memorandum.[447] In that memorandum, Ford cited "Article 3 - Consideration" of the bomber contract that included the cost principles of TD 5000, § 26.9, incorporated by reference, as well as 14 other reimbursable cost items.[448] Ford maintained that the site cleanup costs resulting from contract performance would be charged directly to the contract because Ford was merely complying with law, making the costs of the investigation and remediation allowable contract costs.[449]

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[443] *Id.* at 2.

[444] *Id.* at 4.

[445] *Id.* at 1; *see* 10 C.F.R. § 849.983.1 (1945 Supp.) (referencing art. 4(c)(3) of the form settlement agreement); *see also supra* note 344 and accompanying text.

[446] *Id.* at 2; *see* 10 C.F.R § 88.15-905 (1943 Supp.) (referencing proposed art. at ¶ 2(a)), *supra* note 351; *see also supra* note 319 and accompanying text for Ford's art. 9(b) language.

[447] *Id.* at encl. 5, *Government Responsibility for Willow Run Site Cleanup Costs Required Under CERCLA*, (Jan. 20, 1994).

[448] Included in those other items were all costs of rehabilitation of contractor's plant and equipment, costs of maintenance and repairs of the facilities used for contract performance, and overhead costs. *Id.* at 2-3.

[449] *Id.* at 4.

Ford then posited that the United States had assumed and become liable for all obligations and commitments Ford incurred in performing the bomber contract, including preventing injury to the public from handling hazardous wastes generated in contract performance. Ford maintained that even without a reservations clause, the obligation the government assumed was not terminated because the government had not made any payment concerning Ford's handling of the hazardous waste, thereby triggering the release.[450] Nonetheless, Ford also contended that the reservations and exceptions in the initial settlement agreement allegedly made in 1946 included an "unknown claims" clause. Under Ford's interpretation of the language, the claim must, at a minimum: (1) involve costs reimbursable under the contract; (2) be based on the contractor's responsibility to third parties; and (3) not be known to the contractor at the time of settlement.[451] Ford reasoned:

> [S]ince under Article 9(b)(1) . . . the Government assumed and became liable for all obligations, commitments and claims that Ford may have undertaken or incurred in connection with the contract work, costs required to remedy such contract work are encompassed within the meaning of "costs reimbursable under the contract."[452]

Ford concluded by contending that third parties are those who have an interest in the cleanup including the State of Michigan and Wayne County, Michigan. Finally, Ford asserted that at the time of the settlement agreement in 1946, it was not aware of the

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[450] *Id.* at 5.

[451] *Id.* at 6.

[452] *Id.*

nature of any hazardous waste liability, thereby satisfying the unknown claims element of the reservation to the release.[453]

Ford did not produce a copy of the settlement agreement with the actual language. It did provide the Air Force with a copy of its consolidated lump-sum settlement proposal.[454] In that proposal Ford stated:

> SECTION XI: UNKNOWN THIRD PARTY AND EMPLOYEE CLAIMS
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> . . . .
>
> There are other situations existing in connection Ford's war work which may give rise to the presentation of claims by third parties or employees but which have not yet and may never, reach the stage of actual assertion against the Company. Under the above circumstances, all of the costs associated with the Company's CPFF contracts have not as yet been determined. The contractor has no control over the number and character of claims which may be asserted and reimbursed under the reservations under consideration. Accordingly, Ford knows of no sound basis at this time on which to predicate an offer in settlement.
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> . . . .
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> SECTION XIII: STANDARD RESERVATIONS
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> . . . .
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> 6. Rights and liabilities of the parties under Contract articles, if any, applicable to options, covenants not to compete, *covenants of indemnity*, and agreements with respect to the future care and disposition by the Contractor of Government-owned facilities remaining in his custody.[455]

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[453] *Id.*

[454] Letter including Proposal for the Settlement of War Department Contracts, from L. D. Crusoe, Vice-President, Ford Motor Company, to Kenneth C. Royall, Under Secretary of War, Washington, D.C. (Feb. 28, 1947) (on file with Air Force Materiel Command Law Office, Wright-Patterson Air Force Base, Ohio).

[455] *Id.* at 56, 61.

Based on the language in this proposal, Ford asserted that its responsibility to third parties was not released by the consolidated settlement agreement.

Finally, Ford contended that there is no statute of limitations preventing it from now seeking indemnification. Ford relies on the Contract Disputes Act for the proposition that the six-year Statute of Limitations for actions before the Court of Federal Claims does not apply after the contractor elects to proceed under the Contract Disputes Act.[456]

The theory of indemnification articulated by Ford is still in the form of a notice of claim to the successor contracting officer. It is likely that Ford will bring suit in the Court of Federal Claims or before the Armed Services Board of Contract Appeals.[457]

2. General Dynamics' Indemnification Theory

General Dynamics' theory of indemnification is articulated in its third-party complaint involving the Tucson International Airport Area Superfund Site (the "Tucson Site").[458] General Dynamics alleged that pursuant to the First War Powers Act, the War Department issued procurement regulations establishing uniform termination and assumption of risk clauses for war contracts. Such regulations allegedly provided war contractors with "broad protection against economic risks" and "needed incentives for contractors to bid on war contracts."[459] General Dynamics also alleged that under the

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[456] Letter at encl. 5, *supra* note 452 at 7.

[457] As of July 24, 1996, no suit had been filed.

[458] Defendant's Answer, Counterclaim, Third-Party Complaint at 11-38, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012 (D. Ariz. 1996) (CIV-94-355-TUC-ROS).

[459] *Id.* at 13, ¶ 14.

Contract Settlement Act, Congress provided war contractors with "fair compensation" upon contract termination. General Dynamics alleged:

> Where the amount of fair compensation for a particular cost or potential cost was undeterminable at the time of contract termination, the government had the authority either to assign a value to such cost, subject to the contractor's statutory right of appeal, or to assume the contractor's liability for such cost. Id. § 20(a)(3). . . . In either case, Congress required that the government's agreement to provide such compensation would be scrupulously honored by officers ,agents, and employees of the Government. See id. § 3(m), 6(c).[460]

The complaint alleged further that the CPFF Modification Center contract that Consolidated had entered into with the Army Air Forces contained the standard indemnity language provided for in PR 15.[461] General Dynamics further alleged that under the Contract Settlement Act, the CPFF Modification Center contract was modified slightly to require the war contractors to mount their own defense, and then seek reimbursement from the government.[462] General Dynamics also alleged that:

> Unless the Government modified its assumption of liability obligations before termination of a particular war contract, however, it was forever precluded from doing so.[463]

Regarding Consolidated's CPFF contract, General Dynamics alleged that in "Article 3 - Consideration" it contained the expenses incurred in defense of third party

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[460] *Id.* at 15-16, ¶ 15.

[461] *See supra* note 351 and accompanying text; 10 C.F.R. § 88-905 (1943 Supp.).

[462] Defendant's Answer, Counterclaim, Third-Party Complaint at 16-17, ¶ 19, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012 (D. Ariz. 1996) (CIV-94-355-TUC-ROS).

[463] *Id.* at 17, ¶ 19.

claims as allowable costs.[464] The CPFF contract also included indemnity language in "Article 9 - Termination of Contract By Government."[465] General Dynamics alleged that Article 9 was incorporated by reference in the government's termination notice closing the Tucson Modification Center and releasing funds for final payment. General Dynamics alleged such notice constituted a settlement of a termination claim within the meaning of the Contract Settlement Act, § 6(c). According to General Dynamics, the assumption by the government became final and conclusive within the meaning of the Contract Settlement Act, §§ 3(m) and 6(c) upon expiration of Consolidated's rights of appeal under the Contract Settlement Act § 13.[466] As a result, "the United States irrevocably assumed all obligations and liabilities arising out of work performed by Consolidated" under the contract and responsibility to defend Consolidated and pay for all related costs.[467]

General Dynamics asserted that because of the indemnification under the terminated contract whereby the United States "assumed all liability for all claims", General Dynamics proceeded to notify the Air Force of EPA's groundwater remediation claim. General Dynamics alleged it advised the government it was responsible for

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[464] *Id.* at 18, ¶ 25; *see supra* note 326 and accompanying text for Consolidated's art. 3(b) language.

[465] *Id.* at 18-19, ¶ 26; *see supra* note 327 and accompanying text for Consolidated's art. 9(a), (b), (c) language.

[466] 41 U.S.C. §§ 103(m), 106(c) (1994); Defendant's Answer, Counterclaim, Third-Party Complaint at 28, ¶¶ 64-65, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012 (D. Ariz. 1996) (CIV-94-355-TUC-ROS).

[467] *Id.* at 19, ¶¶ 27-28.

defending General Dynamics and for any other obligation of EPA's claim.[468] General Dynamics also alleged that in 1991 the PRPs at the Tucson Superfund Site entered into a Consent Decree (of which General Dynamics was not a party) agreeing to finance cleanup actions. Thereafter, the Tucson Airport Authority filed the contribution action against General Dynamics.[469] Also in 1991, EPA notified General Dynamics of the soil remediation claim about which General Dynamics alleged it notified the government demanding the United States defend General Dynamics.[470] General Dynamics further alleged that Hughes Aircraft Company was sued in tort by private individuals claiming injuries resulting from the water contamination. Hughes thereafter filed a third-party action against General Dynamics for which General Dynamics also demanded the government to defend it.[471]

Under its action, General Dynamics sought a variety of remedies in District Court. It sought declaratory and injunctive relief compelling the United States to "defend General Dynamics in the pending actions, and to indemnify the company for all liabilities, costs and expenses arising from these actions."[472] Particularly, it alleged violations of the Contract Settlement Act, the Administrative Procedure Act,[473] constitutional violations under the Public Debt Clause, the Fourteenth Amendment Due

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[468] *Id.* at 21 ¶ 32.

[469] *Id.* at 22, ¶ 35-36.

[470] *Id.* at 23, ¶ 37-39.

[471] *Id.* at 25, ¶¶ 47-51.

[472] Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012, at *3 (D. Ariz. 1996).

Process Clause, and the Fifth Amendment Takings Clause, a claim for mandamus relief under 28 U.S.C. § 1361, breach of contract, and for contribution under CERCLA.[474]

In April 1996, the District Court granted the United States' motion for partial judgment on the pleadings. Without reaching the merits of the case, the Court held in all but two counts that the United States had not waived sovereign immunity for General Dynamics' claims in federal district court. The Court wrote, "The Tucker Act vests in the Court of Federal Claims exclusive subject matter jurisdiction over federal contract claims exceeding $10,000."[475] The Court concluded that the various claims by General Dynamics were really contract-based claims and therefore should be brought in the Court of Federal Claims.[476] Therefore, the issues related to indemnification under the Modification Center contract have yet to be decided.[477]

E. Summary

The indemnification theory as postulated by Ford and General Dynamics is based primarily on the authority to indemnify found in § 20(a)(3) of the Contract Settlement Act. It also relies on the settlement and termination language in the Joint Termination Regulation and Procurement Regulation 15. The JTR settlement language contemplated claims which would survive the settlement release, including claims by third parties and "covenants of indemnity." The predecessor to the JTR was PR 15, that also recognized exceptions to the release, including claims subject to future

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[473] 5 U.S.C. §§ 701-706 (1994).

[474] *Tucson Airport Auth.*, 1996 U.S. Dist. LEXIS 8012, at *3.

[475] *See* 28 U.S.C. § 1491 (a)(1) (1994); *id.* at *13.

[476] *Tucson Airport Auth.*, 1996 U.S. Dist. LEXIS 8012, at *13-*14.

litigation. It also expressly provided a standard termination clause in which the government was to "assume and become liable for" claims the contractor may have incurred under the contract.

Linked to the indemnification clause was the requirement that the contractor be reimbursed only for allowable costs as provided for in Article 3 of the contract. Reimbursable costs were determined by the contract and cost principles derived from TM 14-1000, TD 5000, § 26.9, and the *Green Book*. In TM 14-1000, the exception for unknown claims upon settlement was specifically recognized. A key principle, however, was the requirement that all costs were to be incident to and necessary for contract performance.

The issues of indemnification and cost reimbursability in CPFF contracts were the subject of various decisions by the Comptroller General, the War Department Board of Contract Appeals, the Appeals Board of the Office of Contract Settlement, and the Court of Claims. They all reiterated the principle that cost reimbursement is based on rights and obligations under the contract with the key test being whether the expense was "incident to and necessary for" contract performance. The Court of Claims and the ABOCS decided several cases regarding reservations to the release as they applied to excess taxes incurred following settlement. The central issue in those cases was whether the taxes were incurred in the performance of the contract.

The theory as applied to the Ford and General Dynamics cases is similar. In Ford's reliance on the contract clauses, it argues that its costs are reimbursable, were based on its responsibility to third parties, and survived the settlement release. General Dynamics also argues its costs were reimbursable because under Article 3 of the

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[477] As of July 24, 1996, no claim had been file with the Court of Federal Claims.

contract, expenses incurred in defense of third party claims are allowable. It also relied on the indemnity language in Article 9 whereby the government agreed to assume the contractor's liability obligations. Both Ford and General Dynamics contend that their CERCLA liabilities fall under the indemnity clause of their respective World War II-era contracts. In the next chapter, the potential barriers to recovery under the indemnification theory of those contracts are discussed.

CHAPTER IV

POTENTIAL BARRIERS AGAINST RECOVERY

In order for a contractor to prevail on a theory of recovery based on indemnification under a World War II-era government contract, it must overcome several barriers. First, and foremost is the obstacle of the Anti-Deficiency Act.[478] In order to prevail on this issue, the contractor will need to establish that the prohibition against obligating funds in advance of appropriations in the form of an open-ended indemnification agreement was excepted by Congress under either the First War Powers Act or the Contract Settlement Act. A second obstacle is the issue of whether the cost is reimbursable under the terms of the contract. Particularly, since the claims for environmental cleanup were made more than 40 years after the contract settlement itself, the question is raised whether a claim can arise after the contract performance is complete. Another issue related to cost reimbursability is liability insurance and whether the contractor should have obtained such insurance to cover environmental liability. A final issue is the question of finality of the settlement agreement and the effect of the release, an issue which was raised in the last chapter. This chapter will address these issues and offer an assessment of the strength of both the Ford and General Dynamics' claims for indemnification of current environmental cleanup costs.

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[478] Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 (codified as amended at 31 U.S.C. § 1341(a)(1) (1994)).

A. Anti-Deficiency Act

1. Statutory Background

The starting point for any discussion of the Anti-Deficiency Act is the Appropriations Clause in Article I, Section 9, Clause 7 of the United States Constitution. It requires that "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."[479] This clause flows from the basic "power of the purse" granted in Article I, Section 8, authorizing Congress to "pay the Debts and provide for the common Defence and general Welfare of the United States; . . .[and] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."[480]

The latest tension between Congress and the Executive Branch over the federal budget deficit[481] is only one in a long series of skirmishes between the two branches of government over the nation's finances. In the post-Civil War era, federal agencies often incurred obligations in advance of appropriations.[482] Frequently, agencies would use their entire year's appropriation at the beginning of the fiscal year, then incur additional obligations, only to return to Congress to

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[479] U.S. CONST. art. I, § 9, cl. 7.

[480] U.S. CONST. art. I, § 8, cls. 1,18.

[481] Jerry Gray, *Battle Over the Budget: The Overview; A Chilly GOP Response to Clinton's Budget Plan*, N.Y. TIMES, Jan. 8, 1996, at A1.

[482] 59 Comp. Gen. 369, 1980 U.S. Comp. Gen. LEXIS 144 *6-*7 (1980) ("The Anti-deficiency Act was born as a result of Congressional frustration at the constant parade of deficiency requests for appropriations it was receiving in the 19th century and early 20th century, generated, it believed, by the lack of foresight and careful husbanding of funds by Executive branch agencies.").

request additional appropriations to pay for their deficit spending.[483] Consequently, in 1870, Congress passed the Anti-Deficiency Act.[484] It was later codified in Revised Statutes, Section 3679 (a), (d)(2) in 1905.[485] Over the years there were several more amendments to the Act,[486] and a recodification,[487] until it was recodified in its present form scattered among several new sections in Title 31 of the United States Code.[488]

The section of the Act concerning limitations on spending and obligating funds currently reads in pertinent part as follows:

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[483] OFFICE OF THE GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-9 (2d ed. 1992).

[484] 31 U.S.C. § 1341(a)(1)(1994). Although this Act was not the first attempt to curb expenditures made in advance of appropriations, the legislation known as the Anti-Deficiency Act was first enacted in the Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 (1870). The Act provided: "No Department of the Government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for the fiscal year; or involve the Government for the future payment of money in excess of such appropriations." *See* 21 Op. Att'y Gen. 244, 247-8 (1895) ("The purpose of the statute was 'to prevent executive officers from involving the Government in expenditures or liabilities beyond those contemplated and authorized by the law making power.'").

[485] Act of Mar. 3, 1905, ch. 1484, § 4 (1st para.), 33 Stat. 1257. *See also* Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 49 (1906) (containing language which was in effect from 1906 through 1950 as follows: "No Executive department or other Government establishment of the United States shall expend in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law.").

[486] *See* OFFICE OF THE GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, *supra* note 483 at 6-10; *see also* Kenneth G. Mattern, Fiscal Law Principles and Federal Facility Environmental Compliance 50 (1993) (unpublished LL.M thesis, The George Washington University Law School).

[487] 31 U.S.C. § 665 (recodified as 31 U.S.C. § 1341 in 1982, 96 Stat. 923).

§ 1341. Limitations on expending and obligations amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia Government may not--

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.[489]

To summarize the significance of the Act, it is considered the "cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds set by appropriation acts and related statutes."[490]

2. Indemnification and the Anti-Deficiency Act

The courts and the Comptroller General have generally determined that when a contracting officer agrees to open-ended liability under a contractual indemnification agreement, he has violated the Anti-Deficiency Act.[491] The Comptroller General issued an opinion regarding the use of the "Insurance-Liability to Third Persons" clause in

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[488] *See* OFFICE OF THE GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, *supra* note 483 at 6-12.

[489] 31 U.S.C. § 1341 (a)(1) (1994).

[490] Gary L. Hopkins and Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 MIL. L.R. 55, 56 (1978).

[491] Hercules v. United States, 64 U.S.L.W. 4117, 4120 (U.S. Mar. 5, 1996)(No. 94-818)(holding no implied-in-fact agreement of indemnification existed in Agent Orange contract) ("The Comptroller General has repeatedly ruled that Government procurement agencies may not enter into the type of open-ended indemnity for third-party liability that petitioner . . . claims to have implicitly received under the Agent Orange contracts."); *see also* OFFICE OF THE GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, *supra* note 483 at 6-30 to 6-42 (discussing prohibition against unlimited liability in indemnification agreements).

federal cost-reimbursement supply and research and development contracts.[492] In reversing a 40-year practice of using the clause, the Comptroller General stated:

> [T]he accounting officers of the government have never issued a decision sanctioning the incurring of an obligation for an open-ended indemnity in the absence of statutory authority to the contrary.
>
> This line of cases stretches back to the days before this Office came into existence. In 15 Comp. Dec. 405 (1909), the Comptroller General's predecessor . . . said:
>
>> Under the [Anti-Deficiency Act], no officer of the Government has a right to make a contract on its behalf involving the payment of an indefinite and uncertain sum, that may exceed the appropriation and which is not capable of definite ascertainment by the terms of the contract, but is wholly dependent upon the happening of some contingency, the consequences of which cannot be defined by the contract.
>
> The line of decisions applying this general principle stretches, unbroken, right up to the May 3 decision at issue. [citations omitted].[493]

Thus, the Anti-Deficiency Act is clear in its prohibition against indemnification agreements which obligate the government to a contingent liability in an indefinite amount.

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[492] *In re* Assumption by Government of Contractor Liability to Third Persons--Reconsideration, 62 Comp. Gen. 361 (1983) (holding clause providing contractors "virtually complete indemnity" for liability during contract performance in unlimited amounts violates the Anti-Deficiency Act).

[493] *Id.* at 364-65. *See* 7 Comp. Gen. 507 (1928) (holding obligation in utility contract clause prohibited as too indefinite and uncertain); 16 Comp. Gen. 803 (1937) (holding indemnity clause in license agreement null and void because contracting officer exceeded authority executing clause too indefinite and uncertain); 20 Comp. Gen. 95 (1940) (holding provision in aircraft plant contract imposing contingent and continuing obligation to reimburse contractor for indefinite period after contract completion violates Anti-Deficiency Act); 35 Comp. Gen. 85 (1955) (holding contracting officer exceeded his authority entering into lease provisions obligating government to indemnify lessor); 59 Comp. Gen. 369 (1980) (holding State Dep't agreement to indemnify Australia for damages from hurricane seeding agreement violated Anti-Deficiency Act).

3. Statutory Exemptions to the Anti-Deficiency Act

The Act, however, does allow for such agreements if they are authorized by another statute.[494] The Claims Court reviewed the issue in *Johns-Manville Corporation v. United States*,[495] regarding contractors' claims for indemnification under World War II-era shipbuilding contracts for the United States Navy. In that case, the government argued that the Anti-Deficiency Act prohibited the contractors' indemnification for former employees' for asbestos-related injuries that the contractors became obligated to pay. The Court concluded:

> [The Anti-Deficiency Act] ordinarily prohibits the Government from including indemnity agreements in its contracts that might subject the Government to unlimited liability. [citation omitted]. The few situations in which the Comptroller General has permitted exceptions were narrowly drawn and based on factual circumstances that do not lend themselves particularly to favorable comparison with the instant case.[496]

Although there are no federal laws that provide generally for indemnification for government contractors, a number of statutes since World War II provide for indemnification in government contracts under specific circumstances.[497]

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[494] 62 Comp. Gen. 361, 365 (1983) ("Another category of permissible indemnity contracts is those which are protected by the statutory umbrella."); *see also* Marc F. Efron and Devon Engel, *Government Indemnification for Environmental Liability*, FED. PUBS. BRIEFING PAPERS, Oct. 1992, at 1, 3.

[495] 12 Cl. Ct. 1 (1986).

[496] *Id.* at 22-23.

[497] For a comprehensive review of indemnification statutes *see generally*, Grad, *supra* note 335 at 433-525. Statutes granting indemnification authority include: **Pub. L. 85-804**, Act of Aug. 28, 1958, 72 Stat. 972 (1958), (codified at 50 U.S.C. §§ 1431-1435 (1994)) (permitting President to authorize government agency to enter into contracts or amendments "without regard to other provisions of law relating to making, performance, amendment, or modification or contracts, whenever he deems that such action would

Public Law 85-804 is probably the broadest grant of authority by Congress to the President to indemnify government contractors. The statute was implemented by Executive Order 10789 and gives various departments and agencies the authority to grant extraordinary contractual relief to facilitate national defense.[498] This Act succeeded the First War Powers Act[499] which expired on June 30, 1958.[500]

Like the First War Powers Act, Public Law 85-804, as implemented by Executive Order 10789, limited relief to "the amounts appropriated and the contract authorization

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facilitate the national defense"), *see also*, Executive Order 10789, 3 C.F.R. §§ 426-27 (1954) (reprinted in 50 U.S.C. § 1431 (1994)) (clarifying use of indemnification), 48 C.F.R. §§ 50.400 to 403-3 (1996) (standards for use of indemnification in contracts under Pub. L. 85-804), § 52.250-1 (1996) (contract language for use under Pub. L. 85-804), § 5350.401-90 (1996) (specifying criteria for Air Force indemnification clauses under Pub. L. 85-804); **Price-Anderson Act**, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. § 2210 (1994)) (indemnification for government contractors and licensees for limited class of nuclear power plant disasters); **Foreign Assistance Act of 1961**, pt. III, ch. 2, § 633, 75 Stat. 454 (1961) (codified at 22 U.S.C. § 2393 (1994)) (providing authority for the President to make contracts "without regard to provisions of law" regarding formation and performance of contracts similar to Pub. L. 85-804); **National Defense Contracts Act**, ch. 882, § 5, 66 Stat. 726 (1952) (codified as amended at 10 U.S.C. § 2354 (1994) (statute authorizing indemnification provisions for Dep't of Defense research or development contracts), *see also* 48 C.F.R. § 235.070 (1996), § 252.235-7001 (cost-reimbursement contract language to be used for indemnification under 10 U.S.C. § 2354); **38 U.S.C. § 7317** (1994), 105 Stat. 220 (1991) (providing Dep't of Veterans Affairs authority to provide indemnity in research contracts involving risks "of an unusually hazardous nature"); **Pub. L. 96-48, § 6(b)**, 93 Stat. 348 (1979) (providing authority for NASA to indemnify "any user of a space vehicle" for liability to third parties); **42 U.S.C. § 241(a)(7)** (1994) (providing authority for Dep't of Health and Human Services to conduct research and investigation in accordance with military dep't contracts, including authority to indemnify, *see* National Defense Contracts Act, *supra*); **Federal Aviation Act of 1958**, 72 Stat. 800-806 (1958) (codified at 49 U.S.C. app. §§1531-1542 (1994) (providing authority for insuring civil American aircraft against risks from the operation of aircraft in carrying out the foreign policy of the U.S.).

[498] Karen L. Richardson, *The Use of the General and Residual Powers Under Pub. L. No. 85-804 in the Department of Defense*, 14 PUB. CON. L. J. 128, 129 (1983).

[499] 55 Stat. 839 (1941); *see supra* note 197 and accompanying text.

provided therefor."[501] It was not until Executive Order 11610 was issued in 1971 that the President provided for specific indemnification beyond appropriated amounts. It stated that the limitation to relief under Public Law 85-804 "shall not apply to contractual provisions which provide that the United States will hold harmless and indemnify the contractor against any of the claims and losses."[502] It further provided, however, that the indemnification exception only applied to "risks that the contract defines as unusually hazardous or nuclear in nature."[503]

Public Law 85-804 as implemented also provides further limitations. A clause may be included in a contract that is entered into, amended or modified in accordance with the Act, but only after the agency head has considered various factors such as "self-insurance, other proof of financial responsibility, workers' compensation, insurance, and the availability, cost and terms of private insurance."[504] Though the indemnification clause is broad in scope covering claims by third parties for death, personal injury, property loss or damage, as well as contractor or government property damage, it nonetheless contains the following limits:

> (c) This indemnification applies only to the extent that the claim, loss, or damage (1) arises out of or results from a risk defined in this contract as unusually hazardous or nuclear and (2) is not compensated for by insurance or otherwise. Any such claim, loss, or damage, to the extent that it is within the deductible amounts of the Contractor's insurance, is not covered under this clause. If insurance coverage or other financial

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[500] KEYES, *supra* note 384 at § 50.1 n.2.

[501] RALPH C. NASH, JR. & JOHN CIBINIC, JR., 2 FEDERAL PROCUREMENT LAW 1934 (3d ed. 1980).

[502] Executive Order 11610, 3 C.F.R. 594 (1971).

[503] *Id.*

[504] 48 C.F.R. § 50.401 (1996).

> protection in effect on the date the approving official authorizes use of this clause is reduced, the Government's liability under this clause shall not increase as a result.[505]

Limitations are also found in the other statutes providing for indemnity. The Price-Anderson Act,[506] covering nuclear accidents, was originally enacted in 1957 and, though amended during the last 40 years, is still in existence. It provides for indemnification as part of a system for liability recovery for the nuclear energy industry combining insurance and government indemnification.[507] The Act sets up a four-tier system of recovery relying on private insurance, a deferred premium insurance from a pool of other licensees, a recovery ceiling of $7.4 billion for injured parties due to a nuclear incident, and government indemnification. Government indemnity only covers losses above the other insurance mechanisms. Under the current plan, there is no authorization for payment above the current recovery ceiling.[508]

Under 10 U.S.C. § 2354, government contractors with military departments performing research or development contracts may be indemnified for uninsured third-party claims and contractor's loss of property, involving "unusually hazardous risk."[509] The clause for use in cost-reimbursement contracts provides for claims similar to Public Law 85-804, but provides the following limitations:

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[505] 48 C.F.R. §52.250-1(c) (1996).

[506] 42 U.S.C. § 2210 (1994).

[507] Richard A. Smith, *Indemnification of Government Contractors*, FED. PUBS. BRIEFING PAPERS, Oct. 1982, at 6-7.

[508] Grad, *supra* note 335 at 457.

[509] *See* RAMI HANASH, ENVIRONMENTAL LIABILITY OF GOVERNMENT CONTRACTORS 89-90 (1992).

(c) The claim, loss, or damage --
(1) Must arise from the direct performance of this contract;
(2) Must not be compensated by insurance or other means, or be within deductible amounts of the Contractor's insurance;
(3) Must result from an unusually hazardous risk as specifically defined in the contract;
(4) Must not result from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, managers, superintendents, or other equivalent representatives who have supervision or direction of --
(i) All or substantially all of the contractor's business;
(ii) All or substantially all of the Contractor's operations at any one plant or separate location where this contract is being performed; or
(iii) A separate and complete major industrial operation connected with the performance of this contract;
(5) Must not be a liability assumed under any contract or agreement (except for subcontracts covered by paragraph (i) of this clause), unless the Contracting Officer . . . specifically approved the assumption of liability; and
(6) Must be certified as just and reasonable by the Secretary of the department or designated representative.[510]

These statutes and clauses represent exemptions to the Anti-Deficiency Act. The intent to provide for indemnification, and the limitations thereof, is clearly manifested by the respective statutes, and the implementing Executive Orders, and regulations.

4. The First War Powers Act and the Contract Settlement Act as Exemptions to the Anti-Deficiency Act

In order for indemnification agreements based on the First War Powers Act and the Contract Settlement Act to satisfy the requirements of the Anti-Deficiency Act, they must either be limited to available appropriations or there must be express statutory authority allowing for such indemnification. In the case of World War II-era contracts otherwise settled 50 years ago, the appropriations for the contracts would have long

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[510] 48 C.F.R. § 252.235-7001 (1996).

since expired.[511] The other possibility then is to find express statutory authority for indemnification.

a. First War Powers Act

In Title II of the First War Powers Act, Congress authorized the President (or any department or agency involved in the prosecution of the war effort) to "enter into contracts and into amendments or modifications of contracts without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts" in order to facilitate the prosecution of the war.[512] This language is similar to that found in Public Law 85-804.[513] Executive Order 9001 implementing the First War Powers Act differs substantially from those implementing Public Law 85-804. In Title I of Executive Order 9001, the delegation of authority to the War and Navy Departments was subject to the "limits of the amounts appropriated therefor to enter into contracts and into amendments or modification of contracts heretofore or hereafter made."[514] The Claims Court, in discussing the Anti-Deficiency Act in the *Johns-Manville* case,

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[511] During this period, Congress provided that properly obligated funds were available for expenditure for two fiscal years after the period of obligation had terminated. *See also* OFFICE OF THE GENERAL COUNSEL, NAVY DEPARTMENT, *supra* note 187 (1949) at 72 (citing previously codified 31 U.S.C. § 713) ("After the 1st day of July, in each year, the Secretary of the Treasury shall cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury.").

[512] Ch. 593, § 201, 55 Stat. 838, 839 (1941) (codified at 50 U.S.C. App. § 611 (repealed 1966)).

[513] *See supra* note 497.

[514] Executive Order 9001, tit. I, § 1, 3 C.F.R. Cum. Supp. 1054, 1055 (Compilation 1938-1943).

addressed the issue of statutory authority for indemnification under the First War Powers Act and Executive Order 9001. It stated:

> [T]he Executive Order authorized [the War and Navy Departments] to exercise this contracting power only "within the limits of the amounts appropriated therefor." The effect of this limitation was nearly identical to that of the ADA [Anti-Deficiency Act]. Just as the ADA prohibited government officials from spending or obligating an amount in excess of appropriations for the particular purpose, the language of the Executive Order delegated this broad power to make or amend contracts only insofar as the exercise of that power did not exceed the amounts appropriated for those contracts. Just as an indemnity agreement exposing the Government to potentially unlimited liability would create an obligation in excess of appropriations (a violation of the ADA), the same agreement would be an exercise of the power to make or amend contracts that goes beyond "the limits of the amounts appropriated therefor" (and therefore is an action not authorized by the Executive Order). Since the combined effect of the First War Powers Act and Executive Order 9001 was to free the . . . government entities . . . from the constraints of contract law provisions such as the ADA, the inclusion of indemnity agreements in Johns-Manville's contracts would not be violations of the ADA by the government contracting officials. *Rather, they were actions beyond the scope of the legal authority of the officials to obligate the Government. Such actions do not bind the Government to contracts so entered or amended.* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384, 92 L. Ed. 10, 68 S. Ct. 1 (1947); Gratkowski v. United States, 6 Cl. Ct. 458, 461 (1984). Therefore, Johns-Manville's claims based on alleged express or implied-in-fact contracts for indemnity must be dismissed as a matter of law.[515] (emphasis added)

In 1943, the Comptroller General reviewed a Corps of Engineers' contract involving the "Manhattan Project." The contract cited the First War Powers Act as authority and included a broad indemnity agreement providing:

> [I]t is agreed that all work under this contract is to be performed at the expense of the Government, and that the Contractor shall not be liable for, and the Government shall indemnify and hold the contractor harmless

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[515] 12 Cl. Ct. 1, 23 (1986). The Court notes that the opinion rendered by 40 Op. Att'y Gen. 225 (1942), "may have misunderstood or ignored the limitations" on contract authority when it stated that indemnification of a Corps of Engineers dredging contractor was permissible under the Executive Order. *Id.* at 24.

> against, any delay, failure, loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind and for any cause whatsoever, arising out of or connected with the work; . . . that the Government shall assume and carry on the defense of all claims, suits, or legal proceedings which may be asserted or instituted against the Contractor on account of acts or omissions in the performance of the work; and that the Government shall pay directly and discharge completely all final judgments entered against the Contractor in such litigation and all claims which may be settled by agreement approved by the Contracting Officer.[516]

The Comptroller General determined that the indemnity clause was permissible due to the approval by the President under the First War Powers Act, that the contractor was to receive a fixed fee of only $1.00, and because of the "unusual and abnormal conditions" under which the contract work was to be performed, but only "to the extent funds may be available therefor."[517] This opinion is consistent with the limitation on funds set forth in Executive Order 9001. Based on the analysis of this opinion and that found in the *Johns-Manville* case, it is clear the First War Powers Act fails as express statutory authority so as not to violate the Anti-Deficiency Act.

b. Contract Settlement Act

The Contract Settlement Act is more explicit than the First War Powers Act and Executive Order 9001 in providing express statutory authority for government officials to enter into indemnification agreements, but it also fails to satisfy the Anti-Deficiency Act. Section 20 (a)(3) of the Contract Settlement Act expressly states that agencies have authority in settling termination claims "to agree to assume or indemnify the war

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[516] Unpublished decision of the Comptroller General, B-33801, Apr. 19, 1943, and a related decision, Oct. 27, 1943; *see also* OFFICE OF THE GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, *supra* note 483 at 6-39 n.30. The decisions were classified and the subject matter was carefully concealed. They were declassified in 1986. *Id.*

[517] B-33801, *id.* at 3.

contractor against any claims by any person in connection with termination claims or settlement."[518]

Section 22 of the Act provides the funding mechanism in the use of appropriated funds. It authorizes any contracting agency to

> use for . . . the payment of claims . . . any funds which have heretofore been appropriated or allocated or which may hereafter be appropriated or allocated to it or which are or may become available to it, for such purposes or for the purposes of war production or war procurement.[519]

This section indicates that claims for indemnification were limited to the extent of funds either appropriated or available to the contracting agency for the payment of claims or war production or procurement. Indemnity was not open-ended. Whatever funds were appropriated for those purposes have long since expired.

There is no legislative history expressing congressional intent regarding the limitations, if any, to the indemnification or to the funding mechanism.[520] Prior to the enactment of the Contract Settlement Act, there appears to be little express statutory

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[518] 41 U.S.C. § 120(a)(3) (1994).

[519] 41 U.S.C. § 122 (1994).

[520] In 1986, in response to a congressional inquiry regarding amendments to the Price-Anderson Act, *supra* note 497, the Comptroller General issued an opinion highlighting the key issue involved in indemnification legislation. He stated: "An indemnity statute should generally include two features--the indemnification provisions and a funding mechanism. Indemnification provisions can range from a legally binding guarantee to a mere authorization. Funding mechanisms can similarly vary in terms of the degree of congressional control and flexibility retained. It is impossible to maximize both the assurance of payment and congressional flexibility. Either objective is enhanced only at the expense of the other. . . . If payment is to be assured, Congress must yield control over funding, either in whole or up to specified ceilings. . . . Conversely, if Congress is to retain funding control, payment cannot be assured in any legally binding form and the indemnification becomes less than an entitlement." Comp. Gen., B-197742 (1986), cited in OFFICE OF THE GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, *supra* note 483 at 6-40 to 6-41.

authority for open-ended contractual indemnity. In fact, the trend in congressional appropriations tended to be one which preferred holding a tighter "purse string." In one area both during and after World War II, indemnification without regard to the Anti-Deficiency Act was expressly provided for. Contracts covering international short-wave radio stations included an express indemnity provision. The statute read:

> *Notwithstanding the provisions of section 3679, Revised Statutes (31 U.S.C. § 665) [the Anti-Deficiency Act]*, the Office of the Coordinator of Inter-American Affairs is authorized in making contracts for the use of international short-wave radio stations and facilities, to agree on behalf of the United States to indemnify the owners and operators of such radio stations and facilities, from such funds as may be hereafter appropriated for the purpose, against loss or damage on account of injury to persons or property arising from such use of said radio stations and facilities.[521] (emphasis added)

By implication, had Congress intended to offer open-ended indemnification in the Contract Settlement Act, it would have expressly included language similar to that used above allowing indemnification without regard to the Anti-Deficiency Act. Following World War II, the congressional legislation permitting indemnification tended to be explicit about the limitations or funding mechanisms. Since the interpretation of 41 U.S.C. § 120(a)(3) would be a case of first impression in the United States Court of Federal Claims or before the Armed Services Board of Contract Appeals, the contractor seeking indemnity would need to persuade the judge that this clause is in fact an exemption to the Anti-Deficiency Act. In light of congressional mandate at the time against government officials making obligations in advance of or without appropriations, this barrier would prevent indemnification.

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[521] Act of Oct. 26, 1942, ch. 629, tit. II, 56 Stat. 996 (1942). The same language is used in an appropriations act for the Dep'ts of State, Justice, Commerce, and the Judiciary, in the Act of July 5, 1946, ch. 541, 60 Stat. 447 (1946).

B. Reimbursable Costs

Assuming the contractor can overcome the burden of establishing the Anti-Deficiency Act would not be violated by the indemnification agreement, he would still need to prove that the costs claimed are reimbursable under the contract. The contract article covering consideration requires that allowable cost items be in accordance with TD 5000, § 26.9 and the cost principles set forth in the contract. In TD 5000, § 26.9, the costs must have been direct costs incurred "in performing the contract" and indirect costs "incident to and necessary for the performance of the contract."[522] In the contract article covering termination, the government agreed to "assume and become liable for all obligations, commitments and claims that the Contractor may have *theretofore* in good faith undertaken or *incurred* in connection with said work and in accordance with the provisions of this contract." (emphasis added). Furthermore, the government agreed to reimburse the contractor for all costs incurred in termination as determined by the consideration article. These clauses tend to imply costs that had already been incurred as of the date of settlement.[523]

1. Claims Arising After Termination

The obvious objection by the government is that the environmental cleanup costs incurred more than 40 years after the contract termination are simply not reimbursable at all under the contract. The language in the consideration article requires the costs must have been incurred directly "in performing the contract" or were indirectly "incident to and necessary for the performance of the contract." Arguably, costs of cleanup of

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[522] 26 C.F.R. § 26.9(a) (1940 Supp.); *see* Chapter III, Part C.2, *supra*.

the environment or for tort liability occurring long after the contract itself was complete are not incurred or necessary in the performance of the contract. Rather, they resulted later as laws, such as CERCLA, were enacted requiring new standards of environmental liability which were totally unrelated to the specific performance of the contracts. The key to determining whether pre-CERCLA indemnification clauses cover post-CERCLA cleanup cost or damages depends on the specific language of the actual clauses.[524] The interpretations in various cases deciding post-termination claims is helpful.

In *Global Associates,*[525] the NASA Board of Contract Appeals held that attorneys fees and costs from the successful defense of a third party personal injury action did not result from performance of the contract. The contract contained a standard "Insurance--Liability to Third Persons" clause.[526] It also included a standard allowable

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[523] *See* art. 9(b)(1),(2), of the Ford and Consolidated contracts, *supra* notes 319, 327.

[524] Courts have examined pre-CERCLA indemnification clauses in private contracts and have determined that that precise language of the clauses controls whether those clauses will be upheld. *See* Kerr-McGee Chemical Corp. v. Lefton, 14 F.3d 321, 326-28 (7th Cir. 1994) (holding pre-CERCLA indemnity agreement sufficiently clear and "party may indemnify another party for liability arising out of a law not in existence at the time of contracting"); Gopher Oil Co. v. Estate of Romness, Nos. 95-1309, 95-1338, 1996 U.S. App. LEXIS 12310, at *10-*13 (8th Cir. May 29, 1996) (holding pre-CERCLA indemnity agreement was clear in limiting liability to those claims "existing at closing" and did not contemplate covering environmental laws of CERCLA).

[525] 88-2 B.C.A. ¶ 20,723 (1988).

[526] The clause provided in pertinent part: "(c) The Contractor shall be reimbursed: (i) for the portion allocable to this contract of the reasonable cost of insurance as required or approved pursuant to the provisions of this clause, and (ii) for liabilities to third persons for loss of or damage to property . . . , or for death or bodily injury, not compensated by insurance otherwise, *arising out of the performance* of this contract whether or not caused by the negligence of the Contractor, his agent, servants or employees; provided, such liabilities are represented by final judgments or by settlements approved

cost clause which required a release upon termination. The release excepted "claims based upon liabilities of the Contractor to third parties arising out of the performance of [the] contract."[527]

In interpreting the phrase "arising out of the performance of the contract," the Board reasoned that there must have been "a relationship between the injury or liability and contract performance." The Board held:

> The Government is not bound to indemnify a contractor when the facts underlying the litigation show that the contractor's actions were not in furtherance of Contract performance and the costs incurred did not benefit Contract performance. [citations omitted]. When the liability occurs both after the completion of performance and not as a direct result of contract performance, the relationship has been considered too attenuated to find indemnification for third-party liabilities. *Johns-Manville Corp. v. United States,* [citation omitted].[528]

The Board determined that the claim made against the contractor arose because of the fact of performance of "a contract" with the government, but the subject of the claim did not occur "because of" the performance of the contract. One of the factors considered by the Board was the fact that the injury involved occurred more than a year after the expiration of the contract.[529]

The *Johns-Manville*[530] decision cited in *Global Associates* discussed the third-party liabilities arising from uninsured risks under CPFF contracts. The Court analyzed

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in writing by the Government, and expenses incidental to such liabilities, ..." (emphasis added) *Id.* at 104,718.

[527] *Id.*

[528] *Id.* at 104,719.

[529] *Id.* at 104,720.

the "cost principles" in effect during World War II, including TD 5000, § 26.9 and the *Green Book*, concluding that:

> [L]osses suffered or payments incurred under a contractor's policy of self-insurance will be recognized only to the extent of actual losses suffered or payments incurred *during performance* of the contract or subcontract and properly chargeable thereto.[531] (emphasis added)

Though the claim in *Johns-Manville* was under a breach of warranty of specifications theory in a fixed-price supply contract, the principles of "cost of performance" appears equally applicable to a claim under an CPFF contract indemnification clause. The Court concluded:

> Based on a review of the case law and evidence, it can be said that, as a general proposition, indemnification for third-party liabilities may be considered a cost of performance for a breach of warranty of specifications, if the injury to the third-party occurs, or liability is incurred, incident to contract performance. The relationship between contract performance and liability become attenuated when liability occurs both after the completion of performance and not as a direct result of contract performance. In this case the relationship is too attenuated.[532]

The cases decided after World War II by the Court of Claims, the WDBCA, and the ABOCS generally dealt with costs occurring during contract performance. The "excess tax" cases,[533] though also post-termination claims, may not be too analogous to environmental cleanup and tort liability costs. The increased taxes were directly attributable to the increased payroll measured during the years of performance of the

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[530] 13 Cl. Ct. 72 (1987), *vacated*, 855 F.2d 1571 (Fed. Cir. 1988) (the second of two cases brought by Johns-Manville Corporation in the Claims Court concerning World War II-era Navy Dep't contracts involving liability for asbestos personal injury claims).

[531] *Id.* at 161.

[532] *Id.*

[533] *See supra* notes 406, 410, 412, 413, 424, 428, 429.

war contracts. The environmental cleanup costs are probably more analogous to the asbestos claims arising years after the contract, and may be considered too attenuated.

2. Claims Not Covered by Insurance

Another cost-reimbursement issue involves the requirement for the contractor to carry insurance. Article 3(b)(13) of the Ford contract allowed reimbursement for the cost of insurance carried by Ford "against liability . . . for damages because of bodily injury, including death . . . , damage . . . or destruction of property, ..."[534] In addition, the Ford contract also provided that the contractor would not be reimbursed for any amount for which it would have been indemnified, but had failed to procure the proper insurance according to the contracting officer's requirements.[535] The Consolidated contract also includes a clause in Article 3(b)(7) allowing for reimbursement of the cost of insurance as required by the contracting officer and a similar clause precluding reimbursement if the proper type of insurance as required by the contracting officer was not obtained.[536]

The contractors seeking indemnification will first need to establish that they were not otherwise indemnified by insurance and that they were not required to carry the type of insurance which would have covered the liability for which they are currently seeking indemnification. World War II-era contractors with the Navy Department were generally required to procure and maintain employers' and bodily injury liability insurance in their

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[534] *See supra* note 317.

[535] Contract No. W 535-ac-21216, Supplemental Agreement No. 4, Apr. 11, 1942, at 4-5 (on file at the Air Force Materiel Command Law Office, Wright-Patterson Air Force Base, Ohio).

[536] *See supra* note 326.

cost-reimbursement contracts.[537] The precise nature of the insurance requirements will have to be determined, including whether the government intended to cover additional risks not otherwise contemplated by the parties, such as for environmental liability.[538]

C. Finality of the Settlement Agreement

Another potential barrier against recovery for the contractors will be overcoming the finality of the settlement agreement terminating the contract. One of the basic objectives of the Contract Settlement Act was to effect final settlements which would not be reopened except as otherwise agreed to in the settlement.[539] The contractors presumably have the burden of proof on the issue of the right to indemnification under their respective contracts. The government then would have the burden of proof on the issue of whether the reservations to the release in the settlement agreement apply to the contractor's indemnification claims.[540]

During and following World War II, the WDBCA decided a number of contract appeals following final payment. The general rule prior to 1946 was that the neither the Secretary of War nor his representative had authority to consider appeals after final settlement of the contract and after final payment where there had been a complete

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[537] OFFICE OF THE GENERAL COUNSEL, NAVY DEPARTMENT, *supra* note 187 at 223.

[538] Similar issues of insurance were raised in the *Johns-Manville* case. *See* 13 Cl. Ct. 72, 103-109 (1987).

[539] 41 U.S.C. §§ 106(b), 103(m), 106(c) (1994).

[540] *See* Hatco Corp. v. W.R. Grace & Co., 59 F.3d 400, 406 (3d Cir. 1995) (holding that the burden of proof as to the validity of a release is on the defendant who pleads it); *see also supra* note 415 and accompanying text.

release.[541] The Board reversed its prior position in 1946 allowing for such appeals after final payment.[542]

Though the Board had jurisdiction, the Contract Settlement Act provided that where there was a "final and conclusive" settlement, it was not to be "reopened, annulled, modified, set aside, or disregarded" except as otherwise agreed to in the settlement.[543] The JTR provided for a number of standard reservations, which were intended to remain executory after other phases of the contract were completed.[544]

The issue was presented in *American Employers Insurance Company v. United States.*[545] In that case a World War II-era contractor with the United States Maritime Commission paid workers' compensation policy premiums to American Employers, the underwriter. Following termination of the contract in 1948, the contractor assigned its rights to the underwriter. The final settlement of the contract occurred in 1950. After

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[541] John Zimmerman & Sons, Inc, 3 Cont. Cas. Fed. (CCH) 437, 438-39 (1945) (holding contracting officer was foreclosed from assessing additional charges after final payment had been made); Goldschmidt & Bethune Co., 3 Cont. Cas. Fed. (CCH) 381 (1945) (holding contractor was foreclosed from apeal after final payments on contracts had been made and accepted without protest or reservation); Trinidad Bean & Elevator Co., 3 Cont. Cas. Fed. (CCH) 1000 (1945) (holding contractor not liable for damaged beans because after final payment without reservation there existed no active contract available for appeal).

[542] Reed & Prince Manf. Co., 4 Cont. Cas. Fed. (CCH) ¶ 60,140 (1946) (overruling its prior position foreclosing appeal after final payment, the WDBCA held when contracting officer acts "under the contract," even after final payment, the WDBCA had jurisdiction to hear an appeal)

[543] 41 U.S.C. § 106(c) (1994).

[544] 10 C.F.R. §§ 847.743-6, 847.743-9, 849.983-1 (1945 Supp.), *see supra* note 341, 342, 344 and accompanying text; *see also* Keith I. Parsons & Walter J. Blum, *In the Wake of Speedy Termination Settlements*, 13 U. CHI. L. REV. 1, 4-5 (1945); .

[545] 812 F.2d 700 (Fed. Cir. 1987).

1977, more than 30 claims were received by the underwriter from former contractor employers for asbestos-related injuries due to work on the World War II contract. American Employers filed suit in the Claims Court in 1982 seeking additional reimbursement under the World War II-era contract. The Claims Court held that the final settlement disposed of and released all further claims against the government because American Employers failed to show there had been any exemption for the employees claims at the time of the final settlement.

The United States Court of Appeals for the Federal Circuit affirmed the Claims Court holding that there was no evidence the settlement contained "explicit or plain" exception whatever, citing the basic purpose of the Contract Settlement Act which was to "effectuate speedy and final settlement" of war-time contracts.[546] The Court noted that the underwriter never requested that a reserve be set aside for future claims which served to show an effective release from all future claims.

The contractor seeking to litigate a claim from a decades-old war contract will need to establish that there was a plain and explicit exception to the final settlement. In Ford's case, the actual settlement agreement has not been located. The settlement proposal includes a section for unknown third-party and employees claims "which have not yet and may never, reach the stage of actual assertion against the Company."[547] This appears to be an open-ended reservation for claims "in connection with Ford's war work." It was included in the settlement agreement along with the standard reservation

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[546] *Id.* at 703-704 ("Congress did not intend, unless there was a plain or explicit exception, to leave contracts open and unsettled for decades. Rather, Congress wanted to end with finality war-time contracts and move swiftly into a peace-time economy.")

covering covenants of indemnity in the contract. Such language, however, may not be considered plain and explicit to cover specific environmental cleanup costs and tort liability. It tends to be a very nonspecific reservation for any claims which may ever arise related to the contract. In light of American Employers, the Claims Court may strictly construe such language as not being explicit enough.

The Supplemental Settlement Agreement to Consolidated's contract includes the standard release language excepting: "The rights and liabilities of the parties under the articles, if any, in the contracts applicable to . . . covenants of indemnity."[548] The covenant of indemnity arguably refers to the clause in Article 9(b)(1)[549] in which the government agreed to "assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with" the contract. Strictly construing this covenant of indemnity so as to make it plain and explicit, it may be limited to obligations, etc., which were in existence at the time of the release, although unknown. Obligations which did not arise until the 1980s may be considered beyond the mutual intent of the parties of the release.

D. Summary

The barriers against recovery under the indemnification clauses in the World War II-era contracts pose serious obstacles. The Anti-Deficiency Act is the greatest hurdle. If Congress had meant for the language in Contract Settlement Act to be an

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[547] Ford Proposal for Settlement of War Dep't Contracts, *supra* note 454.

[548] Art. 1(f)(4), Supplemental Settlement Agreement to Fixed Price and Cost-Plus-A-Fixed-Fee Contracts for Supplies, Consolidated Vultee Aircraft Corporation, Agreement for Amendement and Termination of Contracts, Nov. 9, 1945.

exception to fiscal prohibition, it would most likely have clearly expressed that intent. Instead, it appears indemnification was authorized, but only to the extent of appropriations made for the payment of termination claims or other war procurement funds. It appears Congress did not intend to create open-ended indemnification, especially in light of the Contract Settlement Act's goal of affecting speedy and final settlements.

The second obstacle is the requirement that the costs claimed also be reimbursable under the contract. Post-termination costs, especially ones decades after contract termination, are difficult to tie to the contract as being "incident to and necessary for" contract performance. Costs of environmental remediation, like costs of asbestos-related injuries, may just be considered too attenuated.

Finally, the release clause in the settlement agreement may be strictly construed against the contractors so that without a plain and explicit exception for environmental cleanup costs, indemnification for such costs may be considered to have been released.

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[549] See *supra* note 327.

CONCLUSION

The bases for environmental liability under CERCLA has become well-established as a result of litigation over the last 15 years involving issues of "owner, operator, and generator," as well as contribution among potentially responsible parties. The question of liability of the federal government as an "owner, operator, or generator" of hazardous waste at contractor-operated sites dating back to World War II has also received attention in recent years as the courts have delved into the issue of government control of war-time contractor operations. Chapter I reviewed the statutory and case law on these issues. The question of federal government liability under a contractual indemnification agreement included in World War II-era government contracts has yet to be decided.

This thesis has reviewed the theory of liability based on the indemnification clauses found in World War II-era cost-plus-fixed-fee contracts. Chapter II examined how World War I government contracting impacted similar war-time era contracting in World War II. Historically, war procurement contracts were made with the goal of expeditious procurement through the Federal Government exercising maximum control over the nation's industrial base. Because of the uncertainties accompanying a war-time environment, war contracts, particularly armament production contracts, were frequently made as cost reimbursement contracts. At the conclusion of hostilities of both wars, the contracts were terminated in an equally swift manner.

The World War II-era contracts included termination clauses containing indemnification language. Were the contracts containing these "indemnification

clauses" meant to be open-ended? Chapter III provided a detailed look at the statutes and regulations under which the contracts were made. The relevant case law in interpreting those statutes and regulations in support of the indemnification theory was also discussed. On their face, the clauses providing that the United States agreed to assume liability for third-party claims against the war contractors in connection with the contract appear to be clear and straight-forward. They do not appear to be limited either as to time or the nature of the claims covered.

There are several problems against contractor recovery, however, that were analyzed in Chapter IV. The major obstacle involves the intent of Congress in enacting the Contract Settlement Act terminating contracts containing open-ended indemnification clauses. Such language may be limited by the Anti-Deficiency Act because it does not appear likely that Congress intended contracting agencies to offer such open-ended indemnity. Historically, Congress has been reluctant to allow the Executive branch to obligate funds beyond Congress' control of the "purse." Additionally, the environmental costs claimed occurred well after the war was concluded and the contracts completed. To be reimbursable, the costs must arise out of the performance of the contract. Recent case law involving both asbestos and Agent Orange litigation suggests that costs occurring decades after contract completion may be considered too attenuated to have arisen from performance under the World War II-era contracts. Finally, the release in the settlement agreements may prevent recovery because the reservations, when strictly construed, were not explicit enough to exempt future environmental cleanup costs from settlement.

These problems will likely be litigated in determining the extent of the assumption of risk between the United States and the war contractors stemming from the conflict that raged more than a half century ago. The sharing of the liability under the CERCLA contribution theory is possible in both the Ford and General Dynamics cases following the *FMC* analysis.[550] The answer to the question of assumption of risk under the indemnification theory, however, will determine whether environmental cleanup of contractor operations will be considered a cost of World War II shifted *entirely* to the shoulders of the United States, and thus society as a whole, under the contract indemnification clauses.[551]

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[550] *See* Chapter I, Part A.1.c, *supra*.

[551] *See FMC Corp.*, 29 F.3d at 846, *supra* note 64 and accompanying text.