

NOTES

THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT: ARE WE ANY CLOSER TO A PROPER ALLOCATION OF SUPERFUND LIABILITY FOR SMALL BUSINESSES?

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I. INTRODUCTION

After ten-plus years of litigation and settlement proceedings, Barbara Williams is intimately aware of the huge costs and personal anguish of being a Potentially Responsible Party (“PRP”) at a major Superfund site.¹ She is one of several hundred PRPs litigating over the cleanup costs associated with the contaminated Keystone Landfill in the Gettysburg-Hanover area of Pennsylvania, which was placed on the National Priorities List (“NPL”) in 1987.² Her attorney’s fees alone over the past decade have left her company on the brink of insolvency and the cost of her “share” of the cleanup costs will certainly be the final push into bankruptcy.³ At first glance, it seems as though Ms. Williams does not deserve any sympathy for her situation; after all, she helped “contaminate” the Keystone site and therefore should be held responsible for her actions. The story changes, however, when one final piece of the puzzle is brought to light: Ms. Williams is the purveyor of SunnyRay Restaurant (“SunnyRay”), a small diner that contributed nothing more to the site than ordinary garbage, consisting almost entirely of food scraps.⁴ She was expected to contribute

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¹ *Regulatory Policy Counsel Nat’l Fed’n of Indep. Bus.: Hearing on H.R. 1300 Before the House Comm. on Transp. and Infrastructure Subcomm. on Water Res. and Env’t*, 106th Cong. (1999) (prepared statement of Thomas M. Sullivan) [hereinafter *Sullivan*].

² *Id.*

³ *Id.*

⁴ *Id.*

over \$75,000 to clean up the site and has spent thousands of dollars on legal fees to fight the claim.⁵

Mike Nobis, the general manager and part owner of J.K. Creative Printers ("J.K.") in Quincy, Illinois, is another unlikely victim of the Superfund program.⁶ On February 10, 1999, the Environmental Protection Agency (the "EPA") notified Mr. Nobis that his company was a named PRP in a contribution action filed by six large corporations that were found liable for contaminating the local landfill.⁷ These corporations, saddled with millions of dollars in cleanup costs, were looking to spread the costs around to anyone and everyone possible.⁸ J.K. Creative Printers was one of 148 named parties in this action, in which the corporations sought to recover \$3.1 million from local small businesses for their "share" of the contamination.⁹ J.K. was told its share amounted to \$42,000, while other businesses were told to contribute amounts of up to \$100,000.¹⁰ As in the case above, J.K.'s "contamination" consisted solely of ordinary garbage (mostly scrap paper), which had probably biodegraded long before the suit ever commenced.¹¹ Since the legal fees to fight the suit would far outstrip the \$42,000 demanded of the company, J.K. tightened its belt and wrote a check for the full amount.¹² Again, justice was not forthcoming.

The plight of Kelvin R. Herstad and his company, United Truck Body ("United"), is probably one of the more egregious examples of Superfund run amok. United was drawn into the proceedings surrounding the Arrowhead Refinery site in Hermantown, Minnesota in June of 1986 when it received a letter from the EPA explaining that a former truck driver remembered United having a business relationship with Arrowhead during the 1960s.¹³ Since Arrowhead had ceased operations several years before, all liability for the cleanup costs fell on businesses that had contributed waste oil to the refinery.¹⁴ Also, because there were no remaining records of contributors, the EPA relied almost entirely on the recollection of a former Arrowhead truck driver that delivered and collected oil for the refinery.¹⁵ As chance would have it, the driver remembered doing business with United.¹⁶ In reality, United's sole business with Arrowhead consisted of selling truck bodies to the refinery for its delivery vehicles and, on a few

⁵ *Id.*

⁶ *Hearing on H.R. 1300 and H.R. 2247 Before the House Commerce Comm. Subcomm. on Fin. and Hazardous Materials*, 106th Cong. (1999) (prepared testimony of Mike Nobis, J.K. Creative Printers, Quincy, Il.) [hereinafter *Nobis*].

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Nobis*, *supra* note 6.

¹² *Id.*

¹³ *Superfund Liability for Small Business: Hearing Before the House Comm. On Small Bus.*, 104th Cong. (1995) (testimony of Kevin R. Herstad, President/Treasurer United Truck Body Co., Inc.) [hereinafter *Herstad*].

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

rare occasions, to *purchase* oil for use in its operations.¹⁷ With the exception of Mr. Herstad having a “hot oil flush” (essentially a routine oil change) performed on his personal car in 1952, neither he nor United *ever* contributed *any* waste oil to the refinery.¹⁸ However, the burden of proof lay with the PRPs and, as a result, United spent eight years and \$10,000 in legal fees simply to be exonerated from a completely false accusation.¹⁹

Although the figures in the above accounts seem relatively trivial when compared to the enormous dollar figures generally associated with Superfund actions, they are not trivial when considered in their context. SunnyRay, J.K., and United are all small businesses for which these figures represent a substantial percentage of their earnings – amounts that can cripple or bankrupt these and similarly situated companies.²⁰ Coupled with the fact that small firms often pay disproportionately higher costs in relation to the type and volume of waste contributed, owners argue that the Superfund system unfairly penalizes their firms.²¹ Consequently, countless politicians, small business advocacy groups, economists, and individual proprietors have lobbied Congress to amend Superfund to alleviate the harsh consequences it imposes on small businesses.

Although there is relative consensus in the small business community about Superfund’s effect on their firms, the argument as to the cause is less cohesive. In general, foes of Superfund’s effects on small businesses fall into one of two camps. Some consider the problem in terms of Superfund saddling small businesses with huge transaction costs and imposing cleanup bills that are out of step with the harm they caused. This group feels that small businesses should be relieved of some liability so that their costs are proportionate to the degree of harm they caused. On the other hand, some view the problem as Superfund placing unique financial hardship on businesses with revenue streams that simply cannot handle the enormous costs associated with being a responsible party. Unlike those described above, these individuals would have Superfund liability eliminated for firms with low annual revenues so that they would not be burdened with high transaction costs, large cleanup bills, harmed banking relationships, and lack of insurance coverage. This group essentially desires special treatment for small businesses based on their financial situations, unlike those above who simply desire a more fair allocation of liability between small and large firms.

In the late 1990s, several bills were introduced in Congress that attempted to address these issues by eliminating or alleviating small

¹⁷ *Id.*

¹⁸ *Herstad*, *supra* note 13.

¹⁹ *See id.*

²⁰ *Superfund and Small Business, Hearing Before the House Comm. On Small Bus.*, 104th Cong. (1995) (statement of Raymond J. Keating, Chief Economist Small Bus. Survival Comm.) [hereinafter *Keating*] (transcript available through Federal Document Clearing House).

²¹ *See* discussion *infra* Part IIIA.

business liability at Superfund sites.²² While they were hotly debated in committee, Congress failed to pass any legislation specifically addressing the issue of small business liability. The issue was revived during the current administration when President George W. Bush made Superfund reform a campaign pledge and pushed through the Small Business Liability Relief and Brownfields Revitalization Act (“the Act”), which he signed into law on January 12, 2002.²³ The law was touted by the Bush administration as “the most significant piece of environmental legislation that was passed by this Congress.”²⁴

This note examines the Act to determine its likely effects on small businesses, how effectively it addresses the problems and concerns of the small business community, and how it could have differed so as to better target these problems. Ultimately, I conclude that the Act is poorly designed and will not allocate liability between small and large firms more fairly. As it only indirectly addresses this issue, the Act goes too far in eliminating liability in many instances and fails to address the unfair allocation of liability in others. Conversely, the Act does a fair job of creating across-the-board special treatment for small businesses. However, I ultimately conclude that this is probably not a justifiable policy goal and, therefore, the issue becomes moot. As a result, the Act appears to be a relatively poor solution to the problems facing the small business community with regard to Superfund liability.

At the outset, I provide a brief overview of the Superfund program and its major amendments in order to better acquaint the reader with the Superfund program as a whole. I then present the major problems and concerns voiced by the small business community, followed by a summary of the Act. Next, I analyze the likely effects of the Act in terms of the arguments posed by small businesses while, at the same time, addressing the validity of these arguments. Finally, I offer my conclusions with respect to whether the relief provisions in the Act are the best manner of achieving the goals of small business liability relief.

²² LLOYD S. DIXON, THE FINANCIAL IMPLICATIONS OF RELEASING SMALL FIRMS AND SMALL-VOLUME CONTRIBUTORS FROM SUPERFUND LIABILITY 1-2 (2000) [hereinafter DIXON, FINANCIAL IMPLICATIONS] (H.R. 1300 proposed to release businesses with 75 or fewer employees and \$3 million or less in annual revenues from liability. S. 1090 sought to release businesses with 75 or fewer employees or \$3 million or less in annual revenue. The Senate bill would also release parties that contributed only a small percentage of the waste, less than 200 pounds or 110 gallons of hazardous substances, while other bills sought to release parties that contributed less than 0.1% of the waste at any given site. Both H.R. 1300 and S. 1090 would shift the liability to the Superfund Trust Fund.)

²³ See President George W. Bush, Remarks at the Signing of the Small Business Liability Relief and Brownfields Revitalization Act (Jan. 11, 2002) (transcript available through Federal Document Clearing House).

²⁴ *Id.* (spoken by Christine Todd Whitman, EPA administrator, while introducing the President).

II. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT (“SUPERFUND”)

The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly referred to as Superfund, was enacted on December 11, 1980, largely in response to contemporary environmental atrocities like Love Canal.²⁵ Administered by the Environmental Protection Agency, Superfund seeks to “achieve two primary objectives: to identify and clean up sites contaminated with hazardous substances throughout the United States and to assign the costs of cleanup directly to those parties – called responsible parties – who had something to do with the sites.”²⁶ The EPA was granted broad authority to either force responsible parties to undertake and pay for clean up efforts themselves or to begin cleanup efforts and then sue to recover the costs.²⁷ Under Superfund, cleanup efforts are funded from one of two sources: either from liability imposed on any number of responsible parties at the site or from a hazardous response trust fund.²⁸ Liability is imposed through a combination of retroactive, strict, and joint and several liability, while the trust fund is funded mostly by taxes on petroleum and chemical feedstocks.²⁹

The program was revised significantly during mandatory reauthorization in 1986 with the enactment of the Superfund Amendments and Reauthorization Act (SARA).³⁰ The trust fund was quintupled to an annual appropriation of \$1.6 billion through a proportionate rise in the taxes funding the program.³¹ The old excise taxes on petroleum and chemical products were also replaced by a new broad-based corporate environmental income tax.³² Additionally, SARA codified certain administrative tools employed by the EPA to speed settlements among PRPs and instituted provisions under which certain *de minimus* parties (those PRPs found to have contributed very little to the site) could be released from liability.³³ Although SARA did not require reauthorization until 1991, Congress instead re-authorized the spending and taxing authority in 1990 in order to head off a potentially problematic reauthorization the following year.³⁴ The environmental taxes supporting the trust fund were never re-authorized and have since expired on December 31, 1995.³⁵

²⁵ See KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS 12 (1995).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 13.

²⁹ *Id.* at 13-14.

³⁰ KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS 13 (1995).

³¹ *Id.* at 14.

³² *Id.*

³³ *Id.* at 13.

³⁴ *Id.*

³⁵ KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS 13 (1995).

Since much of the debate over Superfund revolves around its controversial liability scheme, it is beneficial to briefly explore the methods of recovery available to the EPA. As noted earlier, Superfund liability is based on a combination of retroactive, strict and joint and several liability. Because liability can be imposed regardless of when the activities resulting in contamination occurred, the system is said to be retroactive.³⁶ Likewise, since liability is imposed regardless of whether or not the contributor was negligent in the handling or disposing of the waste, the system employs a strict liability regime.³⁷ Finally, the EPA is authorized to recover under joint and several liability. In other words, the government can recover all cleanup costs from one or more responsible parties, regardless of their relative contribution and regardless of whether there are other parties at the site that may be liable.³⁸ Ultimately, the EPA expects the true allocation of cleanup costs to be assigned through contribution actions undertaken by the parties found joint and severally liable, thus imposing the majority of the transaction costs on the responsible parties.³⁹ This regime is designed to expedite the collection of funds for cleanup activities while reducing transaction costs borne by the *government* and, naturally, has the effect of simply shifting these costs to the private sector.⁴⁰

The trust fund, which, until 1995 was largely funded by various taxes on business, is used for certain other purposes where litigation is either impossible or inappropriate. First, the EPA often uses the trust fund to pay for cleanup activities at "orphan sites" (sites where no responsible parties can be found or no responsible parties are solvent.)⁴¹ In addition, funds can and are used for initial site studies or cleanups where solvent responsible parties have been identified but have refused to undertake cleanup efforts themselves or are in the midst of litigating their liability.⁴² The trust fund may also be used for short-term remedial actions, usually emergency measures to rectify imminent dangers to human health, where circumstances necessitate immediate action and preclude first suing the responsible party.⁴³

Not surprisingly, given the structure of Superfund, the program is largely criticized by the private sector as being unfair, both in terms of the allocation of cleanup and transaction costs and the large financial burden imposed on responsible parties. The transaction costs associated with clean-up efforts are enormous and the use of joint and several liability places these costs on the PRPs, who are expected to fight amongst themselves to properly allocate liability. The criticism is even more acute in the small business community, where many owners feel that the effects

³⁶ *Id.* at 13-14.

³⁷ *Id.* at 14.

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS 17 (1995).

⁴¹ *Id.* at 14.

⁴² *Id.*

⁴³ *Id.* at 15.

of the system are particularly unfair to their businesses.⁴⁴ In the following section, I analyze the specific problems encountered by the small business community in relation to Superfund liability.

III. SUPERFUND LIABILITY AND ITS EFFECTS ON THE SMALL BUSINESS COMMUNITY

As noted above, the small business community proffers two different arguments for providing Superfund liability relief for their businesses. First, some argue that Superfund imposes disproportionately high costs on small businesses that often contribute only insignificantly to the waste problem. This group feels that small businesses should be granted liability relief because Superfund requires them to bear costs that exceed the actual amount of harm they cause. Conversely, others within the small business community cite the catastrophic financial impact of the program to be the most compelling reason to provide liability relief. Superfund, they argue, places huge financial stress on small businesses because the low revenue streams of these businesses cannot absorb the huge costs associated with Superfund liability – often driving these fragile enterprises into bankruptcy. Essentially, proponents of this view are asking for *special treatment* for small businesses in light of their unique financial situations. This view differs significantly from the former, which simply calls for a more equal division of liability between large and small firms. In the following subsections, I present an overview of the arguments presented by both groups in order to build a foundation on which to analyze the Act in later sections.

A. UNFAIR PENALIZATION OF SMALL BUSINESSES IN RELATION TO VOLUME AND TYPE OF WASTE CONTRIBUTED

Many feel that, in light of the quantities and types of waste they contribute, small businesses are responsible for a relatively small amount of the hazardous waste problem, yet pay a disproportionately high amount in cleanup fees and transaction costs. Essentially, the system unfairly asks small businesses to spend more in relation to harm caused than they otherwise should be required to pay. Consequently, proponents of this argument believe that Superfund's liability scheme should be adjusted to provide relief for small businesses that are forced to pay more than their "fair share" of the costs per site.

Not surprisingly, the average volumetric contribution per site is positively correlated with firm size, or, in other words, smaller firms contribute significantly less waste to a given site than do large firms.⁴⁵ On average, firms with annual revenues between \$1 and \$3 million contribute only 0.05% of the waste at a given site.⁴⁶ This contrasts sharply with firms

⁴⁴ See, e.g., Keating, *supra* note 20.

⁴⁵ LLOYD S. DIXON, THE LIABILITY AND EXPENDITURES OF SMALL BUSINESSES AT SUPERFUND SITES 12 (1996) [hereinafter DIXON, LIABILITY AND EXPENDITURES].

⁴⁶ DIXON, FINANCIAL IMPLICATIONS, *supra* note 25, at 18.

whose revenues are much higher. For instance, firms with annual revenues greater than \$100 million each contribute about 0.65% of the waste to a given site.⁴⁷

Conversely, small firms tend to pay a disproportionately higher amount in cleanup costs than do other firms. A 2000 RAND study found that the “distribution of volume-based cleanup costs by annual revenue appears to have a heavy right tail, with the greatest concentrations among the smallest and largest firms.”⁴⁸ Essentially, very large firms and small firms pay a higher percentage of the cleanup costs, in relation to their volumetric contribution, than do firms with medium to large revenues. Consequently, small firms pay a higher percentage of the cleanup costs per volumetric share than do many other firms.

Likewise, small businesses pay a disproportionately high amount of transaction costs relative to other firms. In relation to their total expenditures, small businesses spend an exorbitant amount in transaction costs per site. On average, firms with less than \$10 million in annual revenues spend roughly \$18,000 per site in transaction costs alone.⁴⁹ This amounts to an average of 56% of their total expenditures per site.⁵⁰ In contrast, firms with annual revenues of over \$100 million spend only 18% of their total expenditures in transaction costs.⁵¹ This discrepancy is largely due to the fact that transaction costs remain relatively fixed regardless of volumetric share, resulting in small businesses paying significantly more transaction costs per volumetric share than larger firms. As such, small businesses are faced with the ironic effect of paying more in transaction costs than in actual clean-up costs.

Finally, there is some evidence that small businesses tend to contribute less harmful waste than larger firms. This information comes mostly from congressional committee hearings, indicating that many small businesses contribute relatively harmless waste.⁵² Oftentimes, the waste consists of nothing more than ordinary garbage sent to the local landfill, where some other firm(s) contributed the hazardous waste ultimately responsible for contaminating the site.⁵³ However, no analytical study expressly correlating the type of waste with firm size exists. Thus, this testimony should be taken with a grain of salt. Nevertheless, if this is true to some extent, it shows that small businesses individually contribute relatively little to the contamination per site.

In light of the discussion above, it is clear why many small business owners question the fairness and wisdom of Superfund's liability scheme. In general, even though small businesses may have individually contributed relatively little waste to a given site, they nevertheless spend a

⁴⁷ *Id.*

⁴⁸ *Id.* at 24.

⁴⁹ DIXON, LIABILITY AND EXPENDITURES, *supra* note 45, at 21.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See, e.g., Sullivan, *supra* note 1.

⁵³ *Id.*

disproportionate amount of money when they become involved in the cleanup process. Coupled with the fact that most of these expenditures consist of attorneys' fees, there is a strong argument that Superfund's liability scheme should be reviewed and revised in order to provide a fairer allocation of liability.

B. SUPERFUND'S HARSH FINANCIAL IMPACT ON SMALL FIRMS

Conversely, some other proponents of Superfund reform focus more on the financial impact of liability on small businesses as opposed to questions of intrinsic fairness. Superfund litigation and cleanup expenditures present enormous costs to any business, but often become insurmountable when applied to the typical small business with relatively low cash flows. The receipt of a PRP notification letter alone can have devastating effects on a small business' access to capital and liability insurance, exacerbating the high premiums already paid for these services. As a result, these effects have generated an outcry from many within the small business community for substantial or complete relief from the burden placed on them by the program.

The most significant financial problem faced by small businesses with regard to Superfund liability is the immense dollar values involved in many Superfund actions. Interestingly enough, most small firms are not part of the original action brought by the government.⁵⁴ Employing joint and several liability, the EPA most often sues a few "major" contributors with "deep pockets" at the outset of the action in order to quickly obtain funds to begin cleanup efforts.⁵⁵ Once the EPA resolves its suit against the "major" contributors, the firms held joint and severally liable have the option (which they always exercise) under SARA to collect from other potentially responsible parties through a contribution suit.⁵⁶ Naturally, these firms want to obtain reimbursement for as much of the cleanup costs as possible, and thus minimize their out-of-pocket expenditures, leading to contribution actions involving every possible PRP.⁵⁷ "In their zeal to absolve their own liability, defendants look to anyone who disposed of any kind of waste at the contaminated site."⁵⁸ At this point, many small firms like those identified in the introduction find themselves embroiled in Superfund litigation.

Once involved in a Superfund action, small businesses are faced with a bleak horizon. Oftentimes, they have little choice but to accept their proscribed contribution amount because it simply costs too much to fight back. The legal fees to fight the action can be much higher than the proscribed settlement amount and, without the huge resources of large

⁵⁴ Cathleen Clark, *Should the Butcher, the Baker and the Candle Stick Maker be Held Responsible for Hazardous Waste?*, 1994 UTAH L. REV. 871, 881-82 (1994).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 882.

⁵⁸ *Id.*

firms, small businesses simply cannot mount a serious defense to the action.⁵⁹ In some cases, small businesses are able to tighten their belts and resolve the suit through settlement or by accepting the proscribed contribution amount. Often, however, a small business may face bankruptcy when it becomes involved in a Superfund action.⁶⁰ Generally, either the proscribed contribution amount is simply too high for the firm to bear or the costs of litigating the action drain every last financial resource available to the company.⁶¹ As a result, the costs involved in a Superfund action alone can have disastrous effects on the operations of a small business.

Compounding the insurmountable costs borne by small businesses in a Superfund action is the fact that small firms oftentimes do not have evidence to exonerate themselves. Small businesses are much less likely than medium or large firms to retain records for long periods of time (especially before 1986, when SARA mandated certain record-keeping practices regarding hazardous waste disposal) and, therefore, rarely have records to disprove allegations against them.⁶² As a result, many small businesses must choose between hiring expensive expert witnesses to extrapolate data or simply accepting the dollar figures proscribed by the opposing party.⁶³

Involvement in a Superfund action also has serious effects on a small business' access to capital. Small businesses inherently face more hurdles to capitalization than do larger firms because of their small size.⁶⁴ Also, it is unsettled whether the EPA or the firms' creditors have the priority claim in a bankruptcy proceeding.⁶⁵ As a result, already weary lenders become even more so when a small business is faced with potential Superfund liability. Conversely, large firms are generally more stable and receive more favorable lending relationships than do small firms, and involvement in a Superfund action does not have an enormous effect on their access to capital.⁶⁶ In the case of a small business, however, involvement in a Superfund proceeding is a death knell for borrowing opportunities.⁶⁷ Furthermore, small businesses can typically offer only land owned by the company as sufficient collateral to secure a loan.⁶⁸ However, if a lender sees any possibility of this land being or becoming contaminated, it will not

⁵⁹ See, e.g., *Hearing Before the House Comm. on Small Bus.*, 104th Cong. (1995) (prepared testimony of Susan Eckerly, Dir. of Affairs, Citizens for a Sound Economy) [hereinafter *Eckerly*].

⁶⁰ See, e.g., *id.*

⁶¹ See, e.g., *id.*

⁶² See, e.g., *Hearing Before the House Comm. on Small Bus.* 104th Cong. (1995) (prepared testimony of John B. DeVinck, DeVinck's, Inc., Superior, Wis. on behalf of the National Automobile Dealers Ass'n.) [hereinafter *DeVinck*].

⁶³ See, e.g., *id.*

⁶⁴ See, e.g., *Keating*, *supra* note 20.

⁶⁵ See 61C AM. JUR. 2D *Pollution Control* § 1330 (2002).

⁶⁶ See *Keating*, *supra* note 20.

⁶⁷ See *id.*

⁶⁸ See Eric S. Tresh, *The Return of Lender Liability Under CERCLA: What Should Lenders Do?*, 3 S.C. ENVTL. L.J. 131, 140 (1994).

accept the land as collateral for fear of potentially assuming liability upon foreclosure.⁶⁹ As a result, the prospect of any Superfund liability cripples a small business' access to needed capital.

Availability, cost, and collection of liability insurance are other obstacles small businesses face in light of Superfund liability. Although the vast majority of small businesses carry some form of general comprehensive liability insurance, the law surrounding the applicability of these policies to liability incurred through Superfund actions is unfavorable. Under policies written before 1986, insurance companies have often successfully argued that the standard "pollution exclusion clause"⁷⁰ in their policies precludes such claims and, therefore, refuse to cover the cleanup costs incurred by policyholders.⁷¹ Some jurisdictions have interpreted the clause to include Superfund liability for "sudden and accidental" releases, although the burden of proof lies with the insured.⁷² Thus, firms must sue their insurance provider and prove to the court that the release was both "sudden and accidental," a step that requires resources a small business may not possess – especially in the face of pending Superfund litigation.⁷³ "In 1986, insurers revised the standard pollution exclusion in their policies to eliminate essentially *all* coverage for pollution, including "sudden and accidental" releases. Insurers have had little difficulty in persuading courts to accept their interpretation of the newer language."⁷⁴ As a result, a small firm whose liability falls under a pre-1986 general comprehensive liability insurance policy must either incur high litigation costs to compel its insurer to pay or receive no remedy at all. And, for any claim made after the 1986 revisions, there is no hope of general liability insurance covering the costs.

Since general comprehensive liability insurance does not cover a substantial amount of the liability borne by small firms, some firms choose to obtain specialized environmental liability insurance. For the vast majority of small businesses, however, this type of insurance is either prohibitively expensive or simply unavailable. "Firms interested in protecting against liability for pollution must now purchase specialized insurance, which, to the extent it is available at all, carries high premiums, high deductibles, high coinsurance rates, and low caps."⁷⁵ "Thus, many

⁶⁹ *Id.*

⁷⁰ PROBST, *supra* note 25, at 92. The standard exclusion reads: "to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."

⁷¹ *Id.*

⁷² *See id.* at 93.

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW 131 (Richard L. Revesz & Richard B. Stewart eds., 1995).

firms have had no choice but to self-insure, sometimes risking bankruptcy in the event of an environmental accident.”⁷⁶

Finally, many small business owners state that the threat of Superfund liability significantly impedes their ability to sell or pass on their businesses to others. Finding a buyer for a small business is difficult enough, these owners say, without adding the potential for Superfund liability. Owners of businesses in certain industries susceptible to Superfund liability, like manufacturing, argue that selling their business has become nearly impossible because potential Superfund liability scares off prospective buyers.⁷⁷ Additionally, some of family-owned business owners are weary of passing the family business to their children, for fear of saddling their loved-ones with potential Superfund liability.⁷⁸

In light of the above information, many within the small business community request special exemption from Superfund liability on the ground that their businesses simply cannot handle the added burden. Citing to the fact that many small businesses simply cannot survive in the face of looming Superfund liability, owners argue that they need special carve-out provisions like those provided for in the tax code and elsewhere. However, since these individuals are essentially asking for special treatment at the expense of others, it is important to briefly explore whether there are adequate justifications for such treatment.

From a pure efficiency standpoint, all firms should be treated equally in order to allow the free market to weed out all but the most efficient firms, thereby maximizing economic efficiency.⁷⁹ From this perspective, small businesses should not be given special treatment as this would simply allow inefficient firms to survive while lowering the overall efficiency of the economy.⁸⁰ As a result, according to free market economists, the fact that many small businesses cannot bear the burden of Superfund liability stemming from their operations probably means that they *should* be driven out of business.

Historically, scholars, politicians, and small business owners have offered several justifications defending the special treatment of small businesses in the face of criticism from free market economists. For example, some point to the fact that small businesses, on average, create more jobs per annum than do larger firms and, therefore, play an extremely important role in the job market.⁸¹ However, this justification has been largely refuted in recent years. First, the significance of these jobs may not be as important as previously thought, since they tend to be far less stable

⁷⁶ *Id.*

⁷⁷ *See, e.g., DeVinck, supra note 62.*

⁷⁸ *See, e.g., Nobis, supra note 6.*

⁷⁹ *See generally* Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219 (1995).

⁸⁰ *See id.*

⁸¹ Ronald F. Wilson, *Federal Tax Policy: The Political Influence of American Small Business*, 37 S. TEX. L. REV. 15, 29 (1996).

due to the inherent instability of small businesses.⁸² Furthermore, a properly functioning market would automatically provide the proper employment equilibrium without resorting to special provisions for small businesses.⁸³ As a result, the employment argument provides a weak justification for protecting the interests of small businesses at the expense of others.

Additionally, some argue that small businesses deserve protection because they tend to be far more innovative than their larger and more bureaucratic counterparts.⁸⁴ As with the employment argument, this justification is also largely refuted by economic theory. Just as the free market should provide an equilibrium employment level, it too should create an equilibrium incentive for innovation, thereby eliminating the need to specifically accommodate small businesses.⁸⁵ Furthermore, the reigning studies on this topic failed to consider the actual importance of the innovations offered by small businesses. Recent studies have shown that many of these so-called technological innovations are of relatively little economic value.⁸⁶

The final justification for specifically catering to small businesses is slightly more difficult to dispute. Small businesses have always been an important part of the American psyche and most Americans, ignoring the hard and fast economic arguments, feel that these firms deserve protections because they are an integral part of the collective identity.⁸⁷ Rooted in the Populist fear of concentrations of power, many proponents feel that small business protectionism is needed in order to prevent such concentrations of power in the hands of massive corporations.⁸⁸ Additionally, small firms are revered because they embody the American work ethic, democratic spirit, and entrepreneurial strength that many consider the backbone of American culture, regardless of their actual economic value.⁸⁹ As a result, adherers to this belief feel that the symbolic nature of small business outweighs any market inefficiencies caused by protectionism.

Accordingly, there is no consensus as to whether small businesses should be given preferential treatment under the Superfund regime. From an economic perspective, favoring small businesses will lead to market inefficiencies that harm the economy as a whole while providing benefits to only a specific sector. On the other hand, non-economic rationales for the preferential treatment of small businesses are strong within American society, having deep roots in American "rugged individualism." Thus, the answer to whether small businesses should be granted preferential

⁸² *Id.* at 60-61.

⁸³ *Id.*

⁸⁴ *Id.* at 29.

⁸⁵ *Id.* at 62.

⁸⁶ Ronald F. Wilson, *Federal Tax Policy: The Political Influence of American Small Business*, 37 S. TEX. L. REV. 15, 62 (1996).

⁸⁷ *See id.* at 31.

⁸⁸ *See id.*

⁸⁹ *See id.* at 64.

treatment under the Superfund regime is murky and depends largely on whether society values the iconoclastic virtues of small businesses over market efficiency. Given that strong public support for small business protectionism exists in nearly all facets of government, it seems as though market efficiency may be losing to the sentimentality of American idealism.

In light of the competing arguments regarding whether or not small businesses should be granted preferential treatment under the Superfund regime, for the purposes of the following sections, I operate under the assumption that there are at least some good arguments supporting this view. The reader should note, however, that if the iconoclastic arguments above do not hold water, there is little to support the view that small businesses deserve preferential treatment, excepting the proven unfairness in liability allocation.

IV. THE “SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT” (PUBLIC LAW 107-118)

In an effort to address the aforementioned concerns of the small business community, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act, which became law on January 11, 2002.⁹⁰ The Act seeks to “provide certain relief for small businesses from liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and to amend such Act to promote the cleanup and reuse of brownfields [and] to provide financial assistance for brownfields revitalization[.]”⁹¹ Attesting to the widespread support of small business liability relief, the Act was a bipartisan effort that swept quickly through the 1st session of the 107th Congress.⁹² Although a number of bills seeking to reduce and/or eliminate the liability of small businesses under Superfund have been introduced in Congress, the Act was the first to actually become law.

First, the Act provides an exemption for so-called *de micromis* parties – parties whose contributions to the site are very small. With certain exceptions discussed below, the Act exempts from liability parties that contributed or transported less than 110 gallons of liquid hazardous materials or less than 200 pounds of solid materials to a given site.⁹³ The disposal, treatment, and/or transport of the materials must have occurred

⁹⁰ Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) [hereinafter Small Business Liability Relief Act].

⁹¹ *See id.* As an aside, as this aspect of the legislation is not discussed in this note, Brownfields refer to contaminated sites, mostly in cities, that have been abandoned due to their status as a contaminated Superfund site. Until the passage of this Act, there was the potential for future liability on any developer that purchased the land and, therefore, many sites like this have remained vacant and deserted. The Brownfields aspect of this legislation seeks to encourage the redevelopment of Brownfields by eliminating future liability for landowners not responsible for the former contamination in an effort to encourage developers to make this vacant land productive again and reduce urban blight.

⁹² *See* President George W. Bush, *supra* note 23.

⁹³ Small Business Liability Relief Act § 102(a)(o).

before April 1, 2001,⁹⁴ and the exemption will not apply in cases where the materials in question “have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility.”⁹⁵ The Act charges the EPA with determining whether the *de micromis* party’s contamination “contributed significantly or could contribute significantly” to the cost of cleaning up the site and, interestingly, this determination will not be subject to judicial review.⁹⁶

In the case of a contribution action by a party in the private sector, the Act also shifts the burden of proof onto the initiating party to show non-compliance with the exception.⁹⁷ Therefore, in a contribution action, a *de micromis* party is now presumed exempt from liability until proven otherwise.⁹⁸ Furthermore, the commencing party is liable for all reasonable attorneys’ fees incurred by the defendant if the firm is found to be exempt under the section.⁹⁹

In addition to the *de micromis* exception, the Act also creates a solid waste exception for firms that contributed only municipal solid waste to the contaminated site.¹⁰⁰ The Act provides the exception to: 1) owners, operators, or lessees of residential property, 2) businesses that employ less than 100 full-time employees and meet the definition of a small business under the Small Business Act, and 3) tax-exempt organizations that also employ less than 100 full-time employees and where all of the municipal waste was generated by the exempt facility.¹⁰¹ As with the *de micromis* exception, the solid waste exception does not extend to parties whose waste contributed significantly or could contribute significantly to the cleanup costs at the site and, again, this determination is not subject to judicial review.¹⁰² Unlike the *de micromis* exception, however, the solid waste provision does not have any date restrictions for the contribution. The Act’s fairly broad definition of “municipal solid waste” basically encompasses all ordinary garbage. Specifically, municipal solid waste is defined as any waste material “generated by a household,”¹⁰³ or, in the case of a firm, waste that is “essentially the same as waste normally generated by a household; is collected and disposed of with other municipal solid waste . . . [and] contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.”¹⁰⁴

⁹⁴ *Id.* at § 102(a)(o)(1)(B).

⁹⁵ *Id.* at § 102(a)(o)(2).

⁹⁶ *Id.* at § 102(a)(o)(3).

⁹⁷ *Id.* at § 102(a)(o)(4).

⁹⁸ See Small Business Liability Relief Act § 102(a)(o)(4).

⁹⁹ *Id.* at § 102(a)(p)(7).

¹⁰⁰ See *id.* at § 102(a)(p).

¹⁰¹ *Id.* at § 102(a)(p)(1).

¹⁰² *Id.* at § 102(a)(p)(2)-(3).

¹⁰³ Small Business Liability Relief Act § 102(a)(p)(4)(A)(i).

¹⁰⁴ *Id.* at § 102(a)(p)(4)(A)(ii).

As with the *de micromis* exception, the solid waste exception shifts the burden of proof under certain circumstances and provides for the reimbursement of costs and fees. With respect to non-government entities that contributed or will contribute municipal solid waste on or after April 1, 2001 and all other parties that contributed such waste before April 1, 2001, the burden of proof lies with the initiating party to prove non-application of this provision.¹⁰⁵ Furthermore, any non-governmental entity commencing a contribution action against a party later found exempt under this provision is responsible for costs and fees incurred by the defendant¹⁰⁶ and residential contributors are rendered untouchable by private sector contribution actions.¹⁰⁷

In addition to the above exceptions from liability, the Act also provides favorable settlement treatment for parties with a limited ability to pay.¹⁰⁸ This section requires the EPA to consider a firm's ability to pay by examining "the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues."¹⁰⁹ Additionally, the EPA must consider alternative payment methods if the firm is found to be of limited means, thereby reducing the burden on such firms.¹¹⁰

The remaining sections of the Act focus exclusively on Brownfields provisions that, although are certainly applicable to small businesses, will be ignored for the purposes of this note due to their incidental relationship to liability relief. Therefore, armed with the specific small business liability relief provisions outlined above, the remainder of this note will explore the effect of these provisions on the problems and concerns of the small business community and whether the Act is well-drafted to accomplish the goals of liability reform.

V. APPLICATION OF THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT TO THE SMALL BUSINESS COMMUNITY

In the following section I analyze the likely effects of the Act on the small business community, taking into account the dichotomy of prevailing views on liability relief. At this stage, I look only at the likely effects of the legislation and withhold any judgment with regard to the Act's effectiveness or value. Instead, I present my ultimate conclusions about the Act in the following section. First, I analyze the effects of the Act in terms of alleviating the fairness concerns espoused by those who believe that Superfund unfairly burdens small businesses in terms of their relative contributions to the problem. Subsequently, I examine the Act's likely impact on the financial concerns of small business owners.

¹⁰⁵ *Id.* at § 102(a)(p)(5).

¹⁰⁶ *Id.* at § 102(a)(p)(7).

¹⁰⁷ *Id.* at § 102(a)(p)(6).

¹⁰⁸ Small Business Liability Relief Act § 102(b).

¹⁰⁹ *Id.* at § 102(b)(7)(B).

¹¹⁰ *Id.* at § 102(b)(7)(D).

A. LIKELY EFFECT OF THE ACT ON THE INTRINSIC FAIRNESS OF LIABILITY ALLOCATION

In the following section, I analyze whether the Act will likely reduce the disproportionately high costs imposed on small businesses. On one hand, it appears as though exempting firms based on their relative volumetric contributions and type of waste may go far toward reducing some of the unfair aspects of liability allocation. However, because the Act fails to specifically address the allocation issues, it probably goes too far in eliminating liability in many cases while ignoring other cases where liability should be adjusted.

1. *De Micromis Exception*

The *de micromis* provision in the Act exempts firms from liability based on their relative volumetric contributions to the contamination at a given site. This provision may help bring about some positive change in the allocation of costs to small businesses by exempting firms that only incidentally contributed to the harm at a site. Although a direct comparison cannot be made between actual volume contributed and volumetric share measurements, *de micromis* parties have historically been defined as parties that contribute less than 0.10% of the total waste to a given site.¹¹¹ Assuming that the volumes specified in the Act roughly correlate with a 0.10% volumetric share cutoff, this exception exempts approximately 78% of firms from Superfund liability.¹¹² Furthermore, when applied specifically to small businesses, approximately 80% of firms with annual revenues less than \$1 million and 94% of firms with revenues between \$1 million and \$3 million are exempt from liability.¹¹³ As a result, this exception provides liability relief for a substantial number of small firms. Coupled with the fact that this provision provides burden shifts and reimbursement for costs and fees, the *de micromis* exception relieves a substantial number of small businesses from the burdens of Superfund liability and transaction costs.

However, this provision only applies to actions that occurred before the April 1, 2001 cutoff. As a result, firms that contribute waste after this date will still face liability for their actions and, therefore, the Act has little effect on reducing the unfairness of present and future actions. However, many argue that Superfund is primarily unfair because it *retroactively* imposes liability for small volume contributions.¹¹⁴ Since firms are now on notice that even small contributions can result in liability, they can take steps to minimize their exposure in the future. As a result, the elimination of liability for past contributions of small volumes of waste has some effect on reducing the unfair allocation of liability on small businesses.

¹¹¹ See DIXON, FINANCIAL IMPLICATIONS, *supra* note 22, at 31.

¹¹² *Id.* at 34.

¹¹³ *Id.*

¹¹⁴ See, e.g., *Herstad*, *supra* note 13.

Unfortunately, this provision probably does not significantly improve the fair allocation of costs among small businesses for several reasons. First, many small firms do not fall within the exception and therefore will be unaffected, even if they are faced with costs out of proportion with the harm they caused. As a result, they will still pay disproportionately higher transaction and cleanup costs compared with larger firms. Additionally, the blanket elimination of liability for small volume contributions is an inaccurate solution to the problem. Instead of working to make the allocation of costs fairer among small businesses, the provision instead opts to simply eliminate liability and thus fails to address the fairness issue with regard to those small businesses forced to assume this liability.

2. *Municipal Solid Waste Exception*

Like the *de micromis* exception, the Municipal Solid Waste exception reduces the unfairness caused by the Superfund program to a certain degree. In addition to the argument that small firms are unfairly penalized for contributing small volumes of waste, proponents of this exception also believe that the types of waste contributed by small businesses are not worthy of attracting substantial Superfund liability. The Municipal Solid Waste exception exempts small firms from liability when they contribute only ordinary garbage to a site. As a result, small firms will no longer be forced to pay cleanup and transaction costs for the same act performed by millions of Americans each day – taking out their garbage. Additionally, unlike the *de micromis* exception, this exception is not subject to any cutoff date, so a substantial number of small firms will not be held liable for their past, present or future contributions of garbage. Furthermore, the burden shift and reimbursement for costs and fees provided under this provision will likely prevent many large firms from bringing contribution actions in the first place. Therefore, the Municipal Solid Waste exception probably has a significant effect on reducing the disparity between costs imposed and degree of harm caused by many small businesses.

3. *Expedited Settlement Provision*

With respect to small businesses, the expedited settlement provision may alleviate some of the unfair tendencies of the Superfund program. In the event a small business is found liable for cleanup costs at a site, this provision tailors the settlement to the specific company and requires a quick resolution to the action.¹¹⁵ Since the provision requires the EPA to consider the company's financial condition and ability to pay, the burden on small firms should be reduced. Additionally, the use of expedited settlements greatly reduces transaction costs associated with resolving the action and therefore alleviates the problem of small businesses paying disproportionately high transaction costs. However, this provision does little to specifically address the initial allocation of liability among PRPs

¹¹⁵ See Small Business Liability Relief Act § 102(b).

and, as a result, may not have a significant effect on making the allocation more reasonable.

B. LIKELY EFFECT OF THE ACT ON THE FINANCIAL BURDENS BORNE BY
SMALL BUSINESSES

The following section analyzes the likely remedial effects of the Act in terms of relieving the unique financial hardships placed on small businesses by the Superfund regime. Since these small business owners basically desire special treatment *because* they are proprietors of small businesses (and not necessarily because of any inherent unfairness in the law), it is important to remember that this analysis is moot without justification for the special treatment. However, for the purposes of accomplishing the following analysis, I operate under the assumption that some special treatment is defensible.

1. *De Micromis Exception*

Since firm size and average volumetric contribution are positively correlated, the *de micromis* exception may significantly reduce the financial burden on small businesses. A 2000 Rand study found that 80% of firms with annual revenues of less than \$1 million contribute less than 0.10% of the waste to a given site, while 94% of firms with revenues between \$1 and \$3 million contribute, on average, the same volumetric share.¹¹⁶ Additionally, 80% of firms having revenues between \$3 and \$5 million contribute, on average, less than 0.10% of the waste¹¹⁷ while 91% of firms with revenues between \$5 and \$10 million contribute less than 0.10% of the waste to a given site.¹¹⁸ When taken as a whole, however, firms contributing less than 0.10% of the waste at a site account for only 3% of the total waste contributed.¹¹⁹ Assuming that actual volumetric contribution roughly correlates with volumetric share, the data suggests that a significant number of small businesses will be exempt from liability through the *de micromis* exception. Of course, this exception only applies to firms whose liability stems from actions occurring before April 1, 2001.¹²⁰ Therefore, any recent and future actions do not fall under this exception and these firms are in the same position as they were before the Act was enacted.

For firms whose liability stems from actions occurring before the April 1, 2001 cutoff, the Act probably will have a positive effect on the more serious financial implications of Superfund liability. The most obvious respite comes in the form of relief from expenditures for cleanup costs and hefty legal fees incurred in a Superfund action. Additionally, the burden shift and reimbursement requirements will reduce the number of small

¹¹⁶ DIXON, FINANCIAL IMPLICATIONS, *supra* note 22, at 34.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Small Business Liability Relief Act § 102.

firms brought into contribution actions as large firms reevaluate the possibility of losing the suit and incurring additional costs. Obviously, small firms whose liability stem from actions occurring after the cutoff will not experience these advantages since the *de micromis* exception does not apply.

Additionally, this exception may alleviate the problem of information asymmetry experienced by smaller firms. Since the exception shifts the burden of proof for pre-April 2001 actions,¹²¹ small firms will likely no longer face the problem of needing to prove their innocence. Absent the need to mount a defense, the lack of exculpatory evidence becomes a non-issue. For post-April 2001 actions, the absence of a burden shift is insignificant because all small businesses have been required to retain adequate records since SARA mandated the practice in 1986.¹²² As a result, the lack of exculpatory evidence may no longer be a serious problem for small businesses.

Aside from the above-stated advantages, the *de micromis* exception is unlikely to have an appreciable effect on the remaining financial problems caused by Superfund liability. Naturally, the poor lending relationships caused by the prospect of Superfund liability are a product of past and future actions. As a result, creditors will continue to be leery of extending credit to a small business if there is any potential for liability arising out of actions taking place after April 2001. Additionally, creditors continue to run the risk that actions falling before the cutoff may not qualify for *de micromis* treatment. Therefore, the provision supplies creditors with few additional guarantees that a small business will not become embroiled in a costly Superfund proceeding. Without a reduction in risk, creditors are unlikely to be more forthcoming with credit.

The effect on liability insurance will probably be mixed. For actions meeting the requirements of the exception (including the cutoff date) and falling under policies written before 1986, small firms will not incur costs related to their insurance reimbursement claims. However, there will be no savings for post-1985 policies because the insurance company would not be liable under a general liability coverage plan in the first place.¹²³ Finally, there will be no change in the cost or availability of environmental liability insurance because there will be no change in the risk borne by insurance carriers for future actions.

In terms of selling a small business or passing the business on to one's children, the *de micromis* exception may provide some relief. If a small business owner is able to document waste disposal and show a prospective buyer that the disposal is likely to fall within the exception, this assurance may alleviate some of the problems associated with finding a buyer. Similarly, parents may have a clearer conscience when passing a family-

¹²¹ *Id.*

¹²² See Bradford F. Whitman, SUPERFUND LAW AND PRACTICE 131 (1991).

¹²³ See PROBST, *supra* note 25, at 93.

owned business to their children if they are reasonably certain their past actions fall within the exception.

It is worth noting, however, that a non-trivial number of small businesses will not qualify for *de micromis* treatment and therefore will not experience the effects stated above. Of the firms with revenues falling below \$1 million annually, 21% at a given site will have contributed over 0.10% of the waste, as will 6% of firms with revenues between \$1 and \$3 million.¹²⁴ Also, 20% of firms with revenues between \$3 and \$5 million will fall above the 0.10% threshold.¹²⁵ Since these firms do not fall within the requirements of the exception, they will not experience any of the benefits of the *de micromis* liability exemption notwithstanding their unique position as small businesses. Additionally, the EPA can rule that the waste, regardless of volume, contributed significantly to the cleanup expenditures of the site and thereby impose liability despite the exception.¹²⁶ From the standpoint of desiring across-the-board liability relief for small businesses, the above considerations weaken the impact of the *de micromis* provision.

Nevertheless, the *de micromis* exception probably will have a significant effect on the small business community in terms of reducing the financial strain caused by Superfund liability. Direct expenditures on cleanup activities and litigation costs will be reduced for a substantial number of small businesses due to the correlation between firm size and volumetric share of the contamination. Additionally, the small business community may see some beneficial effects on their ability to obtain funds and may also see a reduction in transaction costs for insurance reimbursement. However, since the provision focuses on volume contributed as opposed to firm size, a sizeable number of small firms may not see any benefit from the provision.

2. *Municipal Solid Waste Exception*

The Municipal Solid Waste exception also shows potential for alleviating some of the financial burdens placed on small businesses. Essentially, this portion of the Act seeks to rectify the egregious examples of small businesses becoming enveloped in Superfund liability for contributing only their garbage to a site. Obviously, the main benefit is the elimination of small businesses' fear that they may potentially be brought into a Superfund action simply for throwing away their garbage. In so doing, however, this provision will have a significant effect on reducing the financial burden on small businesses.

With no cutoff dates for private sector contributions, the solid waste exception is more far reaching than the *de micromis* exception in eliminating financial responsibility for future as well as past actions. Like the *de micromis* exception, however, the EPA may revoke the liability

¹²⁴ DIXON, FINANCIAL IMPLICATIONS, *supra* note 22, at 34.

¹²⁵ *Id.*

¹²⁶ Small Business Liability Relief Act §102 (o)(2)(A)(i).

exemption if it finds that the waste contributed significantly to the cleanup costs at the site.¹²⁷ Given the type of waste excluded under this provision, carefully defined so as to exclude nearly all hazardous materials, it is unlikely that the EPA will invoke this provision. As a result, it appears as though small businesses do not need to fear liability for simply throwing away their garbage.

This exception is fairly narrow and probably leaves open a considerable amount of liability for small businesses. Since the Municipal Solid Waste exception applies only to ordinary garbage, the provision leaves open liability for all other types of waste generated by small businesses. Although there is little data available on the types and relative proportion of waste generated by small business, which precludes direct analysis, it is probably safe to assume that a non-trivial number of small businesses generate waste other than ordinary garbage. Therefore, a considerable number of small firms probably contribute waste falling outside of this provision and will incur liability for these contributions. As a result, this provision probably has diverging effects on small businesses depending on the industries in which they operate.

Firms in sectors that typically do not generate hazardous waste may benefit from better borrowing opportunities, while firms in waste-producing sectors probably will not be affected. In terms of financing, small firms in non-hazardous waste producing sectors may see a slight increase in the availability of capital as lenders re-evaluate the risks associated with Superfund liability. As the likelihood of these firms' involvement in Superfund actions decreases, lenders may be less inhibited to provide funds. For firms that generate waste in addition to ordinary garbage, it seems plausible that there will be no change in borrowing opportunities because the risk to the lender is not reduced significantly by this provision.

Conversely, all firms will benefit from reduced litigation costs for seeking reimbursement from pre-1986 general liability insurance policies for municipal waste-related actions. Without liability stemming from municipal solid waste, there will be no costs incurred in suing insurance providers to recover cleanup costs. However, firms that contribute other types of waste will be in the same position as they otherwise would have been absent the new exemption. Since these firms will still be liable for non-municipal waste (absent qualifying for a *de micromis* exemption), they will most likely still see high environmental insurance rates and will also incur litigation costs from obtaining reimbursement under their pre-1986 general liability insurance policies.

Finally, the Municipal Solid Waste exemption will probably have some effect on the ability of small business owners to transfer or sell their businesses. Again, the effects will probably diverge along business sectors, with the greatest benefits seen in sectors that generate little or no waste beyond municipal solid waste. Potential buyers will have far fewer

¹²⁷ *Id.*

concerns regarding potential Superfund liability if the only waste generated by the firm is exempt from liability under the Act. Conversely, the provision does little to assuage the fears of potential buyers of firms in industries that generate other waste (assuming no application of the *de micromis* exception), since these firms will continue to face potential liability.

In sum, the Municipal Solid Waste exception will have a divergent effect on reducing the financial burden on small businesses, depending on their type of business. For firms that only generate ordinary garbage, this provision will have the effect of virtually eliminating Superfund liability. Conversely, many small businesses probably generate other waste and are therefore still subject to Superfund liability. Because the exemption is so narrowly tailored, it probably will have little effect on concerns outside of direct expenditures.

3. *Expedited Settlement Provision*

In addition to the above provisions, the Small Business Liability Relief and Brownfields Revitalization Act alters certain settlement provisions within CERCLA. Specifically, the Act requires the EPA to take into account the financial position of the company seeking settlement and to consider alternative payment methods. Both of these requirements should alleviate the financial burden imposed on small businesses.

This provision will likely benefit small businesses by reducing the financial burden imposed by an adverse finding. Although the language is vague, it seems as though the EPA will take into account the company's financial condition and ability to pay while structuring a settlement. This will probably have the effect of preventing severe outcomes that would jeopardize the solvency of a small business and reduce transaction costs that otherwise would have been spent on litigation. Additionally, the provision allows for alternative payment methods that may alleviate some strain on firms by providing a more flexible payment schedule. Again, this provision is unlikely to have an effect aside from reducing direct expenditures that threaten the solvency of a company.

VI. WHO PAYS NOW?

In an ideal world, eliminating small business Superfund liability would benefit small businesses but would not increase the burden on other parties. Unfortunately, in the real world, this liability must be borne by some other party. Therefore, it is important to consider the effects of shifting the burden to larger corporations and the government in order to better evaluate the ramifications of the Act.

The foregone contributions from small businesses will be borne by either the EPA or the larger PRPs remaining at the site. Given the recent passage of the Act, there is little empirical data regarding the actual costs shifted to the EPA and/or larger firms from small business liability relief.

However, a 2000 Rand study attempted to estimate the costs shifted to the government and larger firms based on a blanket relief for all small businesses. Although the present legislation is far more narrowly tailored, this study nevertheless provides a worst-case scenario of the costs transferred to the EPA and other firms. For firms with annual revenues less than \$3 million, the study estimates that between \$3.5 and \$9.8 billion will be transferred to other parties.¹²⁸ It also estimates that eliminating liability for firms with less than 75 employees would transfer approximately \$7.5 to \$13.5 billion to either the EPA or larger PRPs.¹²⁹ Finally, Rand estimates that approximately \$540 to \$710 million would be shifted to other parties through a *de micromis* exception.¹³⁰ Given the Act's narrower exceptions, it is relatively safe to assume that the actual figures will be somewhat smaller than these estimates. In any case, there will be non-trivial sums of money that will need to be paid by someone else.

The problem is further exacerbated because the taxes formerly used to replenish the trust fund have not been renewed since 1995¹³¹ and are unlikely to be reinstated under the present administration. As a result, it seems unlikely that the trust fund will be used to pay a significant portion of these costs – at least until the taxes are reinstated. Without the ability to assume the transferred liability, the EPA most likely will be forced to aggressively use joint and several liability to pin the outstanding costs on the remaining PRPs.

As a result, the cost shifting aspect of the Act opens a host of new issues that need to be recognized. Since the Act has the effect of simply shifting the liability from small businesses to larger firms, it is questionable as to whether this is any better than the old system. In terms of making the system fairer, the effect of the Act is mixed. In cases where small firms pay disproportionately high costs in relation to harm caused,¹³² this cost shifting may be justified. After all, the larger polluter was the contributor that ultimately caused the contamination. Likewise, in the case where the ratio is skewed because fixed transaction costs make the overall costs disproportionately high in comparison to the harm caused, the shift may be justified. Here, the actual cleanup costs are low but fixed transaction costs make the overall costs very high compared to the actual harm caused. The net costs imposed on the larger firm would be relatively small¹³³ since the transferred cleanup costs are small and the larger firm would, in most cases, also benefit from a reduction in its transaction costs. However, the shift becomes less justifiable as the net costs transferred become higher and in the many cases where complete exemption is overkill.

¹²⁸ DIXON, FINANCIAL IMPLICATIONS, *supra* note 22, at 42.

¹²⁹ *Id.*

¹³⁰ *Id.* at 44.

¹³¹ See PROBST, *supra* note 25, at 13.

¹³² For example, a small business simply contributes garbage to a site where a larger firm(s) has contributed the hazardous waste.

¹³³ See DIXON, FINANCIAL IMPLICATIONS, *supra* note 22, at 45 (noting in conclusion that although a substantial number of small firms would be exempt from liability, they represent a disproportionately small amount of the waste contributed and, therefore, actual cleanup costs transferred).

Unlike the fairness argument, those who simply desire special treatment for small businesses without regard to liability inequities have a much weaker case in showing that cost shifting is justified. As noted earlier, the economic justifications are fairly weak in supporting preferential treatment, leaving only ideological support. The ideological argument becomes harder to support when one is confronted with the fact that cost shifting presents serious fairness issues for the larger firms. As a result, the argument for special treatment is extremely weak when one also considers the additional burden placed on the remaining firms.

VII. IS THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT A GOOD SOLUTION?

Armed with the above information, the next question to consider is whether the Act is a good solution to the concerns surrounding small business Superfund liability. In order to answer this question, it is important to consider all aspects of the problem, the effects on all parties involved, and whether better alternatives are available. Following in the same structure as before, this section breaks the analysis down between the two competing arguments made by the small business community with regard to why liability relief is necessary and justified.

A. IS THE ACT A GOOD SOLUTION IN TERMS OF CORRECTING THE INTRINSIC FAIRNESS PROBLEM?

The first logical issue to address is whether the concerns of the small business community with regard to the fair distribution of costs are justified. Given the empirical data presented above, it seems as though small businesses do pay a disproportionately higher amount per cleanup action than do larger firms. In addition, the data suggests that small businesses pay, on average, more per volume contributed than do their larger counterparts for actual cleanup costs. This disproportion is further exacerbated by the fact that transaction costs are relatively fixed regardless of volume contributed, meaning that small businesses pay significantly more transaction costs in relation to volume contributed than do larger firms. Coupled with the fact that there is some evidence that small firms tend to contribute less harmful waste than do many larger firms, small businesses seem to be solidly justified in arguing that they pay significantly more in relation to harm caused than do larger firms. As a result, those arguing that the distribution of liability among PRPs at a given site unfairly penalizes small firms have a firm foundation in their concerns.

Given that small firms tend to pay more in relation to harm caused than larger firms, the next logical question is whether the Act adequately and properly addresses this issue. In short, the Act's structure does not adequately rectify this problem. Instead of specifically attempting to link the allocation of liability with degree of harm caused and alleviating the high transaction costs borne by small firms, the Act selectively eliminates liability for certain actions. Although this elimination of liability probably

encompasses many of the firms unfairly penalized by Superfund liability, it fails to alleviate the burden on many others. In many cases, firms that otherwise would face disproportionately higher costs will have their liability eliminated. However, some firms that should have their liability *reduced* will be unaffected. Furthermore, a blanket elimination of liability is probably overkill and unfairly transfers this liability to the remaining PRPs at the site. Finally, the Act does little to specifically address one of the main complaints of this group: the disproportionately high transaction costs imposed on small businesses. With the exception of expedited settlements, which may have only a marginal effect, the Act nowhere addresses this concern. Therefore, the Act does a poor job of addressing the proportionality issue with respect to allocation of Superfund-related costs.

A far more logical method of addressing the fairness issue would have been to specifically target the two main areas where small businesses tend to pay more in relation to harm caused. First, the Act should have amended CERCLA's liability allocation scheme to more fairly allocate cleanup liability among the parties with respect to the harm caused, taking into account type and quantity of waste contributed. Second, the Act should have specifically addressed the issue of transaction costs and streamlined the allocation process so as to reduce the burden on small businesses. The Act's blanket elimination of liability under certain circumstances fails to provide a mechanism by which the allocation of liability is fair across the board and, instead, opens up a host of new fairness issues with regard to the imposition of more liability on larger firms. As it stands, the Act sacrifices the accuracy of liability and cost allocation for simplicity of application.

B. IS THE ACT A GOOD SOLUTION IN TERMS OF ELIMINATING THE HARSH FINANCIAL IMPACT ON SMALL BUSINESSES?

In terms of justifying special treatment for small businesses based on their unique financial situation, the arguments are much weaker and probably fail. As noted earlier, the economic justifications for eliminating or reducing Superfund liability because small businesses, in general, cannot handle the costs associated with Superfund liability are extremely weak. From a pure efficiency standpoint, a small business cannot handle the costs associated with its operations, it should not continue to operate. Although the iconoclastic justifications for propping up small businesses are strong among the American populace, they are supported by little, if any, logical justifications. As a result, excepting the unfair allocation of Superfund costs noted above, small businesses probably should not be granted any special treatment simply *because* they are small businesses.

In taking the stand that small businesses should not be granted immunity from Superfund liability simply because they often cannot handle the costs associated with the liability, the argument for special treatment is rendered moot. Without a solid justification for providing special exemptions for small businesses, again, excepting any unfair allocation of

liability, the argument for across the board elimination of liability should be ignored. However, the structure of the Act seems to rely heavily on the argument that small businesses should be granted special treatment. The blanket elimination of liability under the circumstances outlined in the Act seem to draw heavily on the mindset that small businesses should be granted special immunity from Superfund liability simply *because* they are small businesses, without regard to the respective harm caused. Therefore, the Act appears to also be a failure as it draws too heavily on the mostly unjustified attitude that small businesses somehow deserve special treatment under the Superfund regime.

VIII. CONCLUSION

In light of the analysis above, it appears as though the Small Business Liability Relief and Brownfields Revitalization Act does not effectively address the problems faced by the small business community as a whole. Although there is substantial empirical evidence showing that small businesses pay disproportionately high costs in relation to harm caused, the Act fails to adequately or specifically address this concern. Instead, legislators seem to have opted for a “patch” fix that somewhat addresses this problem without resorting to a drastic overhaul of the Superfund system. Although substantial change to the extremely complicated Superfund regime would require extensive time and resources to accomplish, it is still not an excuse for simply trying to apply a “quick fix” to the problem. It is important to note, however, that this assessment does not take into account the legislative limits of our political system, which is a valid mitigating factor in this criticism.

Furthermore, the legislators seem to have bent to popular will regarding the special treatment of small businesses. Although there is little, if any, practical rationale for providing special treatment to small businesses, legislators nevertheless ostensibly structured the Act with these intentions in mind. Blanket elimination of liability, without regard to equitable allocation of costs among PRPs, is certainly motivated, at least in part, by the Congress’ belief in providing a “break” for small businesses. Again, this criticism does not account for the obvious fact that legislators must represent the will of their constituents, who widely favor special treatment for the small business community.

Therefore, from a purely empirical standpoint, the Small Business Liability Relief and Brownfields Revitalization Act is a fairly poor piece of legislation in terms of rectifying the problems it proposes to fix. Most likely, the Act is the result of a legislative system that is beholden to the will of the populace, no matter how unjustified that will is, and traded an accurate solution for speed and ease of application.