ARTICLES

New Directions in Joint and Several Liability Under CERCLA?

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INTRODUCTION

Since the Comprehensive Environmental Response, Compensation and Liability Act[1] (CERCLA or Act) was enacted in 1980, courts and commentators have struggled to determine how principles of joint and several liability should apply to the costs of addressing the release or threatened release of hazardous substances.[2] As with so many other liability issues raised under CERCLA, the statute's ambiguous language and sparse legislative history have made this task extremely difficult.

The factual context in which most CERCLA liability cases arise makes the issue of joint and several liability particularly potent. CERCLA sites seldom contain a single hazardous waste deposited by a sole defendant. In most instances, sites contain

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[1] Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C. §§ 9601-9657 (1988)), *amended by* the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1988). The Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 104 Stat. 1388, 1388-319 (1990) (codified as amended at 42 U.S.C. § 9611(a)) reauthorizes CERCLA until September 30, 1994, and provides for up to $5.1 million in funding. The Act is often referred to as "Superfund," in reference to the hazardous substance trust fund created under 26 U.S.C. § 9507 (1988).

[2] Commentators typically offer several arguments in support of imposing joint and several liability in the CERCLA context. First, proponents argue that "as against an innocent, injured plaintiff, an industry which profited from the manufacture of a product that caused harm should pay for the damage." Douglas F. Brennan, *Joint and Several Liability for Generators Under Superfund: A Federal Formula for Cost Recovery*, 5 UCLA J. ENVTL. L. & POL'Y 101, 115 n.71 (1986). Second, joint and several liability relieves the injured plaintiff of the burden of establishing exactly the amount of hazardous substance contributed by each defendant. *See* Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 VA. L. REV. 1157, 1187 n.117 (1982) [hereafter Note, *Joint and Several Liability*]. Third, joint and several liability is said to deter environmental contamination by creating incentives to voluntarily clean up existing contamination and to encourage proper future disposal. *See* Brennan, *supra*, at 114-15 (stating threat of CERCLA liability for cleanup costs and protracted litigation heightens hazardous waste generators' concern over choice of transporters and disposal sites); Anita M. D'Arcy, Note, *Joint and Several Liability Under Superfund*, 13 LOY. U. CHI. L.J. 489, 522 (1982) (noting joint and several liability may deter future improper hazardous substance disposal and encourage parties to clean up inactive disposal facilities without resort to litigation). Fourth, joint and several liability is viewed as an effective cost-spreading mechanism. *See* Brennan, *supra*, at 115 (analogizing CERCLA to products liability actions where courts have imposed strict liability and apportioned causation and cost of harm); Thomas C.L. Roberts, *Allocation of Liability Under CERCLA: A "Carrot and Stick" Formula*, 14 ECOLOGY L.Q. 601, 621 (1987) (illustrating courts' willingness to allocate liability among various defendants). *See generally* Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 21-36 (1993) (discussing principal reasons for supporting joint and several liability).

hazardous substances deposited by a number of parties over substantial periods of time.[3] It is almost always impossible to determine precisely which parties deposited which substances and at what times. The records of generators and transporters indicating the type and quantity of wastes sent to a site are often inaccurate, incomplete, or nonexistent.[4] Moreover, many substances, when mixed, can interact synergistically to greatly amplify the resulting harm, thus making it difficult, if not impossible, to scientifically assign the harms attributable to each contributor at a multi-polluter site.[5] The Environmental Protection Agency (EPA) has considerably increased the stakes in CERCLA cleanup actions by taking the firm stance that when hazardous substances are commingled, joint and several liability must necessarily and automatically be imposed upon the parties responsible for the substances[6] — a stance that at least some courts have adopted.[7]

CERCLA's response to these factual uncertainties is the imposition of *legal* uncertainty upon defendants — that is, the imposition of joint and several liability. Although such a stan-

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[3] *See In re* Bell Petroleum Serv., Inc., 3 F.3d 889, 895 n.7 (5th Cir. 1993) (noting that many cases in which joint and several liability has been imposed involved hazardous waste sites at which numerous substances have commingled) (citing United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 994 (D.S.C. 1986), *aff'd in part and vacated in part sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1396 (D.N.H. 1985)).

[4] *See, e.g.*, United States v. Acton Corp., 733 F. Supp. 869, 870 (D.N.J. 1990) (noting lack of complete waste dumping records in case at bar).

[5] *See Monsanto*, 858 F.2d at 170 (noting technical infeasibility of tracing improperly disposed of waste to its source); *see also* United States v. Bliss, 667 F. Supp. 1298, 1309 (E.D. Mo. 1987) (stating that waste commingling and migration at disposal sites make it scientifically difficult and economically infeasible to identify sources); United States v. A & F Materials Co., 578 F. Supp. 1249, 1253 (S.D. Ill. 1984) (same); United States v. Medley, 17 Envtl. L. Rep. (Envtl. L. Inst.) 20,297 (D.S.C. 1986) (stating that commingling of wastes constitutes a single indivisible environmental harm that cannot be rationally apportioned); *South Carolina Recycling & Disposal*, 653 F. Supp. at 994 (citing case law assigning joint and several liability when it is impossible to divide harm in any meaningful way).

[6] *See, e.g.*, United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993) (rejecting government argument that commingling is synonymous with indivisible harm); United States v. Alcan Aluminum Corp., 964 F.2d 252, 270 n.29 (3d Cir. 1992) (same).

[7] *See, e.g.*, United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987) (finding that "the harm is theoretically and practically incapable of division among the defendants due to the synergistic effects of the commingling of difficult wastes").

dard eases the government's task by relieving it of difficult burdens of proof, joint and several liability is potentially disastrous for defendants. First, the costs of cleaning up environmental contamination are extremely high.[8] Second, defendants who voluntarily settle cleanup claims with the EPA may be insulated from contribution suits[9] by nonsettling defendants.[10]

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[8] At the time CERCLA was enacted, the Environmental Protection Agency (EPA) estimated that the United States produced 57 million metric tons of hazardous waste per year. S. REP. NO. 848, 96th Cong., 2d Sess. 3 (1980), *reprinted in* SENATE COMM. ON ENV'T & PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 (SUPERFUND), vol. I, at 310 (Comm. Print 1983). The University of Tennessee's Waste Management Research and Education Institute estimates that cleanup of Superfund sites is likely to cost between $106 and $302 billion over the next 30 years (measured in 1990 dollars). MILTON RUSSELL ET AL., HAZARDOUS WASTE REMEDIATION: THE TASK AHEAD 16 (1991).

The EPA estimated the average costs (in 1988 dollars) associated with a Remedial Investigation and Feasibility Study (RI/FS) and design and implementation of a remedy at a National Priority List (NPL) site to be $1.3 million for the RI/FS, $1.5 million for remedial design, $25 million for remedial action, and $3.77 million for the present value of operation and management of the site remedy over 30 years. *See* 57 Fed. Reg. 4824, 4829 (1992).

[9] "Under general legal principles, a claim for contribution is one in which one liable party attempts to recover from another potentially liable party for its share of the cost." Transtech Indus., Inc. v. A & Z Septic Clean, 798 F. Supp. 1079, 1086 (D.N.J. 1992) (citations omitted).

According to the United States Supreme Court:

> Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability. Recognition of the right reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability.

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 87-88 (1981) (footnotes omitted). Contribution is an equitable remedy. *See* RESTATEMENT (SECOND) OF TORTS § 886A(2) (1979) (hereafter *Restatement*). *See generally infra* notes 184-200 and accompanying text (discussing contribution under CERCLA).

[10] *See* 42 U.S.C. § 9613(f)(2) (1988) (providing that a defendant that has settled its liability to the United States or a state "shall not be liable for claims for contribution regarding matters addressed in the settlement"). Similar provisions apply to de minimis settlements, *id.* § 9622(g)(5), and cost recovery actions, *id.* § 9622(h)(4). *See generally* Barry S. Neuman, *No Way Out? The Plight of the Superfund Nonsettlor*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,295, 10,297 (1990) (discussing settlor's protection against contribution suits by nonsettlors); Elizabeth F. Mason, Note, *Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following* Laskin's *Lead*, 19 B.C. ENVTL. AFF. L. REV 73 (1991) (proposing that courts should mitigate harsh effects of contribution protection on nonsettlors by allocating liability on fair share basis); William W. Balcke, Note, *Superfund Settlements: The*

The threat of joint and several liability for massive cleanup costs, coupled with an inability to seek contribution from settling defendants, creates a powerful incentive for defendants to settle early and dissuades them from contesting liability.[11] Even a small contribution to a hazardous waste site can result in a defendant being held jointly liable for millions of dollars of cleanup costs.[12]

CERCLA was recently before Congress for reauthorization, but it appears highly unlikely that problems associated with the statute's joint and several liability scheme will be eradicated by reform legislation. The Clinton Administration has vehemently opposed proposals for substantial redrafting of CERCLA's retroactive, strict, and joint and several liability provisions.[13] As a

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Failed Promise of the 1986 Amendments, 74 VA. L. REV. 123, 140-42 (1988) (same).

[11] As then-EPA Administrator Lee Thomas stated:

> Knowledge that they can be held jointly and severally liable for full cleanup gives responsible parties the impetus to negotiate settlements for cleanup when the harm at a site is indivisible. Without this powerful tool, incentives for delay while parties quibble over the particulars of individual contribution at the site may outweigh the real priority — getting on with the job of cleanup.

Hearings on Superfund Reauthorization: Judicial and Legal Issues Before the Comm. on the Judiciary of the House of Representatives, 99th Cong., 1st Sess. 13 (1985) (statement of Lee M. Thomas, Administrator, EPA); *see also Hearings on Superfund Reauthorization Before the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. 718 (1993) (statement of Hon. Robert Abrams, Attorney General, State of New York) (noting that threat of strict, joint and several liability scheme induces cleanup of hazardous sites that are not on the NPL).

[12] Such a result is particularly unfair to those who contribute only small volumes of waste to a multi-polluter site. Courts profess concern for such defendants. *See, e.g.*, Idaho v. Bunker Hill Co., 635 F. Supp. 665, 676-77 (D. Idaho 1986) (recognizing that "care must be taken by the courts in imposing joint and several liability upon what may be a relatively small contributor to the waste site because of the inherent unfairness"); United States v. Stringfellow, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,385, 20,387 (C.D. Cal. 1984) (same). However, virtually every court that has examined the issue has held such defendants jointly and severally liable. *See infra* note 145 and accompanying text (noting that joint and several liability has attached in virtually every case involving multiple contributors to a CERCLA site).

[13] *See* Raymond A. Ludwiszewski, *Superfund Liability at Issue*, NAT'L L.J., June 14, 1993, at 29 (citing EPA Administrator Carol Browner's opposition to substantive legislative amendments to Superfund). The Clinton Administration's Superfund reform proposal was introduced in the House as H.R. 3800, 103d Cong., 2d Sess. (1994), and in the Senate as S. 1834, 103d Cong., 2d Sess. (1994). For a summary of the Administration's proposal, see 140 CONG. REC. S1058-59 (daily ed. Feb. 7, 1994) (statement of Sen. Baucus).

Currently, CERCLA authorizes the EPA to engage in nonbinding allocation of responsibility at sites. *See* 42 U.S.C. § 9622(e)(3)(A) (1988). The Administration's proposal would create a more detailed nonbinding allocation procedure using a third-party allocator. *See,*

result, CERCLA defendants must continue to look to the courts for relief from the statute's harsh joint and several liability standard.

Three recent decisions by the Second, Third, and Fifth Circuit Courts of Appeal — *United States v. Alcan Aluminum Corp. (Alcan I)*,[14] *United States v. Alcan Aluminum Corp. (Alcan II)*,[15] and *In re Bell Petroleum Services, Inc. (Bell)*[16] — have re-examined CERCLA's joint and several liability standard. Most commentators have heralded these opinions as a victory for beleaguered environmental defendants and as a signal that the courts will no longer tolerate the extraordinarily onerous liability rules that have evolved under CERCLA.[17] Unfortunately,

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e.g., S. 1834, *supra*, § 104. The allocator would use a modified version of the Gore factors in making an allocation determination. *See infra* notes 158-59 and accompanying text (discussing Gore factors). Many commentators regard the allocation provision as unsatisfactory. *See, e.g.*, Steven M. Jawetz, *The Superfund Reform Act of 1994: Success or Failure is Within EPA's Sole Discretion*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,161, 10,168 (1994) (questioning proposed allocation system's "implementability" and fairness); Steven T. Miano & Madeleine H. Cozine, *Will CERCLA Careen Toward Reauthorization?*, THE LEGAL INTELLIGENCER, June 28, 1994, at 11 (arguing allocation scheme is likely to increase, not decrease, litigation and transaction costs); *but see* RAND CORP., FIXING SUPERFUND: THE EFFECT OF THE PROPOSED SUPERFUND REFORM ACT OF 1994 ON TRANSACTION COSTS 54 (1994) (arguing proposed allocation system will decrease litigation of allocation issues).

[14] 964 F.2d 252 (3d Cir. 1992).

[15] 990 F.2d 711 (2d Cir. 1993).

[16] 3 F.3d 889 (5th Cir. 1993).

[17] *See, e.g.*, Daniel P. Harris & David M. Milan, *Liability Under CERCLA: Joint and Several with a Twist*, BARRISTER, Winter 1993, at 38, 42 (noting *Alcan I* may "provide defendants with a real opportunity to meet their burden of proving divisibility"); Stephen C. Jones, *Courts Skeptical on Superfund Liability*, NAT'L L.J., Feb. 7, 1994, at 18 (interpreting decisions to indicate that courts have begun to defer less to agency expertise and "have begun to introduce an element of fairness into the Superfund process"); Linda L. Rockwood & James L. Harrison, *The* Alcan *Decisions: Causation Through the Back Door*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,542, 10,543 (1993) (arguing that *Alcan I* and *Alcan II* have "created a chink" in CERCLA plaintiffs' armor); David Sive, *Understanding Superfund's New Calculus*, NAT'L L.J., Feb. 21, 1994, at 16 (writing that decisions "have nearly destroyed the government's joint-and-several liability weapon"); *Third Circuit Ruling Said to Strike Blow at CERCLA's Joint and Several Liability Scheme*, 7 TOXICS L. REP. (BNA) 17, 17 (June 3, 1992) (stating that *Alcan I* spells "the beginning of the end of joint and several liability under Superfund"). A few commentators have asserted that while the decisions may change the procedural mode in which cases are decided, they will have no impact on the substantive rules regarding joint and several liability under CERCLA. *See, e.g.*, David Montgomery Moore, *The Divisibility of Harm Defense to Joint and Several Liability Under CERCLA*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,529, 10,529 (1993) (arguing that *Alcan I* and *Alcan II* neither lessen a defendant's burden of proof nor increase the likelihood of successful divisibility claims); *see also* William H. Black, Jr., *CERCLA Defendants Entitled to Prove Clean-up Costs Capable of*

rumors of the decline and potential demise of CERCLA's expansive liability scheme are greatly exaggerated. A close examination of *Alcan I, Alcan II,* and *Bell* reveals that these three appellate opinions do little to further the cause of the typical defendant caught in the web of CERCLA joint and several liability. The influence these cases will have on the reasoned development of CERCLA liability rules is certain to be slight because the holdings of the cases are narrow and their facts unusual. Given the nature of CERCLA's statutory scheme, however, it is not at all clear that the courts can unilaterally resolve the problems associated with its liability provisions. Extensive legislative reforms are the only solution.

Part I of this Article examines common law principles of joint and several liability as articulated in the *Restatement (Second) of Torts.* Part II.A analyzes CERCLA's statutory provisions and legislative history regarding issues of joint and several liability and causation. Part II.B discusses the manner in which the courts have interpreted and applied these standards in CERCLA cases, looking specifically at: (1) the divisibility of harm approach adopted by the majority of courts; and (2) the minority "moderate" approach and its relationship to the equitable right of contribution. Part III examines the effect of *Alcan I, Alcan II,* and *Bell* on CERCLA's joint and several liability standard and assesses their impact on issues of causation and burdens of proof. Concluding remarks are made in Part IV.

I. COMMON LAW PRINCIPLES OF JOINT AND SEVERAL LIABILITY

Although the concept is almost two hundred years old, joint and several liability was used sparingly by American courts until the past two decades. Originally, under English common law, joint and several liability was imposed only upon two or more individuals who acted in concert to cause injury to the plaintiff, or who breached a common duty owed to the plaintiff.[18] As

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Apportionment, THE LEGAL INTELLIGENCER, Jan. 7. 1993, at 4 (arguing *Alcan I* and *Alcan II* may actually increase PRP liability and transactional costs by encouraging litigation of liability).

[18] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 322-23 (5th ed. 1984) [hereafter PROSSER & KEETON].

joint tortfeasors, each was liable for the entire injury produced. Where the tort was intentional, neither was permitted to seek contribution from the other.[19]

Over time, joint and several liability was expanded, first by American courts and later by English ones, to instances in which independent torts caused a single, indivisible injury.[20] American courts also adopted the English "no-contribution" rule and expanded it to apply to *all* types of torts, including negligent acts and other types of unintentional misconduct.[21] The inability of defendants to demand contribution from their joint tortfeasors made many American courts reluctant to impose joint and several liability upon them.[22] By the 1970s, however, state courts and legislatures had begun to allow jointly liable defendants to seek contribution from their fellow tortfeasors — a development that increased judicial willingness to impose joint and several liability.[23]

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[19] *Id.* § 50, at 336-37. The "no-contribution" rule was first articulated in Merryweather v. Nixan, 101 Eng. Rep. 1337 (1799). Scholars and courts assert that *Merryweather* barred contribution only in intentional tort cases, and that its holding has been incorrectly interpreted as being broader. *See, e.g.*, Knell v. Feltman, 174 F.2d 662, 666 (D.C. Cir. 1949) (explaining that, "due to the brevity of the report and a misleading headnote, the Merryweather case has often been cited in support of the sweeping proposition that no contribution can be had between joint tortfeasors. It is plain, however, that the ruling of the case was limited to the denial of contribution [between] wilful or intentional wrongdoers."); PROSSER & KEETON, *supra* note 18, § 50, at 336.

[20] *See* PROSSER & KEETON, *supra* note 18, § 47, at 328-29; *see, e.g.*, Flaherty v. Northern Pac. Ry., 40 N.W. 160, 160-61 (Minn. 1888); Peters v. Johnson, 264 P. 459, 462 (Or. 1928).

[21] PROSSER & KEETON, *supra* note 18, § 50, at 337; *see also* Union Stock Yards Co. v. Chicago B. & Q. R.R., 196 U.S. 217, 224 (1905) (stating that "the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done").

[22] *See* PROSSER & KEETON, *supra* note 18, § 50, at 337-38; *see also* Velsicol Chem. Corp. v. Rowe, 543 S.W.2d 337 (Tenn. 1976) (overruling previous case in which court refused to impose joint and several liability on joint tortfeasors who had caused an indivisible harm because enactment of state statute providing for contribution minimized possibility of inequitable results).

[23] *See* PROSSER & KEETON, *supra* note 18, § 50, at 337-38; *see also* RESTATEMENT, *supra* note 9, § 886A cmt. a (noting that substantial majority of states now recognize right of contribution); William M. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517, 550-51 (1980) (same). Many state legislatures enacted a version of the Uniform Contribution Among Tortfeasors Act, which provides that a liable defendant may sue other tortfeasors for their fair share of the damages owing to the plaintiff. UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT § 3(a), 12 U.L.A. 88 (1955). It appears, however, that a handful of states still do not permit contribution. *See* Lewis A. Kornhauser & Richard L. Revesz, *Apportioning Damages Among Potentially Insolvent*

Under modern American law, courts usually impose joint and several liability in one of four situations: (1) when two or more persons act in concert to create a harm; (2) when two or more persons breach a common duty owed to the plaintiff; (3) when a special relationship exists between the parties (such as a master-servant or other type of relationship leading to vicarious liability); or (4) when the harm to the plaintiff is indivisible.[24] The last category is the one most applicable to CERCLA actions and the one most commonly relied upon by courts in this context; hence, it is the focus of this Article.[25]

The *Restatement* reflects the modern common law approach to joint and several liability. It draws a sharp distinction between divisible and indivisible harms, finding joint and several liability is unavailable for divisible harms, but potentially appropriate for indivisible harms. Section 433A of the *Restatement* provides:

> (1) Damages for harm are to be apportioned among two or more causes where
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> (a) there are distinct harms, or
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> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

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that did not recognize contribution rights among negligent tortfeasors). *See generally* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 87 n.17 (1981) (describing evolution of right to contribution under state law).

[24] PROSSER & KEETON, *supra* note 18, § 52, at 346-48. *See generally* Elizabeth T. Luster, Note, *The Comprehensive Environmental Response, Compensation, and Liability Act of 1980: Is Joint and Several Liability the Answer to Superfund?*, 18 NEW ENG. L. REV. 109, 132-34 (1982) (discussing four traditional grounds for imposition of joint and several liability).

[25] Very few CERCLA cases have arisen under the other categories. *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 845 (W.D. Mo. 1984) (finding generator, transporter, and site owner jointly and severally liable because they acted in concert to create single, indivisible harm), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

Professor John H. Wigmore explored the extension of joint and several liability to instances in which two individuals, not acting in concert, created an indivisible harm. *See* John H. Wigmore, *Joint-Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress*, 17 ILL. L.F. 458 (1923). Wigmore found that the concerted action requirement served only to prevent injured plaintiffs from recovering damages from multiple defendants who had not acted in concert. He concluded that: "Wherever two or more persons by culpable acts, *whether concerted or not*, cause a single general harm, not obviously assignable in part to the respective wrongdoers, the injured party may recover from each for the whole." *Id.* at 459 (emphasis in original).

> (2) Damages for any other harm cannot be apportioned among two or more causes.[26]

Thus, under the *Restatement,* if the harms are "distinct" (i.e., the harm caused by one tortfeasor is completely different from the harm caused by a second tortfeasor),[27] courts should not impose joint and several liability. For example, if one defendant shoots the plaintiff in the arm, and a second defendant shoots the plaintiff in the leg, the wounds are separate injuries, caused by distinct harms.[28] Although it may be difficult to apportion some of plaintiff's damages between the tortfeasors, such as pain and suffering, a "rough estimate which will fairly apportion such subsidiary elements of damages"[29] will suffice; neither of the two defendants will be made to answer for the distinct harm inflicted upon the plaintiff by the other.[30]

Similarly, if joint tortfeasors cause a single harm that is nonetheless divisible, each tortfeasor is liable only for the harm which that tortfeasor actually caused, provided a reasonable basis for apportionment exists.[31] The *Restatement* provides the example of cattle owned by two persons. If the cattle stray upon the plaintiff's property and destroy his crops, "the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each,

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[26] RESTATEMENT, *supra* note 9, § 433A.

[27] The *Restatement* provides the example of successive traffic accidents in which the first driver negligently fractures the victim's skull, and a second negligent driver runs over the unconscious victim and breaks his leg. *Id.* § 433A cmt. c, illus. 2.

[28] *Id.* § 433A cmt. b.

[29] *Id.*

[30] *Id.*

[31] *Id.* § 433A(1)(b). According to the accompanying comment, such harm:

> while not so clearly marked out as severable into distinct parts, [is] still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible. . . . Where such apportionment can be made without injustice to any of the parties, the court may require it to be made.

Id. § 433A cmt. d; *see also id.* § 881 (providing that if two or more parties, "acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused").

The initial determination of *whether* harm can be apportioned among two or more causes is a question of law. *See id.* § 434(1)(b). Actual apportionment of damages, however, is a question of fact. *See id.* § 434(2)(b).

number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number."[32]

Other types of harm, such as the burning of a house or the sinking of a barge, "by their very nature, are normally incapable of any logical, reasonable, or practical division."[33] Section 875 of the *Restatement* provides that where two or more tortfeasors cause a single and indivisible harm for which no reasonable basis for apportionment exists, each tortfeasor is liable to the injured plaintiff for the entire harm.[34] The plaintiff may choose to bring suit against one, some, or all of the joint tortfeasors.[35]

Causation plays a significant role in apportioning liability under the *Restatement.* The plaintiff has the duty of establishing that each defendant's act was a substantial cause of the inju-

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[32] *Id.* § 433A cmt. d. The *Restatement* also provides the following example of a divisible harm:

> Through the negligence of A, B, and C, water escapes from irrigation ditches on their land, and floods a part of D's farm. There is evidence that 50 per cent of the water came from A's ditch, 30 per cent from B's and 20 per cent from C's. On the basis of this evidence, A may be held liable for 50 per cent of the damages to [D]'s farm, B liable for 30 per cent, and C liable for 20 per cent.

Id. § 433A cmt. d., illus. 4. The *Restatement* also provides the following example of an indivisible harm:

> A Company and B Company each negligently discharge oil into a stream. The oil floats on the surface and is ignited by a spark from an unknown source. The fire spreads to C's barn, and burns it down. C may recover a judgment for the full amount of his damages against A Company, or B Company, or both of them.

Id. cmt. i, illus. 14.

[33] *Id.* cmt. i.

[34] *Id.* § 875. Indivisibility of harm can be a thorny factual issue even outside the CERCLA arena. As one treatise notes, indivisible "can mean that the harm is not even theoretically divisible (as death or total destruction of a building) or that the harm, while theoretically divisible, is single in a practical sense so far as the plaintiff's ability to apportion it among the wrongdoers is concerned (as where a stream is polluted as a result of refuse from several factories)." FOWLER V. HARPER ET AL., THE LAW OF TORTS § 10.1, at 18 (2d ed. 1986).

[35] *See* Landers v. East Texas Salt Water Disposal Co., 248 S.W.2d 731, 734 (Tex. 1952) (holding that when "the tortious acts of two or more wrongdoers join to produce an indivisible injury . . . all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit").

ry.[36] Once the plaintiff establishes causation, the burden of showing divisibility is on the defendant seeking to avoid joint and several liability.[37]

Over the past four decades, courts have developed a substantial body of case law on joint and several liability in the specific context of pollution. Early cases treated pollution as a nuisance and found that joint and several liability was inappropriate because the harm could easily and fairly be divided among multiple defendants.[38] However, courts soon recognized the tremendous difficulty that plaintiffs faced in trying to prove each individual defendant's share of the harm in a multi-polluter context.[39] As a result, courts began to impose joint and several liability more frequently in such cases by finding that the harm created by multiple polluters was indivisible.[40]

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[36] RESTATEMENT, *supra* note 9, § 433B(1); *see also id.* cmt. a (explaining that plaintiff "must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm").

[37] *Id.* § 433B(2). The *Restatement* comments indicate that the rationale is that, as between the proved tortfeasor and the innocent plaintiff, the burden of proof as to divisibility is more fairly placed upon the defendant. *Id.* cmt. d.

The *Restatement* also provides that:

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon such actor to prove that he has not caused the harm.

Id. § 433B(3).

[38] *See, e.g.*, Vaughn v. Burnette, 84 S.E.2d 568, 569-70 (Ga. 1954) (holding that action at law may not be maintained jointly in nuisance case where damages could be apportioned); Maas v. Perkings, 253 P.2d 427, 430 (Wash. 1953) (finding that where pollution came from numerous independent sources liability of those contributors to injury was several).

[39] As one court phrased it, "[T]he rule of joint and several liability in the field of torts had its inception in the need of the law, bent on justice, to relieve a plaintiff of the intolerable burden of proving what share each of two or more wrongdoers contributed to the plaintiff's injuries. . . ." Landers v. East Texas Salt Water Disposal Co., 248 S.W.2d 731, 733 (Tex. 1952).

[40] *See, e.g.*, Michie v. Great Lakes Steel Div., Nat'l Steel Corp., 495 F.2d 213, 214-18 (6th Cir. 1974), *cert. denied*, 419 U.S. 997 (1974); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1102 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Phillips Petroleum Co. v. Hardee, 189 F.2d 205, 212 (5th Cir. 1951); United States v. Reserve Mining Co., 408 F. Supp. 1212, 1216-18 (D. Minn. 1976); Oakwood Homeowners Ass'n v. Ford Motor Co., 258 N.W.2d 475, 485 (Mich. 1977); City of Perth Amboy v. Madison Indus., Inc., 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,554, 20,554-55 (N.J. Super. Ct. 1983); New York v. Schenectady Chems., Inc., 459 N.Y.S.2d 971, 978 (1983).

By the time Congress enacted CERCLA in 1980, the parameters of common law joint and several liability were well-established. Courts had also begun to apply joint and several liability in the context of multi-polluter tort actions. As the next section demonstrates, the vagueness and ambiguity of CERCLA's statutory language and legislative history has catapulted the *Restatement*'s joint and several liability standards to a starring role in CERCLA liability analysis.

II. JOINT AND SEVERAL LIABILITY UNDER CERCLA: STATUTORY STANDARDS AND JUDICIAL INTERPRETATIONS

As with so many other liability standards under CERCLA, Congress failed to expressly provide for joint and several liability in the statutory language. Instead, it deliberately left the task of articulating such a standard to the courts, to be developed under "traditional and evolving principles of common law."[41] As a result, CERCLA's liability scheme today is as much the result of judicial interpretation as it is of congressional creation. Because CERCLA's joint and several liability standard has been developed through case law, a certain degree of inconsistency and disagreement in judicial articulations and applications of the standard is evident in early opinions. In recent years, however, the rules pertaining to joint and several liability in CERCLA cases have crystallized, and the outcome of cases has become more predictable.

A. CERCLA's Joint and Several Liability Standard

Congress enacted CERCLA in 1980 as a remedial statute to correct the problems created by hazardous substances produced and abandoned in the past.[42] CERCLA was hastily passed by a lame-duck Congress and in many ways is a "last-minute

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For a more detailed analysis of the development of joint and several liability under modern tort law, see Frank Prager, *Apportioning Liability for Cleanup Costs Under CERCLA*, 6 STAN. ENVTL. L.J. 198, 198-204 (1986-87); Luster, *supra* note 24, at 138-44.

[41] 126 CONG. REC. 31,965 (1980).

[42] *See, e.g.*, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (explaining that Congress intended CERCLA to enable EPA to respond effectively to hazardous waste problems, and to ensure that those responsible for hazardous waste problems paid for harm created).

compromise."[43] As a result, much of the statutory language is incomplete, inconsistent, and at times, incomprehensible.[44]

CERCLA is an unusual law because its liability provisions are simultaneously draconian and nebulous. The statute contains few explicit provisions regarding liability standards; the standards have been developed through case law. The courts have determined that CERCLA's liability scheme must be "liberally" construed in order to achieve its remedial goals.[45] This construction has led courts to find that liability under CERCLA is strict,[46] retroactive,[47] and more importantly for purposes of this Article, joint and several, at least in instances of indivisible harm.[48] CERCLA does not expressly provide for joint and several liability; instead, courts have extracted this liability standard from the chaotic legislative history and ambiguous language of the statute.[49]

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[43] *See* United States v. A & F Materials Co., 578 F. Supp. 1249, 1253 (S.D. Ill. 1984) (discussing circumstances of CERCLA's enactment); *see also* New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985) (calling CERCLA "an eleventh hour compromise"); United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905, 1907 (C.D. Cal. 1984) (stating that CERCLA "bears the earmarks of hasty drafting and last-minute political compromise").

[44] *See* sources cited *supra* note 43 and *infra* note 71. *See generally* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

[45] *See, e.g.*, B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

[46] *See, e.g.*, Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988); *Shore Realty*, 759 F.2d at 1042. *See generally* Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 598-603 (1993) (discussing CERCLA's strict liability standard).

[47] *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732-33 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. Conservation Chem. Co., 619 F. Supp. 162, 220-21 (W.D. Mo. 1985); United States v. Price, 577 F. Supp. 1103, 1108-10 (D.N.J. 1983).

[48] *See, e.g.*, O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

[49] As one court has noted, both proponents and opponents of the joint and several liability standard under CERCLA can find support for their positions in the Act's statutory language and legislative history. *See* United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905, 1907 (C.D. Cal. 1984).

1. CERCLA's Statutory Scheme

Congress enacted CERCLA to ensure that those responsible for environmental contamination bear the costs of cleaning it up.[50] To achieve this goal, CERCLA imposes broad liability on four categories of potentially responsible parties (PRPs): (1) the current owners and operators of a facility; (2) persons who formerly owned or operated the facility at the time of disposal of hazardous substances; (3) persons who arranged for the disposal or treatment of hazardous substances (commonly known as "generators"); and (4) transporters of hazardous waste.[51]

Imposition of CERCLA liability generally requires findings that: (1) the contaminated property or site is a "facility;" (2) a

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[50] *See* H.R. REP. NO. 253(III), 99th Cong., 1st Sess. 15, (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038 (stating Congress' goals in enacting CERCLA were: "(1) to provide for cleanup if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these cleanups").

[51] Section 107 of CERCLA states in relevant part:

> (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
>
> (1) the owner and operator of a vessel or a facility;
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —
>
> (A) all costs of removal or remedial action
> incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a) (1988).

release or threatened release of a hazardous substance from the facility has occurred; (3) response costs have been incurred as a result of the release or threatened release; and (4) the party to be held liable falls within one of the four classes of PRPs enumerated above.[52] Suits may be brought by the United States, the states, or private parties.[53] The statute specifically provides that PRPs must ultimately bear the costs of any cleanup actions taken.[54]

Once the government establishes each of the required elements, the burden shifts to the defendant to demonstrate the existence of one of the narrow affirmative defenses permitted under CERCLA. These defenses allow the defendant to escape liability only if it can establish by a preponderance of the evidence that the release occurred as a result of: (1) an act of God; (2) an act of war; or (3) an act or omission of a wholly unrelated third party.[55] If the defendant fails to meet its bur-

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[52] *See, e.g.*, B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992) (setting forth elements of prima facie CERCLA case); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989) (same).

[53] 42 U.S.C. § 9607(a) (1988).

[54] Under section 104 of CERCLA, the EPA may clean up the site itself, 42 U.S.C. § 9604(a)(1) (1988), using the resources of "Superfund," a hazardous substance trust fund created to enable the EPA to finance immediate site cleanup where the responsible party either cannot be found or cannot pay the costs of cleanup. *See* 26 U.S.C. § 9507 (1988) (creating Superfund trust fund). The EPA may recover its expenses by bringing a cost recovery action against a PRP. 42 U.S.C. § 9607(a)(4)(A) (1988). Under § 106 of CERCLA, the government may order the PRP to clean up the site directly. *See id.* § 9606(a). Under § 107 of CERCLA, private parties may sue PRPs to recover costs incurred in the cleanup of a site. *Id.* § 9607(a)(4)(B).

[55] 42 U.S.C. § 9607(b) (1988). Virtually all courts that have examined the issue have determined that equitable defenses are not available under the Act. *See, e.g.*, Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988) (stating that doctrines such as caveat emptor and clean hands are incompatible with CERCLA objectives), *cert. denied*, 488 U.S. 1029 (1989); *see also* General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1418 (8th Cir. 1990) (discussing limited defenses available to polluters), *cert. denied*, 499 U.S. 937 (1991); United States v. Atlas Minerals & Chems., Inc., 797 F. Supp. 411, 416 (E.D. Pa. 1992) and cases cited therein (same). *But see* Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1059 (D. Ariz. 1984) (recognizing equitable defense of unclean hands in private cost recovery action, but indicating that it would be unavailable in action brought by state or federal government), *aff'd on other grounds*, 804 F.2d 1454 (9th Cir. 1986).

The legislative history of SARA supports the majority view that the only affirmative defenses allowed under CERCLA are those listed in the statute. *See* 131 CONG. REC. 11,074 (1985) (statement of Rep. Eckhardt) ("The listed defenses are the only defenses which are available to avoid liability under § 107(a). There should be no other defenses, including

den of proof, the plaintiff is entitled to summary judgment on the issue of the defendant's liability, even though issues of material fact might remain as to damages.[56]

CERCLA defendants have repeatedly (and unsuccessfully) argued that the government must demonstrate that the defendant's actions "caused" the harm before the court can impose joint and several liability.[57] Typically, the defendant contends that the government is required to prove that the defendant's waste caused or contributed to the release or to the government's incurrence of response costs.[58] This argument tracks the rule of section 433B of the *Restatement*, which provides that the plaintiff bears the initial burden of proving that the defendant's wrongful conduct caused the harm.[59]

In the CERCLA context, however, the courts have uniformly rejected such arguments, finding instead that the Act does not require the government to trace the substances at a site to substances deposited by a specific defendant.[60] In this respect,

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equitable defenses, that defeat liability under §§ 106 and 107 of the act."). *See generally* Grad, *supra* note 44, at 9 (discussing CERCLA defenses); Note, *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1518 (1986) (same). As one commentator has noted, "[t]hese defenses . . . have had only very narrow application and have found little success in courts." Elizabeth Ann Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385, 395 (1988).

[56] *Alcan II*, 990 F.2d 711, 720 (2d Cir. 1993) (citing Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989)).

[57] *See, e.g., id.* at 721 (discussing judicial and congressional rejection of causation requirement); *Alcan I*, 964 F.2d 252, 264 (3d Cir. 1992) (stating that CERCLA plaintiffs are not required to prove causation); O'Neil v. Picillo, 883 F.2d 176, 179 (1st Cir. 1989) (explaining that causation is not central to finding joint and several liability), *cert. denied*, 493 U.S. 1071 (1990).

[58] *See, e.g., Alcan I*, 964 F.2d at 264.

[59] *See supra* notes 36-37 and accompanying text (discussing *Restatement*'s causation requirement); PROSSER & KEETON, *supra* note 18, § 41, at 269.

[60] *See, e.g., In re* Bell Petroleum Serv. Inc., 3 F.3d 889, 893 n.4 & 896 (5th Cir. 1993) (stating that under CERCLA, plaintiff need not show defendant's conduct caused harm); Dedham Water Co., v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1152-54 (1st Cir. 1989) (explaining that CERCLA only requires evidence that actual or threatened release caused or contributed to response costs); United States v. Monsanto Co., 858 F.2d 160, 170 (4th Cir. 1988) (finding Congress did not require causation because doing so would make it difficult for plaintiffs confronted by multi-generator site to prevail), *cert. denied*, 490 U.S. 1106 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (finding that CERCLA clearly imposes strict liability standard upon PRPs without regard to causation and that imputing causation requirement would render statutory defenses superfluous); Arizona v. Motorola, Inc., 805 F. Supp. 742, 746 (D. Ariz. 1992) (stating that "CERCLA does not require that plaintiffs establish a causal link between each responsible party and

CERCLA diverges from traditional common law rules, which state that the plaintiff must establish proximate cause between the defendant's actions and the harm incurred.[61] Courts see

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the incurrence of response costs"); United States v. Western Processing Co., 734 F. Supp. 930, 936 (W.D. Wash. 1990) (explaining that in multi-generator context, government need not show response costs were incurred as to each generator); United States v. Bliss, 667 F. Supp. 1298, 1309 (E.D. Mo. 1987) (rejecting application of traditional tort notions, such as proximate cause, to CERCLA); United States v. Stringfellow, 661 F. Supp. 1053, 1060-61 (C.D. Cal. 1987) (same). *See generally* Note, *Joint and Several Liability*, *supra* note 2, at 1182-85 (explaining that Congress intended to relieve government of burden of proving causation).

It would appear that the only decision to the contrary is Louisiana-Pacific Corp. v. ASARCO, Inc., 735 F. Supp. 358, 362 (W.D. Wash. 1990), where the court held that "liability does not attach because the defendant caused 'a release,' but because it caused 'response costs.'" The *Alcan I* court dismissed the case as incorrectly decided. *See Alcan I*, 964 F.2d at 266 n.23.

[61] *See supra* notes 36-37 and accompanying text (discussing *Restatement*'s causation requirement). The two major (and competing) theories of proximate causation are: (1) "the scope of liability should ordinarily extend to but not beyond the scope of the 'foreseeable risks' — that is, the risks by reason of which the actor's conduct is held to be negligent"; and (2) "the scope of liability should ordinarily extend to but not beyond all 'direct' (or 'directly traceable') consequences and those indirect consequences that are foreseeable." PROSSER & KEETON, *supra* note 18, § 42, at 273.

The original House bill on CERCLA contained a provision requiring proof of proximate causation. *See* H.R. 7020, 96th Cong., 2d Sess. § 3071(a) (1980) (quoted in *Shore Realty*, 759 F.2d at 1044). The Senate draft version contained a similar provision. *See* STAFF OF SENATE COMM. ON ENV'T & PUB. WORKS, 96TH CONG., 2D SESS., WORKING PAPER #1 ON S. 1480 § 4(a) (Feb. 1, 1980), *reprinted in* SENATE COMM. ON ENV'T. & PUB. WORKS, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980, S. Doc. No. 97-14, 97th Cong., 2d Sess. (1983) (cited in United States v. Wade, 577 F. Supp. 1326, 1333 n.5 (E.D. Pa. 1983)). The House Committee summarized the House proposal as follows:

> [T]he usual common law principles of causation, including those of proximate causation should govern the determination of whether a defendant 'caused or contributed' to a release or threatened release. . . . Thus, for instance, the mere act of generation or transportation of hazardous waste, or the mere existence of a generator's or transporter's waste in a site with respect to which cleanup costs are incurred would not, in and of itself, result in liability. . . . [F]or liability to attach under this section, the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action. . . .

H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 33-34 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136-37.

The enacted version of CERCLA contains no such requirement. *See Shore Realty*, 759 F.2d at 1044 (observing that, as enacted, CERCLA "imposed liability on classes of persons without reference to whether they caused or contributed to the release or threat of release"). The Fourth Circuit linked CERCLA's lack of a causation requirement to the dangers of commingled substances: "In deleting causation language from section 107(a), we

this deviation from the common law rule as necessary because they have determined that a proximate causation requirement would conflict with CERCLA's statutory goal of promoting cleanup of contaminated sites by requiring the government to meet an extremely high burden of proof and by diverting government funds from cleanup actions to litigation costs.[62] Moreover, in the courts' view, a proximate causation requirement would render superfluous the affirmative defenses listed in section 107(b) of CERCLA, which provide causation-based exemptions from liability.[63]

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assume as have many other courts, that Congress knew of the synergistic and migratory capacities of leaking chemical waste, and the technological infeasibility of tracing improperly disposed of waste to its source." *Monsanto*, 858 F.2d at 170.

Some courts have indicated that CERCLA's strict liability standard obviates traditional tort law notions of causation. *See, e.g.*, United States v. Atlas Minerals & Chems., Inc., 797 F. Supp. 411, 416 n.8 (E.D. Pa. 1992) (explaining that "[s]ince CERCLA imposes strict liability, 'ordinary' notions of causation are not applicable to CERCLA actions"). However, traditional tort law does not make causation irrelevant in strict liability actions. *See Shore Realty*, 759 F.2d at 1044 n.17 (observing that "[t]raditional tort law has often imposed strict liability while recognizing a causation defense") (citing PROSSER & KEETON, *supra* note 18, § 79, at 517 (1971)); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 674 (D. Idaho 1986) (stating, in case involving liability for damage to natural resources, that "strict liability does not abrogate the necessity of showing causation, but merely displaces any necessity for showing some degree of culpability by the actor").

[62] *See* United States v. Wade, 577 F. Supp. 1326, 1332-33 (E.D. Pa. 1983) (stating that requiring government to trace wastes to each defendant would "eviscerate" statute); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1402 (D.N.H. 1985) (same).

The House's version of CERCLA provided that PRPs could be held liable only if they "caused or contributed to" a release. *See* H.R. REP. NO. 7020, 96th Cong., 2d Sess. § 3071(a)(1) (1980). The committee report stated:

> The Committee intends that the usual common law principles of causation, including those of proximate causation, should govern the determination of whether a defendant 'caused or contributed' to a release or threatened release. . . . Thus, for instance, the mere act of generation or transportation of hazardous waste, or the mere existence of a generator's or transporter's waste in a site with respect to which cleanup costs are incurred would not, in and of itself, result in liability under section 3071. The committee intends that for liability to attach under this section, the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action under section 3071.

H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136.

[63] *See, e.g., Shore Realty*, 759 F.2d at 1044 (stating that interpreting CERCLA to require causation would make causation-based affirmative defenses of § 9607(b) superfluous); *Monsanto*, 858 F.2d at 170 (finding that requiring proximate cause would frustrate congressional intent); *Bliss*, 667 F. Supp. at 1309 (interpreting CERCLA to exclude traditional tort proximate cause requirements).

As a general rule, the courts have concluded that under CERCLA the government need only show that: (1) the defendant's wastes were delivered to the site; (2) wastes of that type were found at the site at the time the release occurred; (3) a release or threat of release of any hazardous substance occurred; and (4) the government incurred response costs as a result of the release or threatened release.[64] According to most courts, traditional tort notions of causation play no role in CERCLA analysis.[65]

The role of causation under CERCLA was first addressed in detail in United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983). *Wade* involved a cost recovery suit by the federal government against a number of defendants in connection with a hazardous waste dump site. The defendants argued that, in accordance with traditional tort notions of proximate causation, the government had the burden of proving a causal nexus between cleanup costs incurred and a specific defendant's waste. *Id.* at 1331. In particular, the defendants argued that the government had to prove that a particular defendant's actual waste was present at the site and was the subject of a removal or remedial measure. *Id.* at 1332. At a minimum, they argued, the government had to show that it incurred cleanup costs responding to waste of a specific type produced by that defendant before the defendant could be held liable. *Id.* at 1331.

The *Wade* court found both CERCLA's statutory language and its legislative history to be singularly unhelpful in resolving the causation issue before it. *Id.* at 1332. As a policy matter, however, the court was unwilling to adopt the defendants' position. Requiring the plaintiff to "fingerprint" the waste generated by each specific defendant would, in the court's view, "eviscerate" the statute, as modern scientific techniques do not permit identification of wastes with such a degree of specificity. *Id.* Thus, the court concluded that "[t]he only required nexus between the defendant and the site is that the defendant have dumped his waste there and that the hazardous substances found in the defendant's wastes are also found at the site." *Id.* at 1333; *accord Atlas Minerals & Chems.*, 797 F. Supp. at 416 (citing, *inter alia*, City of New York v. Exxon Corp., 744 F. Supp. 474, 480 n.8 (S.D.N.Y. 1990)); Violet v. Picillo, 648 F. Supp. 1283, 1292 (D.R.I. 1986).

[64] *See, e.g., Wade*, 577 F. Supp. at 1333; *see also Monsanto*, 858 F.2d at 170 (refusing to require proof of ownership, "which in practice, would be as onerous as the language Congress saw fit to delete").

[65] *See, e.g.*, United States v. Miami Drum Servs., Inc., 17 Envtl. L. Rep. (Envtl. L. Inst.) 20,539 (S.D. Fla. 1986)

> The causation requirement under CERCLA differs from state common law causation, which normally requires a showing of cause-in-fact and proximate cause. As initially stated, however, interpretation of CERCLA's liability provisions is a matter of Federal common law. CERCLA's causation requirement has been somewhat relaxed due to the difficult proof problems inherent in toxic waste cases.

Id. at 20,541; *see also Shore Realty*, 759 F.2d at 1044 (stating that CERCLA "unequivocally imposes strict liability . . . without regard to causation"); *Bliss*, 667 F. Supp. at 1309 (same); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986) (same). Some courts have suggested that a limited nexus requirement exists under CERCLA. *See, e.g.*,

Further, the courts have generally found that no minimum quantity is required for a substance to qualify as "hazardous" for purposes of CERCLA section 101(14).[66] The mere existence in a defendant's waste of a substance that is defined as "hazardous" within the meaning of the statute suffices.[67] Moreover, the courts generally agree that CERCLA does not require that any minimum quantity of a hazardous substance be involved for a release or threatened release to occur within the meaning of CERCLA section 101(22).[68] The government need only show

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United States v. Rohm & Haas Co., 2 F.3d 1265, 1280 (3d Cir. 1993) (suggesting that defendant could avoid liability if it could "prove that none of the hazardous substances found at the site were fairly attributable to it").

[66] Section 101(14), 42 U.S.C. § 9601(14) (1988), defines "hazardous substance" in terms of other environmental statutes, many of which do contain minimum quantity requirements. *See, e.g.*, 33 U.S.C. § 1321(b)(4) (1988) (setting minimum quantity requirements under Clean Water Act). The courts have rejected contentions that CERCLA imposes minimum quantity requirements. *See, e.g.*, Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669 (5th Cir. 1989) (declining to impose quantitative requirement for defining hazardous substance); Elf Atochem N. Am., Inc. v. United States, 833 F. Supp. 488, 494 (E.D. Pa. 1993) (same); Burlington N. R.R. v. Woods Indus., 815 F. Supp. 1384, 1390 n.8 (E.D. Wash. 1993) (same); *Exxon*, 744 F. Supp. at 483 (same); United States v. New Castle County, 642 F. Supp. 1270, 1274-75 (D. Del. 1986) (same); *Wade*, 577 F. Supp. at 1339-49 (same). *But see* United States v. Ottati & Goss, Inc., 22 Env't Rep. Cas. (BNA) 1736, 1739 (D.N.H. 1984) (holding that waste with substances in quantities "far below" EPA thresholds set in other acts was not hazardous for CERCLA purposes).

[67] *See, e.g.*, Mid Valley Bank v. North Valley Bank, 764 F. Supp. 1377, 1386 (E.D. Cal. 1991) (defendant's argument that there was not enough toxic waste present to violate state law did not preclude liability under CERCLA); United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2126 (D.S.C. 1984) (rejecting defendant's argument that its waste contained insufficient hazardous materials to be classified as hazardous).

[68] *See, e.g.*, Stewman v. Mid-South Wood Prods. of Mena, Inc., 993 F.2d 646, 649 (8th Cir. 1993); *Alcan I*, 964 F.2d 252, 259 (3d Cir. 1992); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1403 (D.N.H. 1985). These courts typically base their reasoning upon the language of § 101(22) of CERCLA, 42 U.S.C. § 9601(22) (1988), which provides that a release includes "any" spilling, leaking, pumping, etc., and on § 107(a), *id.* § 9607(a)(4), which imposes liability for "a" hazardous substance release. As one court put it: "Presumably, if Congress had intended the definition of hazardous substances to be contingent upon the presence of a certain amount or concentration of a hazardous substance, it would have so provided." *Carolawn*, 21 Env't Rep. Cas. (BNA) at 2126 n.3. *See generally Mid Valley Bank*, 764 F. Supp. at 1386 (stating that CERCLA hazardous waste definition has no quantitative component); United States v. Western Processing Co., 734 F. Supp. 930, 936 (W.D. Wash. 1990) (reasoning that because statute contains no threshold, concentration and amount are irrelevant to hazardous waste definition); United States v. Carolina Transformer Co., 739 F. Supp. 1030, 1036 (E.D.N.C. 1989) (holding that any amount of hazardous substance will establish release); United States v. Conservation Chem. Co., 619 F. Supp. 162, 185 (W.D. Mo. 1985) (same).

In Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989), however, the Fifth

that the defendant's wastes contained a substance designated as hazardous or toxic within the meaning of CERCLA;[69] it need not show that a certain quantity was present.[70]

2. CERCLA's Legislative History

CERCLA's legislative history is generally regarded as unclear and incomplete.[71] The statute was the result of a compromise between two bills that moved simultaneously through Congress: House Bill 7020[72] and Senate Bill 1480.[73] Earlier versions of both bills provided for the imposition of joint and several liability on responsible parties.[74] However, vocal opposition by various

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Circuit rejected the contention that liability attached upon the release of any quantity of a hazardous substance, no matter how small. The court noted that adoption of that position would render liable parties whose actions did not pose a threat to the public or the environment. *Id.* at 670. Instead, the court adopted a "threshold standard of justification" for determining whether a given release or threatened release caused the incurrence of response costs. *Id.* Under the court's approach, a plaintiff who has incurred response costs will meet the threshold by showing that the release or threatened release violated or would violate "*any* applicable state or federal standard, including the most stringent." *Id.* at 671. *Amoco* presented a narrow factual scenario — a single-generator, single-substance, private cost recovery action — and at least one district court has urged that *Amoco* be limited to these specific facts. *See Western Processing*, 734 F. Supp. at 942.

[69] Section 101(14) of CERCLA, 42 U.S.C. § 9601(14) (1988), defines hazardous substances by referencing various other environmental statutes.

[70] *Wade*, 577 F. Supp. at 1340. Thus, although such a result would be absurd, CERCLA's language clearly implies that disposal of a single copper penny could technically give rise to CERCLA liability. *Id. But see* United States v. Atlas Minerals & Chems., Inc., 797 F. Supp. 411, 418-19 (E.D. Pa. 1992) (explaining that courts may consider various factors and apply traditional equitable considerations to avoid such absurd results).

[71] *See, e.g.*, Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) (calling CERCLA "a hastily conceived and briefly debated piece of legislation"), *cert. denied*, 488 U.S. 1029 (1989); Chemical Waste Mgt., Inc. v. Armstrong World Indus., 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987) (noting that "CERCLA's legislative history is sparse and generally uninformative" and "last-minute additions and deletions to the statute render its legislative history of little practical use"); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) (observing that "CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history").

[72] H.R. 7020, 96th Cong., 2d Sess. (1980).

[73] S. 1480, 96th Cong., 2d Sess. (1980).

[74] H.R. 7020 originally provided for joint and several liability, and would have allowed liable parties to recover any costs they incurred in excess of their proportionate share through a statutorily-created fund. *See* H.R. REP. NO. 1016, 96th Cong., 2d Sess. 7-8 (1980) (discussing H.R. 7020). The bill was eventually amended to provide for typical joint and several liability (in which the liable party was to bear the burden of seeking contribution from other responsible parties). *See* 126 CONG. REC. 9478-79 (1980). The initial version of S. 1480 also provided for reimbursement from a fund, *see* S. REP. NO. 484, 96th Cong., 2d

members of Congress regarding the potential unfairness of such a standard, particularly in the context of de minimis contributors, led to the deletion of all explicit references to joint and several liability in the bills.[75]

Despite the deletion, the sponsors of the legislation did not abandon the concept of joint and several liability for hazardous waste cleanup costs. Senator Randolph, a sponsor of the Senate version, indicated that common law principles should determine "when parties should be severally liable."[76] He noted that the deletion of the explicit joint and several liability standard was "made in recognition of the difficulty in prescribing in statutory

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Sess. 38 (1980) (discussing § 4 of S. 1480), in addition to providing for contribution. *Id.* at 38-39.

[75] Senator Helms summarized the opposition as follows:

> Retention of joint and several liability in S. 1480 received intense and well-deserved criticism from a number of sources, since it could impose financial responsibility for massive costs and damages awards on persons who contributed minimally (if at all) to a release or injury. Joint and several liability for costs and damages was especially pernicious in [the original version of] S.1480, not only because of the exceedingly broad categories of persons subject to liability and the wide array of damages available, but also because it was coupled with an industry-based fund. Those contributing to the fund will frequently be paying for conditions they had no responsibility in creating or even contributing to. To adopt a joint and several liability scheme on top of this would have been grossly unfair.

126 CONG. REC. 30,972 (1980). Senator Helms further stated that joint and several liability eliminated "any meaningful link between culpable conduct and financial responsibility." *Id.* In analyzing the legislative history of CERCLA's joint and several liability standard, courts have given Senator Helms' statements little weight because he consistently opposed the bill. *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802, 806 (S.D. Ohio 1983) (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 204 n.24 (1975) and Holtzman v. Schlesinger, 414 U.S. 1304, 1313 n.13 (1973)); United States v. A & F Materials, Co., 578 F. Supp. 1249, 1254 (S.D. Ill. 1984). Courts have given more weight to Senator Randolph's and Representative Florio's statements because they sponsored the legislation. *See, e.g.*, United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905, 1908 (C.D. Cal. 1984) (citing Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976)); *Chem-Dyne*, 572 F. Supp. at 807 (citing Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979)).

[76] 126 CONG. REC. 30,932 (1980). Senator Randolph, chairman of the Committee on Environment and Public Works, which reported S. 1480, stated:

> It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tortfeasors will be determined under common or previous statutory law.

Id.

terms liability standards which will be applicable in individual cases."[77] Thus, he stated, "the liability of joint tortfeasors will be determined under common or previous statutory law."[78]

Similarly, Senator Randolph explained that the explicit joint and several liability language was deleted from the legislation in order to provide flexibility in responding to individual cases.[79] He specifically noted, however, that "[t]he changes do not reflect a rejection of the standards in the earlier bill."[80] Representative Florio, a sponsor of the House version, also indicated that while not explicitly addressed in the statute, section 311 of the Clean Water Act and traditional and evolving principles of common law should govern issues of joint and several liability under CERCLA.[81]

Thus, CERCLA was enacted with no express statutory provision for joint and several liability, although its legislative history revealed a strong commitment to such a standard on the part of the legislation's sponsors (and an equally strong rejection of the concept on the part of the legislation's opponents). Faced with this backdrop of congressional discordance and statutory silence, the courts did indeed create a federal common law of joint and several liability under CERCLA,[82] just as the sponsors of the legislation had proposed. Overall, Congress seemed satisfied with

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[77] *Id.*

[78] *Id.* Common law rules of joint and several liability are by no means uniform. *See generally* Brennan, *supra* note 2, at 110-11.

[79] *See* 126 CONG. REC. 30,932 (1980).

[80] *Id.*

[81] *Id.* at 31,965. Representative Florio stated:

> [T]his bill refers to section 311 of the Clean Water Act and to traditional and evolving principles of common law in determining the liability of such joint tortfeasors. To insure the development of a uniform rule of law, and to discourage businesses dealing in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area.

Id.; *see also id.* at 31,978 (remarks of Rep. Waxman) (noting that "the prevailing common law rules relating to apportionment among defendants who are held jointly and severally liable" would control). Other representatives echoed this stance. *See id.* at 31,978 (remarks of Rep. Jeffords); 26,784-85 (remarks of Rep. Gore); 31,976 (remarks of Rep. Mikulski). Senator Randolph had indicated that he understood § 311 to impose a standard of strict liability, but he apparently did not view § 311 as imposing joint and several liability. *Id.* at 30,932.

[82] *See infra* notes 93-96 and accompanying text.

early judicial efforts in this area. When CERCLA was amended in 1986 by the Superfund Amendment and Reauthorization Act (SARA),[83] Congress declined to alter the joint and several liability standard that had evolved over the previous six years.[84] It also declined to provide more specific direction on the applicability of joint and several liability under the statute, thus ensuring that CERCLA's liability standard would continue to be developed in the courts.

B. Judicial Approaches to Joint and Several Liability Under CERCLA

The courts have taken two approaches to imposing joint and several liability under CERCLA: (1) the majority approach, which is based upon the *Restatement* and section 311 of the Clean Water Act; and (2) the minority (or moderate) approach, which is based upon the so-called "Gore factors,"[85] a list of six equitable considerations. As this subsection discusses, the courts have unanimously embraced the majority approach in recent years. The Gore factors have been relegated to contribution actions, where equitable factors have traditionally been explicitly considered.

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[83] Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-75 (1988)).

[84] SARA extended the Superfund program, increased its funding, and established stricter cleanup standards. *See* 42 U.S.C. §§ 9507, 9611, 9621 (1988). The committee report noted that the "[e]xplicit mention of joint and several liability was deleted from CERCLA in 1980 to allow courts to establish liability through a case-by-case application of 'traditional and evolving principles of common law' and pre-existing statutory law." H.R. REP. NO. 253, 99th Cong., 1st Sess. pt. 1, at 74 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856. The report also cited with approval judicial applications of joint and several liability under CERCLA. *See id. See generally* Timothy B. Atkeson, et al., *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,363 (1986); Prager, *supra* note 40, at 215-17.

While the statutory language of SARA did not explicitly address joint and several liability, it did expressly create a right of contribution among PRPs. *See* 42 U.S.C. § 9613(f)(1) (1988). *See generally infra* notes 184-200 and accompanying text (discussing contribution under CERCLA and SARA).

[85] *See infra* notes 158-59 and accompanying text (discussing Gore factors).

1. Divisibility of Harm: The Majority Approach

The landmark case on joint and several liability under CERCLA is *United States v. Chem-Dyne Corp.*[86] This 1983 opinion was the first to discuss and apply the two rules that provide the basis for the majority approach to joint and several liability under CERCLA: section 311 of the Clean Water Act[87] and the divisibility rule of the *Restatement*.[88]

Chem-Dyne arose from a motion by twenty-four defendants for an "early determination" that they were not jointly and severally liable for cleanup costs incurred at a treatment facility.[89] After reviewing the legislative history of the joint and several liability standard under CERCLA, the *Chem-Dyne* court concluded that the deletion of the explicit joint and several liability standard from the statute did not evidence a rejection of the standard, as the defendants had argued.[90] Instead, the court found that Congress intended the courts to "perform[] a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites [and] assess the propriety of applying joint and several liability on an individual basis."[91] Deletion of the mandatory joint and several standard increased judicial flexibility to respond to individual situations and reduced the possibility that "inequitable results" might occur.[92]

Having determined that Congress intended the courts to apply a common law joint and several liability standard under CERCLA, the *Chem-Dyne* court turned to the issue of whether state or federal common law should apply. Federal courts may

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[86] 572 F. Supp. 802 (S.D. Ohio 1983).

[87] 95 U.S.C. § 1321 (1988); *see also infra* notes 97-106 and accompanying text (discussing Clean Water Act § 311).

[88] *See infra* notes 111-13 and accompanying text (discussing *Restatement* divisibility rule).

[89] 572 F. Supp. at 804.

[90] *Id.* at 805-08. The court stated:

> A reading of the entire legislative history in context reveals that the scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases. The deletion was not intended as a rejection of joint and several liability.

Id. at 808 (citations omitted).

[91] *Id.*

[92] *Id.*

create federal common law to fill gaps left in federal statutes,[93] or where "necessary to protect uniquely federal issues."[94] The *Chem-Dyne* court noted that cleanup of hazardous substances was "an enormous and complex problem of national magnitude involving uniquely federal interests,"[95] and that CERCLA's legislative history indicated that Congress intended courts to develop federal rules of decision to deal with the issues raised by the statutory provisions.[96]

The court next turned to the task of delineating a federal rule of decision that would comport with the legislative history and statutory policies of CERCLA. It was aided in this endeavor by section 101(32) of CERCLA, which explicitly states that the standard of liability under CERCLA is to be the same as that found in section 311 of the Clean Water Act.[97] Like CERCLA, section 311 of the Clean Water Act contains no express liability standard. Thus, development of the liability rules under that statute was left to the judiciary. By the time CERCLA was enacted in 1980, a number of courts had held that section 311 imposes strict liability upon violators of the Clean Water Act.[98] It appears, however, that at that time only one court had consid-

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[93] United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973).

[94] Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (quoted in *Chem-Dyne*, 572 F. Supp. at 808). Federal courts are permitted to create federal common law in cases arising under federal statutes. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979). In deciding whether to create federal common law or apply state common law, courts must consider factors such as: (1) whether applying state law would frustrate the objectives of the federal statute; (2) the need for national uniformity on the issue; and (3) the extent to which a federal rule would disrupt commercial relationships predicated on state law. *Id.* at 728-29.

[95] 572 F. Supp. at 808.

[96] *Id.* Many courts have expressed concern that failure to create a uniform federal rule would result in legal uncertainties and in concentrations of illegal waste disposal in states with lax liability rules. *See, e.g.*, United States v. A & F Materials Co., 578 F. Supp 1249, 1255 (S.D. Ill. 1984); United States v. Wade, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983); *Chem-Dyne*, 572 F. Supp. at 809; United States v. Hardage, 116 F.R.D. 460, 465 (W.D. Okla. 1987). Representative Florio voiced the same concern during the debate over CERCLA. *See supra* note 81 and accompanying text (citing Representative Florio's remarks).

[97] 42 U.S.C. § 9601(32) (1988) (referencing Clean Water Act § 311, 33 U.S.C. § 1321 (1988)).

[98] *See* Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979); United States v. Tex-Tow, Inc., 589 F.2d 1310, 1314 (7th Cir. 1978); United States v. Bear Marine Servs., 509 F. Supp. 710, 713 (E.D. La. 1980) (dictum). *See generally* Oswald, *supra* note 46, at 599-600 (discussing derivation of CERCLA's strict liability standard from Clean Water Act § 311).

ered the applicability of joint and several liability under the Clean Water Act.[99]

CERCLA's legislative history is ambiguous as to whether section 101(32) refers solely to the strict liability standard of the Clean Water Act,[100] or whether the reference encompasses joint and several liability as well. The sponsors of CERCLA expressed no clear opinion on this issue. For example, Senator Randolph stated: "We have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act, but we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable. . . ."[101] He immediately followed this with a statement that "the liability of joint tortfeasors will be determined under common or previous statutory law,"[102] although he did not specify whether "previous statutory law" included section 311 of the Clean Water Act.

Representative Florio, the sponsor of the House bill, was more explicit, stating that "the liability of joint tortfeasors [should] be determined under common or previous statutory law," and that the House bill thus referred "to Section 311 of the Clean Water Act and to traditional and evolving principles of common law in determining the liability of such joint tortfeasors."[103] He went on to note that section 311 had been interpreted by the Coast Guard, its administering agency, as "imposing joint and several liability under appropriate circumstances," and that "[t]his established policy seems particularly applicable in cases of hazardous waste sites, where several persons have often contributed to an indivisible harm."[104]

After reviewing this ambiguous legislative history, the *Chem-*

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[99] *See Bear Marine*, 509 F. Supp. at 710 (imposing joint and several liability). Subsequently, several courts held that section 311 imposes joint and several liability upon joint tortfeasors. *See, e.g.*, United States v. M/V Big Sam, 681 F.2d 432, 439 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); *In re* Berkley Curtis Bay Co., 557 F. Supp. 335, 339 (S.D.N.Y.), *aff'd in part and rev'd in part*, 697 F.2d 288 (2d Cir. 1983); United States v. Hollywood Marine, Inc., 519 F. Supp. 688, 692 (S.D. Tex. 1981).

[100] 126 CONG. REC. 31,965 (1980). *See generally infra* notes 101-04 and accompanying text (discussing statements of Sen. Randolph and Rep. Florio).

[101] 126 CONG. REC. 30,932 (1980).

[102] *Id.*

[103] *Id.* at 31,965.

[104] *Id.*

Dyne court determined that Congress intended for judges to be guided by the liability standards of the Clean Water Act when imposing joint and several liability under CERCLA.[105] The *Chem-Dyne* court found that section 311(b)(1) of the Clean Water Act[106] imposes joint and several liability upon violators of that Act, and noted the "strikingly similar" liability and contribution language of the two statutes.[107] In the court's view, all of these factors indicated that joint and several liability ought to apply under CERCLA.

However, the *Chem-Dyne* court also found that the differences between the Clean Water Act and CERCLA were significant enough to make "blanket adoption" of the Clean Water Act's joint and several liability standard inappropriate.[108] The court hesitated to adopt a rule that would impose joint and several liability in every instance.[109] Instead, the court sought to limit the scope of joint and several liability under CERCLA by adopting the standards set forth in the *Restatement*.[110] As discussed above, the *Restatement* provides that joint and several liability should apply where two or more tortfeasors acting individually cause an indivisible harm.[111] The *Restatement*'s rules depend entirely upon the divisibility of the harm created. According to the

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[105] Later courts have agreed with the *Chem-Dyne* court that Congress wanted judges to use the Clean Water Act's standards for guidance. *See, e.g.*, United States v. A & F Materials, Inc., 578 F. Supp. 1249, 1255 (S.D. Ill. 1984); United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905, 1909 (C.D. Cal. 1984).

[106] 33 U.S.C. § 1321(b)(1) (1988).

[107] United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983). The court compared 33 U.S.C. § 1321(f)(1) with 42 U.S.C. § 9607(a), (b) and 33 U.S.C. § 1321(h) with 42 U.S.C. § 9607(e)(2). *See* 572 F. Supp. at 810. The court's reference to CERCLA's contribution language is confusing. Prior to SARA's enactment in 1986, CERCLA did not contain any contribution language. *See generally infra* notes 191-96 and accompanying text (discussing evolution of right of contribution under CERCLA).

[108] 572 F. Supp. at 810. Although the *Chem-Dyne* court did not expand on this point, later courts have. First, unlike CERCLA, the Clean Water Act does not provide for generator liability, which means the cases under each diverge significantly on their facts. *See A & F Materials*, 578 F. Supp. at 1254 (noting that generator liability is not available under Clean Water Act). Second, liability under CERCLA is more expansive than liability under the Clean Water Act, making courts more hesitant to adopt hard and fast rules of liability. *See Stringfellow*, 20 Env't Rep. Cas. (BNA) at 1909-10 (noting that CERCLA's legislative history "calls for flexibility" in the fashioning of a joint and several liability standard).

[109] *Chem-Dyne*, 572 F. Supp. at 810.

[110] *Id.*

[111] *See supra* notes 26-37 and accompanying text (discussing *Restatement* view of joint and several liability).

Chem-Dyne court, these rules were "most likely to advance the legislative policies and objectives of the Act."[112]

Using the *Restatement*'s standards, the *Chem-Dyne* court concluded that where two or more individuals have caused divisible environmental harm, each polluter is liable only for the harm she actually caused.[113] Where the harm is indivisible, each is liable for the entire amount of damages.[114] Thus, according to *Chem-Dyne*, joint and several liability is not mandatory under CERCLA, but rather turns upon the factual inquiry into whether the harm is divisible.[115] Under CERCLA, the burden of proving such divisibility rests on the defendant[116] — a result which tracks section 433B(2) of the *Restatement*.[117]

A number of courts have followed the *Chem-Dyne* court's lead in adopting the *Restatement* standard of joint and several liability in CERCLA cases,[118] and it clearly represents the majority approach.[119] In the nine-year span between the 1983 holding in

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[112] 572 F. Supp. at 810.

[113] *Id.* (citing RESTATEMENT, *supra* note 9, §§ 433A, 881).

[114] *Id.* (citing RESTATEMENT, *supra* note 9, § 875).

[115] *Id. See generally* Carroll E. Dubuc & William D. Evans, Jr., *Recent Developments Under CERCLA: Toward a More Equitable Distribution of Liability*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,197, 10,197 (1987).

[116] *Chem-Dyne*, 572 F. Supp. at 810; United States v. Rohm & Haas Co., 2 F.3d 1265, 1280 (3d Cir. 1993); Arizona v. Motorola, Inc., 805 F. Supp. 749, 752 (D. Ariz. 1992); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1396 (D.N.H. 1985). The *Chem-Dyne* court found that the defendants before it had not met their burden of demonstrating divisibility of harm. The facility contained 608,000 pounds of commingled hazardous waste from 289 defendants, making divisibility practically impossible. 572 F. Supp. at 811.

[117] RESTATEMENT, *supra* note 9, § 433B(2).

[118] *See, e.g., Alcan I*, 964 F.2d 252, 267 (3d Cir. 1992); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1506-08 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); United States v. Monsanto Co., 858 F.2d 160, 171-73 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 n.13 (2d Cir. 1985); Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1266, 1278-79 (E.D. Va. 1992); Kelley v. Thomas Solvent Co., 727 F. Supp. 1532, 1552-53 (W.D. Mich. 1989); United States v. Bliss, 667 F. Supp. 1298, 1312-13 (E.D. Mo. 1987); United States v. Miami Drum Servs., Inc., 17 Envtl. L. Rep. (Envtl. L. Inst.) 20,539, 20,540-41 (S.D. Fla. 1986); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 994-95 (D.S.C. 1986), *aff'd in part & vacated in part sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Dickerson, 640 F. Supp. 448, 450 (D. Md. 1986); Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1489-90 (D. Colo. 1985); *Ottati & Goss*, 630 F. Supp. at 1395-96; United States v. Wade, 577 F. Supp. 1326, 1338-39 (E.D. Pa. 1983).

[119] In addition, the *Chem-Dyne* decision was cited with approval in the legislative history

Chem-Dyne and the 1992 holding in *Alcan I*, only two circuit courts rendered decisions that analyzed the scope of joint and several liability under CERCLA: *United States v. Monsanto Co.*,[120] decided in 1988; and *O'Neil v. Picillo*,[121] decided in 1989.[122] Both courts explicitly followed *Chem-Dyne*'s analysis, and both courts concluded that in the absence of a very specific showing of divisibility by the defendant, commingled waste inexorably leads to joint and several liability.[123]

In *Monsanto*, the federal government and the State of South Carolina brought an action to recover response costs from several defendants for the release and threatened release of hazardous wastes from a storage facility.[124] The disposal contractor had "haphazardly" deposited over 7,000 drums of hazardous waste at the site, keeping no inventory records and following no documented safety procedures.[125] As the drums deteriorated over time, hazardous substances leaked into the ground and commingled, causing "noxious fumes, fires, and explosions."[126] The district court found the harm was indivisible and held the defendants jointly and severally liable.[127]

On appeal, the Fourth Circuit upheld the imposition of joint and several liability on summary judgment, using the *Chem-Dyne*

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of SARA. *See* H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 74, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856 (stating that House fully subscribed to *Chem-Dyne* rule allowing joint and several liability in appropriate CERCLA cases). *See also* 131 CONG. REC. 11,073 (1985) (remarks of Rep. Eckart) (stating support of House committees for *Chem-Dyne* rule). Several courts have used this as evidence that Congress approved of the judicially-created joint and several liability standard. *See, e.g.*, O'Neil v. Picillo, 883 F.2d 176, 179 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *In re* National Gypsum Co., 139 B.R. 397, 413-14 (N.D. Tex. 1992); AM Int'l, Inc. v. Datacard Corp., 146 B.R. 391, 401-02 (N.D. Ill. 1992).

[120] 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

[121] 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

[122] In addition to the First and Fourth Circuits, other courts mentioned the issue of joint and several liability between 1983 and 1992, but did not provide substantial analysis of the issues raised. *See, e.g.*, *Meyer*, 889 F.2d at 1507 (adopting *Chem-Dyne* and *Monsanto* approach to joint and several liability).

[123] *Monsanto*, 858 F.2d at 172; *Picillo*, 883 F.2d at 178-79.

[124] *Monsanto*, 858 F.2d at 165-66.

[125] *Id.* at 164.

[126] *Id.*

[127] United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 994-95 (D.S.C. 1984), *aff'd in part and vacated in part sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

analysis.[128] The case hinged on whether the harm incurred was "divisible."[129] The defendants had argued that a volumetric apportionment was possible.[130] The court rejected this basis for apportionment, noting that the defendants had presented no evidence "showing a relationship between waste volume, the release of hazardous substances, and the harm at the site."[131] The diverse nature of the hazardous substances disposed of at the site persuaded the court that "volumetric apportionment based on the overall quantity of waste, as opposed to the quantity and quality of hazardous substances contained in the waste[,] would have made little sense."[132] Rather, the court concluded, "[v]olumetric contributions provide a reasonable basis for apportioning liability only if it can be reasonably assumed, or it has been demonstrated, that independent factors had no substantial effect on the harm to the environment."[133]

A year later, the First Circuit also had occasion to examine the scope of joint and several liability under CERCLA in *O'Neil v. Picillo.*[134] The State of Rhode Island sued to recover cleanup costs associated with contamination found at a dump site on a pig farm. The district court had found that the site contained "massive trenches and pits 'filled with free flowing, multi-colored, pungent liquid wastes' and thousands of 'dented and corroded drums' containing a veritable potpourri of toxic fluids."[135] The district court held three non-settling defendants jointly and severally liable for all cleanup costs not borne by the thirty settling defendants, as well as for all future costs.[136]

On appeal, the *Picillo* court, like the *Monsanto* court, adopted the *Chem-Dyne* approach[137] and found that the case turned on

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[128] *Monsanto*, 858 F.2d at 172, 176.

[129] *Id.* at 171-72.

[130] *Id.* at 172.

[131] *Id.*

[132] *Id.* at 172 n.25.

[133] *Id.* at 172 n.27. The court reasoned that "[c]ommon sense counsels that a million gallons of certain substances could be mixed together without significant consequences, whereas a few pints of others improperly mixed could result in disastrous consequences." *Id.* at 172.

[134] 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

[135] *Id.* at 177 (quoting O'Neil v. Picillo, 682 F. Supp. 706, 709, 725 (D.R.I. 1988)).

[136] *Id.* at 178.

[137] *Id.* at 178-79.

whether the defendants could prove the harm was divisible.[138] The court noted that both the *Chem-Dyne* and *Monsanto* courts had found that where unidentified wastes commingle, "it is simply impossible to determine the amount of environmental harm caused by each party."[139] Although the court acknowledged that this fact often results in defendants paying more than their fair share of the harm,[140] it nonetheless felt that this was the result that Congress had intended.[141] The court found that the defendants had failed to meet their burden of showing how many barrels each had contributed to the site.[142] In addition, even if the defendants had made such a showing, the court found that they would also have to show the cost of removing each barrel, which the court asserted would necessarily vary depending upon its contents.[143] Thus, despite the court's acknowledgment that the defendants had "argued ably" against the imposition of joint and several liability, the court found that they had failed to satisfy the "stringent burden placed on them by Congress."[144]

District courts that examined the issue during this period took much the same path in finding defendants jointly and severally liable. As a result, joint and several liability has attached in virtually every case involving multiple contributors to a CERCLA site, and commingled wastes have become synonymous with indivisible harm.[145] The courts have imposed a certainty requirement

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[138] *Id.* at 179.

[139] *Id.* (citing United States v. Chem-Dyne, 572 F. Supp. 802, 811 (S.D. Ohio 1983) and United States v. Monsanto, 858 F.2d 160, 172-73 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989)).

[140] *Id.*

[141] *Id.* The court noted that a contribution action might alleviate some of the unfairness resulting from joint and several liability. *Id.*

[142] *Id.* at 182-83.

[143] *Id.* at 183 n.11.

[144] *Id.* at 183.

[145] *See id.* at 178-79 (explaining that practical effect of placing burden of proving divisibility on defendants is that where wastes commingle, responsible parties rarely escape joint and several liability). *See generally* Moore, *supra* note 17, at 10,529 (noting that "no defendant has ever successfully invoked the divisibility defense in any reported decision"); Harris & Milan, *supra* note 17, at 38 (noting that courts have "consistently" imposed joint and several liability). Even the *Alcan I* and *Alcan II* courts did not find apportionment appropriate on the facts before them. *Alcan I*, 964 F.2d 232, 269 (3d Cir. 1992); *Alcan II*, 990 F.2d 711, 722 (2d Cir. 1993). Rather, they merely ordered the trial courts to consider the possibility of apportionment. *See infra* notes 203-77 and accompanying text (discussing *Alcan I*

upon defendants, rendering their burden of proving that the hazardous wastes they sent to a site caused a separate and distinct environmental harm virtually insurmountable.[146] The courts typically reject theories of apportionment based solely upon volume of waste contributed to the site because issues such as toxicity, migratory potential, and synergistic interactions are not necessarily related to volume.[147] Similarly, the courts have held that even if the defendant can show that certain hazardous substances are traceable to it, the harm at the site is still indivisible if the substances have commingled with other substances such that cleanup of the defendant's waste cannot proceed unless other waste at the site is also cleaned up.[148] In addition, courts have rejected divisibility arguments based upon

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and *II* holdings). However, in United States v. Ottati & Goss, Inc., 24 Env't Rep. Cas. (BNA) 1152 (D.N.H. 1986), the court did apportion surface cleanup costs based upon the number of drums each defendant had sent to the site.

[146] *See, e.g.*, United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1396 (D.N.H. 1985) (refusing to apportion because defendants could not pinpoint the exact amount of waste for which each was responsible).

[147] *See, e.g.*, O'Neil v. Picillo, 682 F. Supp. 706, 725 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); United States v. Kramer, 757 F. Supp. 397, 422 (D.N.J. 1991); United States v. Chrysler Corp., 31 Env't Rep. Cas. (BNA) 1997, 2006 (D. Del. 1990); United States v. South Carolina Recycling & Disposal Inc., 653 F. Supp. 984, 995 (D.S.C. 1986), *aff'd in part and vacated in part sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 811 (S.D. Ohio 1983); *Ottati & Goss*, 630 F. Supp. at 1396. According to the Fourth Circuit, waste volume is an appropriate measure of apportionment only where the PRPs can also present evidence "disclosing the relative toxicity, migratory potential, and synergistic capacity of the hazardous substances at the site. . . ." *Monsanto*, 858 F.2d at 172 n.26. *See generally* Moore, *supra* note 17, at 10,531-32 (discussing reasonable bases for apportioning harm).

[148] *See, e.g.*, United States v. Western Processing Co., 734 F. Supp. 930, 942 (W.D. Wash. 1990) (finding that even where hazardous waste was traceable to defendant, harm was not divisible where entire site had to be cleaned up to remove defendant's waste). In addition, CERCLA imposes liability for actual or *threatened* releases that cause the incurrence of cleanup costs. *See* 42 U.S.C. § 9607(a)(4) (1988) (quoted *supra* note 51). The district court in Arizona v. Motorola, Inc., 805 F. Supp. 749, 755 (D. Ariz. 1992), thus held defendants jointly and severally liable even though there had not yet been a release of defendants' hazardous wastes from the site. The court stated that it could not "reasonably apportion liability without clear evidence disclosing the lack of, or lack of potential for, interaction of the substances deposited at" the site. *Id.* at 753. The court found that it needed evidence "that defendants' substances never have, or never will, interact or react with other substances or never have or never will result in environmentally disastrous consequences." *Id. See generally* B. Todd Wetzel, Note, *Divisibility of Harm Under CERCLA: Does an Indivisible Potential or Averted Harm Warrant the Imposition of Joint and Several Liability?*, 81 KY. L. J. 825 (1992-93) (discussing court decisions holding liability indivisible where harm is also indivisible).

removal or remedial expenses,[149] and upon percentage of ownership of the site,[150] holding that the divisibility of harm is the only relevant consideration.

The courts repeatedly emphasize that while joint and several liability is available under CERCLA, its application is by no means compulsory or automatic.[151] Nonetheless, the practical effect of the majority approach has been blanket application of joint and several liability for CERCLA cleanup costs.[152] Early attempts were made to minimize this outcome through application of equitable factors under the "moderate" approach. As the next subsection discusses, however, this approach was never widely adopted and was quickly abandoned. Today, equitable considerations arise under CERCLA only in the context of contribution actions.[153]

2. Equitable Considerations: The "Moderate" Approach and the Role of Contribution

Soon after CERCLA was enacted, a minority of courts rejected the *Restatement*'s divisibility approach, calling it extremely harsh and unfair, particularly when imposed upon a defendant who contributed only small amounts of hazardous substances to a site.[154] These courts advocated a case-by-case factual evaluation,

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[149] *Western Processing*, 734 F. Supp. at 937.

[150] *See, e.g.*, United States v. Rohm & Haas Co., 2 F.3d 1265, 1280 (3d Cir. 1993). In *Rohm & Haas*, the court saw no necessary connection between defendant's proportion of site ownership and the amount of harm attributable to the defendant. *Id.* The court noted that defendant's ownership of less than 10% of the site was an "equitable factor" to be considered in a contribution claim, but that it was irrelevant to a joint and several liability action. *Id.* at 1280-81.

[151] *See, e.g., Alcan I*, 964 F.2d 232, 268-69 (3d Cir. 1992) (finding that CERCLA does not mandate joint and several liability, but permits it in cases of indivisible harm); *Monsanto*, 858 F.2d at 171.

[152] Harris & Milan, *supra* note 17, at 38 (noting that "district courts have consistently ruled as though joint and several liability applies to all CERCLA situations").

[153] The Clinton Administration's proposal to reform CERCLA would revitalize the Gore factors. *See infra* notes 156-59 and accompanying text (discussing Gore factors). For a summary of the Administration's proposal, see 140 CONG. REC. S1058 (daily ed. Feb. 7, 1994). Under the Administration's bill, a neutral "allocator" would use the Gore factors and other factors promulgated by the EPA to allocate liability among responsible parties. *See* S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[154] *See, e.g.*, United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984); *see also* Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1118

using not the *Restatement*'s divisibility of harm formulation, but equitable considerations. In particular, the courts looked to the equitable factors set forth in the Gore Amendment, a failed amendment to the original CERCLA legislation.[155] The moderate approach, never widely adopted in the first instance, quickly fell into disfavor and failed to become a significant part of CERCLA joint and several liability case law. Equitable considerations still arise under CERCLA, but only in the context of contribution actions, their more traditional home.

When CERCLA was originally enacted, the House adopted the Gore Amendment.[156] This amendment was intended to moderate the common law approach to joint and several liability as applied to a small-volume defendant.[157] The Amendment would have provided courts with the power and discretion to apportion damages according to a number of equitable factors, even when the defendant was unable to demonstrate its contribution to the harm incurred. These factors included:

> (i) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;
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> (ii) the amount of the hazardous waste involved;
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> (iii) the degree of toxicity of the hazardous waste involved;
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> (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
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> (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
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> (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or environment.[158]

Under the Gore Amendment, the court was to consider these

(N.D. Ill. 1988); United States v. Hardage, 116 F.R.D. 460, 465-66 (W.D. Okla. 1987); United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905, 1909-10 (C.D. Cal. 1984). *See generally* Stephen B. Russo, Note, *Contribution Under CERCLA: Judicial Treatment After SARA*, 14 COLUM. J. ENVTL. L. 267, 270-73 (1989) (discussing equitable apportionment).

[155] *See generally* Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1486-89 (D. Colo. 1985) (discussing legislative history of Gore Amendment).

[156] *A & F Materials*, 578 F. Supp. at 1256 (citing 126 CONG. REC. 26,781-99 (1980)).

[157] *See generally ASARCO*, 608 F. Supp. at 1486-89 (discussing legislative history of the Gore Amendment).

[158] *Id.* at 1487-88.

factors in apportioning harm if the court determined the harm to be indivisible and thus incapable of apportionment under traditional common law rules.[159] Thus, the Gore Amendment supplemented, rather than supplanted, traditional *Restatement* notions of joint and several liability, and was intended to diminish the use of joint and several liability under CERCLA.

a. The "Moderate" Approach to Joint and Several Liability Under CERCLA

The "moderate" approach to joint and several liability under CERCLA was first articulated in *United States v. A & F Materials Co.*[160] The EPA sought to hold a number of parties liable for the improper disposal of over seven million gallons of hazardous wastes. The *A & F Materials* court recognized the difficulties created by the nature of hazardous substance contamination.[161] It also noted that "CERCLA, on its face, gives no guidance on how to solve the problem of comingling [sic], or whether liability should be apportioned based on the volume or toxicity of the waste, or how liability is to be apportioned between owners, operators, transporters and generators."[162] Like the *Chem-Dyne* court, the *A & F Materials* court found that joint and several liability, imposed on a case-by-case basis, was the appropriate response to this factual uncertainty.[163]

The *A & F Materials* court also agreed with the majority view that a uniform federal common law was needed in this area and that the *Restatement* provided an "excellent starting point" for fashioning such a rule.[164] However, the court went on to state that "rigid application" of the *Restatement*'s approach was "inappropriate."[165] The court was concerned specifically about the inequity of holding jointly and severally liable a defendant who had contributed "only a small amount to a site."[166] The *A & F*

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[159] H.R. 7020, 96th Cong., 2d Sess. § 3071(3)(A) (1980).
[160] 578 F. Supp. 1249, 1256-57 (S.D. Ill. 1984).
[161] *Id.* at 1253.
[162] *Id.* at 1255.
[163] *See id.*
[164] *Id.*
[165] *Id.* at 1256.
[166] *Id.*

Materials court thus concluded that the *Restatement*'s approach to joint and several liability should be "softened" by application of the six factors outlined in the Gore Amendment.[167]

The *A & F Materials* court was apparently unconcerned about the incongruity of using an unsuccessful legislative amendment to fashion a federal rule of decision. The court found that "the Senate's failure to adopt the Gore Amendment [could not] be interpreted as a rejection of its approach,"[168] and that comments of various Representatives indicated their belief that the final legislation incorporated the "essence" of the Gore Amendment.[169] Moreover, the *A & F Materials* court found that the moderate approach fostered fairness because rather than "indiscriminately" imposing joint and several liability upon defendants, it looked to "such factors as the amount and toxicity of a particular defendant's contribution to a waste site."[170]

Few courts have followed the lead of *A & F Materials*.[171] In *Allied Corp. v. Acme Solvents Reclaiming, Inc.*,[172] for example, the court adopted the "moderate" approach in a private cost recovery action.[173] The court acknowledged that the legislative histo-

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[167] *Id.*; *see supra* note 158 and accompanying text (listing Gore factors).

[168] 578 F. Supp. at 1256.

[169] *Id.* at 1256-57 (citing 126 CONG. REC. at 31,976-31,981 (1980) (remarks of Representatives Mikulski, Gore, and Brown)).

[170] *Id.* at 1257.

[171] *See* cases cited *supra* note 154.

[172] 691 F. Supp. 1100 (N.D. Ill. 1988).

[173] *Id.* at 1118. The courts have clearly determined that joint and several liability is available against defendants when the federal or a state government is the plaintiff. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Chem-Dyne Corp., 572 F. Supp. 803, 810-11 (S.D. Ohio 1983). Courts have also applied joint and several liability where a plaintiff is a private party, although the issue is less settled in this context. *See* County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1516 (10th Cir. 1991) (holding that joint and several liability may be imposed where private parties incur response costs); Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913, 915-16 (N.D. Okla. 1987) (same); Jones v. Inmont Corp., 584 F. Supp. 1425, 1428 (S.D. Ohio 1984) (same). The EPA has taken the position that joint and several liability applies "no matter whether the plaintiff is governmental or private." Actions Under CERCLA § 107(a), 55 Fed. Reg. 8798 (1990). *See generally* Daniel R. Hansen, *CERCLA Cost Allocation and Nonparties Responsibility: Who Bears the Orphan Shares?*, 11 UCLA J. ENVTL. L. & POL'Y 37, 37 (1992) (describing liability under CERCLA in light of cases listed above).

The courts disagree on whether a suit against a private party, brought by a private party who cleaned up a site, is more properly viewed as a private cost recovery action under § 107(a), to which joint and several liability principles apply, or as an action for contribution under § 113(f). *Compare* Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.,

ry of SARA embraced the reasoning of *Chem-Dyne*,[174] but found that this did not necessarily indicate congressional rejection of the moderate approach.[175] *Acme Solvents* characterized the moderate approach as "employing the *Chem-Dyne-Restatement* rule as a general rule susceptible to exceptions."[176] Thus, the court set forth the following sequence of analysis: if the defendant can demonstrate the harm is divisible, the liability is several; if the harm is indivisible, the court may or may not impose joint and several liability after applying the equitable factors in the Gore Amendment.[177] This approach, according to the court, would facilitate the "expeditious and safe clean up" of hazardous wastes.[178]

The moderate approach to joint and several liability under CERCLA has not been employed by a court since *Acme Solvents* was decided in 1988. Although the Gore factors are still considered by courts,[179] they now arise solely in the context of contribution actions, where equitable considerations are routinely employed, rather than in joint and several liability actions, where they traditionally play no role.

b. Apportionment of Harm v. Allocation of Costs: The Role of Contribution in CERCLA Actions

Application of the joint and several liability standard under CERCLA, as under the common law, requires a two-step

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814 F. Supp. 1269, 1278 (E.D. Va. 1992) (holding such actions arise under § 107 as private recovery actions); Allied Corp. v. Acme Solvents Reclaiming Corp., 691 F. Supp. 1100, 1118 (N.D. Ill. 1988) (same); Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913, 915-16 (N.D. Okla. 1987) (same) *with* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1992) (holding such actions arise under § 113(f) as contribution actions); Transtech Indus., Inc. v. A & Z Septic Clean, 798 F. Supp. 1079, 1086 (D.N.J. 1992) (same). *See generally* Daniel R. Avery, *Statutory Right or Statutory Prohibition? Reconciling CERCLA's Contribution Protection with the Private Response Cost Recovery Action*, 12 VA. ENVTL. L.J. 367 (1993) (distinguishing between private cost recovery actions and claims for contribution).

[174] *See supra* note 119 and accompanying text (discussing legislative history of SARA).

[175] *Acme Solvents*, 691 F. Supp. at 1117 (calling House report "ambiguous as to the propriety of judicial application of multiple factor analysis of the moderate approach").

[176] *Id.* at 1116.

[177] *Id.* at 1118.

[178] *Id.*

[179] *See infra* notes 198-200 and accompanying text (discussing cases considering Gore factors in contribution actions).

analysis.[180] The first step is to determine whether the harm is divisible or indivisible.[181] If the harm is divisible, it is "apportioned" among the defendants, and joint and several liability does not attach.[182] If the harm is "indivisible," the defendants are held jointly and severally liable; each defendant is thus liable to the plaintiff for the entire harm.[183]

If joint and several liability is imposed, the defendant may seek contribution from other liable parties.[184] Contribution is an equitable remedy that is intended to ameliorate the harsh effects of joint and several liability.[185] It enables a defendant who has paid more than its fair share of the damages to the plaintiff to seek reimbursement from defendants who paid less than their fair share.[186] As the First Circuit has noted, however, the right of contribution is not "a complete panacea" for defendants held jointly and severally liable for more than their fair share.[187] Not only is it often difficult for the defendant to lo-

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[180] *See* United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987).

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] RESTATEMENT, *supra* note 9, § 886A(2); *see also* O'Neil v. Picillo, 883 F.2d 176, 179 (1st Cir. 1989) (noting SARA's statutory cause of action for contribution), *cert. denied*, 493 U.S. 1071 (1990).

[185] *See* Barbara J. Gulino, Note, *A Right of Contribution Under CERCLA: The Case for Federal Common Law*, 71 CORNELL L. REV. 668, 668 (1986) (favoring federal common law of contribution).

[186] PROSSER & KEETON, *supra* note 18, § 50, at 336-41; RESTATEMENT, *supra* note 9, § 886A(2). Traditionally, contribution has been unavailable for intentional tortfeasors, so as to force them to bear the full cost of their actions. PROSSER & KEETON, *supra* note 18, § 50, at 339; RESTATEMENT, *supra* note 9, § 886A(3).

CERCLA contribution actions usually arise in one of three situations:

> [1] the EPA has sued fewer than all the PRPs at a site under section 9606 or 9607(a), and those "named" parties seek contribution against the other, unnamed PRPs at the site; [2] a PRP that has financed the cleanup at a site has brought a cost recovery action under section 9607(a)(4)(B) against fewer than all of the other PRPs at the site, and those named parties bring actions for contribution against the unnamed PRPs at the site, as well as counterclaims for contribution against the PRP originally seeking to recover its costs; or [3] a PRP brings an action to recover its response costs from another PRP at a site.

Mason, *supra* note 10, at 89-90 (footnotes omitted). As one district court noted, however, "the Court's discretion in allocating damages among the defendants during the contribution phase does not affect the defendants' liability." United States v. Western Processing Co., 734 F. Supp. 930, 938 (W.D. Wash. 1990).

[187] O'Neil v. Picillo, 883 F.2d 176, 179 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

cate enough other solvent parties to significantly alleviate its liability burden, but the transaction costs of pursuing such parties are often prohibitively high.[188]

The distinction between apportionment under joint and several liability and allocation of costs in a contribution action is an important one. In an apportionment action, the plaintiff will bear the risk that a defendant held severally liable is insolvent or judgment-proof. In a contribution action, the other defendants held jointly liable bear that risk; the plaintiff bears only the risk that *all* defendants will be insolvent or judgment-proof. In the CERCLA context, the courts have reasoned that Congress intended PRPs, who are by definition "at least partially culpable," to bear the costs of uncertainty associated with the possibility that other defendants may be insolvent or judgment-proof.[189]

Section 886A of the *Restatement* expressly notes a right of contribution for defendants held jointly and severally liable under common law.[190] Initially, CERCLA did not explicitly provide for a right of contribution.[191] As a result, courts disagreed about whether a right of contribution existed under CERCLA.[192] However, in 1986, SARA created an express right

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[188] *See id.* (recognizing difficulty of seeking contribution).

[189] *See id.* (citing United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809-10 (S.D. Ohio 1983)).

[190] The *Restatement* provides:

> (1) Except as stated in Subsections (2), (3), and (4), when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them.
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> (2) The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability, and is limited to the amount paid by him in excess of his share. No tortfeasor can be required to make contribution beyond his own equitable share of the liability.
>
> (3) There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm.
>
> (4) When one tortfeasor has a right of indemnity against another, neither of them has a right of contribution against the other.

RESTATEMENT, *supra* note 9, § 886A.

[191] The Senate bill had contained a contribution provision, see S. 1480, 96th Cong., 2d Sess., § 4(f)(2) (1980), 126 CONG. REC. 30,900 (1980), but it was deleted from the final legislation.

[192] Typically, the federal courts will not create common law rules of contribution unless

of contribution among PRPs,[193] thus eliminating any uncertainty as to the existence of this remedy under CERCLA. SARA explicitly states that contribution claims are to be decided under federal law "using such equitable factors as the court determines are appropriate."[194] SARA also created a "contribution protection" mechanism, which shields a PRP who reaches an administrative or judicially approved settlement with the government from contribution actions brought by nonsettling PRPs.[195] The contribution protection section is clearly designed to provide an incentive for PRPs to settle by limiting their liability exposure if they settle early, and by increasing their liability exposure if they delay settlement.[196]

Congress has explicitly or implicitly granted them authority to do so. *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642-46 (1981). Prior to SARA's enactment, courts disagreed on whether contribution was available under CERCLA. *Compare* United States v. Westinghouse Elec. Co., 22 Env't Rep. Cas. (BNA) 1230, 1233 (S.D. Ind. 1983) (holding right to contribution unavailable) *with* United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 995 n.8 (D.S.C. 1984) (holding contribution available), *aff'd sub nom.* United States v. Monsanto Co., 858 F.2d 160, 164 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). Among the courts that had found a pre-SARA right to contribution, some had found that CERCLA created an implied right to contribution. *See, e.g.*, United States v. Miami Drum Serv., Inc., 17 Envtl. L. Rep. (Envtl. L. Inst.) 20,539, 20,541 (S.D. Fla. 1986); United States v. Conservation Chem. Co., 619 F. Supp. 162, 228 (W.D. Mo. 1985). Others had found that courts had the right to create a federal rule of contribution under CERCLA. *See, e.g.*, United States v. New Castle County, 642 F. Supp. 1258, 1268-69 (D. Del. 1986); Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1486 (D. Colo. 1985).

[193] *See* SARA, Pub. L. No. 99-499, § 113(b), 100 Stat. 1613, 1647 (1986) (codified at 42 U.S.C. § 9613(f)(1) (1988)).

[194] 42 U.S.C. § 9613(f)(1) (1988). The defenses to contribution suits are not limited to the defenses identified in § 107(b). *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3d Cir. 1988) (stating "defenses enumerated in § 9607(b) are not exclusive in suits for contribution"), *cert. denied*, 488 U.S. 1029 (1989). *See generally* Ellen J. Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 ECOLOGY L.Q. 365 (1987) (analyzing SARA's effect on CERCLA contribution case law); F. James Handley, *CERCLA Contribution Protection: How Much Protection?*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10,542 (1992) (discussing express right of contribution under SARA); Mason, *supra* note 10, at 100-12 (discussing contribution protection under CERCLA and SARA); Russo, *supra* note 154, at 281-85 (discussing equitable factors).

[195] *See* 42 U.S.C. § 9613(f)(2) (1988). This section also provides that the court must reduce the nonsettling PRPs' potential liability by the "amount of the settlement." *Id.* The majority of courts examining this issue have determined that nonsettling defendants' liability is reduced by the amount of the settlement, regardless of the amount. *See, e.g.*, United States v. Cannons Eng'g Corp., 899 F.2d 79, 91 (1st Cir. 1990). A minority have held that the reduction is equal to the settling defendants' proportionate share of liability. *See* United States v. Laskin, 1989 U.S. Dist. LEXIS 4900, at *8-9 (N.D. Ohio Feb. 27, 1989). *See generally* Mason, *supra* note 10, at 125-26 (discussing § 9613(f)(2)).

[196] *See* Burlington N. R.R. v. Time Oil Co., 738 F. Supp. 1339, 1342 (W.D. Wash. 1990)

The legislative history of SARA cited *A & F Materials* for the proposition that the Gore factors may be considered in determining whether to allocate costs in an action for contribution.[197] Courts have since determined that equitable considerations other than those found in the Gore Amendment may be taken into account as well.[198] However, the majority rule continues to be that while equitable factors are relevant to an action for contribution,[199] they are not relevant to the initial questions of apportionment of harm and imposition of joint and several liability.[200]

(stating that in enacting the contribution protection provision, Congress intended "to allow a settling party to avoid the specter of future litigation after settling with the [government], by providing protection from later collateral attacks by other potentially liable parties who were not willing to come to the negotiating table early rather than late"); United States v. Rohm & Haas Co., 721 F. Supp. 666, 679 (D.N.J. 1989) (stating that nonsettling PRPs "bear the risk that the settling defendants are paying less than their equitable share").

[197] *See* H.R. Rep. No. 253, 99th Cong., 1st Sess. 19, *reprinted in* 1986 U.S.C.C.A.N. 2835, 3042.

[198] *See* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1206 (2d Cir. 1992) (holding that courts may consider equitable factors, including parties' "financial resources"); Central Maine Power Co. v. F.J. O'Connor Co., 838 F. Supp. 641, 645 (D. Me. 1993) (stating that Gore factors are "not exhaustive"); CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 571-76 (W.D. Mich. 1991) (considering party's degree of involvement in disposal actions, amount of hazardous waste involved, and degree of care exercised); Weyerhaeuser Co. v. Koppers Co., 771 F. Supp. 1420, 1426 (D. Md. 1991) (stating that factors include benefits received from contaminating activities and knowledge of and/or acquiescence in such activities). Commentators, as well, have examined different methods of allocating liability in CERCLA contribution actions. *See* Mason, *supra* note 10, at 93-100 (discussing pro rata, comparative fault, comparative causation, and Gore factors approaches); John C. Butler, et al., *Allocating Superfund Costs: Cleaning Up the Controversy*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,133 (1993) (discussing cost allocation methods).

[199] *See* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672-73 (5th Cir. 1989) (using equitable factors to determine allocation); Purolator Prods. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124, 134-35 (W.D.N.Y. 1991) (same); United States v. Western Processing Co., 734 F. Supp. 930, 938 (W.D. Wash. 1990) (same); Amoco Oil Co. v. Dingwell, 690 F. Supp. 78, 86 (D. Me. 1988) (same), *aff'd sub nom.* Travelers Indem. Co. v. Dingwell, 884 F.2d 629 (1st Cir. 1989).

[200] *See, e.g.*, Environmental Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 507-09 (7th Cir. 1992) (holding no right to contribution until joint and several liability determined); *Alcan I*, 964 F.2d 252, 270 n.29 (3d Cir. 1992) (resolving liability issue prior to determining contribution); United States v. R.W. Meyer, Inc., 932 F.2d 568, 570-71 n.2 (6th Cir. 1991) (same); *Borden*, 889 F.2d at 672-73 (same); O'Neil v. Picillo, 883 F.2d 176, 179 (1st Cir. 1989) (same), *cert. denied*, 493 U.S. 1071 (1990); United States v. Monsanto Co., 858 F.2d 160, 171 n.22 (4th Cir. 1988) (same), *cert. denied*, 490 U.S. 1106 (1989); *Central Maine Power*, 838 F. Supp. at 645-47 (same); *Koppers*, 771 F. Supp. at 1426 (same); *Western Processing*, 734 F. Supp. at 938 (same); *Dingwell*, 690 F. Supp. at 86-87 (same); United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987) (same).

III. RE-EXAMINING CERCLA'S JOINT AND SEVERAL LIABILITY STANDARD: *ALCAN I*, *ALCAN II*, AND *BELL*

Recently, the Second, Third, and Fifth Circuits examined the issue of joint and several liability under CERCLA. All three courts applied a joint and several liability standard based upon the *Restatement*. As noted above, under the *Restatement*'s formulation, liability may be apportioned between joint tortfeasors if there are distinct harms or if there is a reasonable basis for determining the contribution of each cause to a single harm.[201] *Alcan I* and *Alcan II* addressed the first situation, where separate and distinct harms have occurred; *Bell* addressed the second situation, where a single harm has resulted from separate and distinct causes.

Many commentators viewed these three cases as indicating a shift in judicial attitudes toward the imposition of joint and several liability under CERCLA — a shift that, these commentators asserted, bodes well for defendants.[202] To some extent, these characterizations are accurate. *Alcan I* and *Alcan II* evidence judicial recognition that joint liability is *not* a necessary consequence of commingled waste. More importantly, the two decisions created an opportunity for defendants to raise causation issues, a previously prohibited consideration under CERCLA. *Bell*, on the other hand, relaxed the rigid burden of proof required by previous courts.

Despite these promising developments in CERCLA joint and several liability jurisprudence, *Alcan I*, *Alcan II*, and *Bell* offer little real comfort for CERCLA defendants. These opinions contain very narrow holdings based upon very specific, atypical fact patterns. The incremental advances made in these three opinions offer little more than window dressing for the problems associated with CERCLA joint and several liability. They should not be allowed to blind the courts and Congress to the very real need for further judicial and/or legislative reform in this area.

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[201] *See, e.g.*, *Monsanto*, 858 F.2d at 171-73. *See generally supra* note 26 and accompanying text (setting forth *Restatement* approach to apportionment).

[202] *See supra* note 17 and accompanying text (reviewing commentary); *see also* Abrams, *supra* note 11 (arguing that these three cases are defining reach of strict, joint and several liability under CERCLA and allowing "traditional defenses that should diminish perceptions of inequity").

A. Re-introducing Causation in CERCLA Liability Analysis

1. *Alcan I*

Alcan I and *Alcan II* both involved assertions by the defendant that the pollutants disposed of by various contributors to a disposal site created separate and distinct harms such that the imposition of joint and several liability was inappropriate. Both cases evolved out of a manufacturing process used by Alcan Aluminum Corporation (Alcan) that produced an emulsion of deionized water and mineral oil containing small fragments of copper, cadmium, lead, and zinc.[203] Although Alcan filtered the emulsion in an effort to remove these hazardous substances before disposing of it, some of the fragments remained in the emulsion at the time of disposal.[204]

In *Alcan I*, Alcan's disposal contractor dumped over 30,000 gallons of the emulsion into a borehole.[205] In 1985, the EPA discovered that contaminated waters had been released from the borehole into the Susquehanna River.[206] It brought a recovery action against twenty defendants, including Alcan, who were known to have generated or disposed of wastes found at the site.[207] All of the defendants except Alcan settled with the EPA.[208] The district court granted the government's motion for summary judgment and imposed joint and several liability upon Alcan for the difference between the full response costs incurred and the amount the EPA had recovered from the settling defendants.[209]

On appeal, the Third Circuit agreed that joint and several liability was "the only means to achieve the proper balance" between the conflicting interests of the EPA and the PRPs, and the only way "to infuse fairness into the statutory scheme without distorting its plain meaning or disregarding congressional in-

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[203] *Alcan I*, 964 F.2d at 256; *Alcan II*, 990 F.2d 711, 717 (2d Cir. 1993);

[204] These substances are all hazardous under CERCLA. *Alcan I*, 964 F.2d at 256.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 255.

[208] *Id.* at 257.

[209] *Id.* The total cleanup cost in *Alcan I* was in excess of $1.3 million. *Id.* at 256. The settling parties agreed to pay approximately $830,000, and the district court found Alcan liable for approximately $473,000. *Id.* at 270 n.29.

tent."[210] However, the circuit court found that the district court erred in failing to conduct a hearing to consider Alcan's evidence regarding divisibility of the harm.[211] The Third Circuit vacated the grant of summary judgment to the government and remanded the case to allow Alcan the opportunity to prove that the harm attributable to it was divisible from the harm attributable to the other defendants.[212]

Alcan raised a number of mostly unsuccessful arguments before the Third Circuit.[213] The *Alcan I* court quickly rejected Alcan's contention that it was not liable under CERCLA because the concentration of hazardous substances in its emulsion was below natural background levels and thus could not have contributed to the environmental contamination.[214] Like earlier courts,[215] the *Alcan I* court found that CERCLA contained no quantitative requirement for hazardous substances.[216] The court concluded that if Congress had wished to impose a threshold requirement under CERCLA, it could easily have done so.[217] While acknowledging Alcan's fear that the court's expansive holding was broad enough to render "virtually everything" hazardous, the court asserted that its holding regarding the nature and scope of joint and several liability under CERCLA should calm that fear.[218]

Alcan then argued that if no threshold applied under CERCLA, the government must show that Alcan's hazardous

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[210] *Id.* at 268.

[211] *Id.* at 269.

[212] *Id.*

[213] Alcan raised the following issues on appeal (all of which were rejected by the court): (1) CERCLA has a minimum quantitative requirement for "hazardous substance"; (2) Alcan's emulsion was a petroleum product excluded from CERCLA's coverage; (3) the lower court's decision was inconsistent with EPA regulations; (4) CERCLA requires a causal relationship; and (5) CERCLA does not give fair notice of what is considered a hazardous substance to PRPs. *Id.* at 259-67.

[214] *Id.* at 259-60.

[215] *See supra* notes 66-70 and accompanying text (discussing lack of minimum quantity requirement for hazardous substances).

[216] *Alcan I*, 964 F.2d at 259-60.

[217] *Id.* at 259-61. The court concluded that to be hazardous under CERCLA, "the substance under consideration must simply fall within one of the designated categories." *Id.* at 260. The court based its ruling upon the plain meaning of the statute, the legislative history, and upon prior case law. *See id.* at 260-61.

[218] *Id.* at 261 n.13. Alcan also argued that the generic substances in its emulsion were not hazardous substances under CERCLA. The court rejected this claim. *Id.* at 261-64.

substances caused or contributed to an actual or threatened release within the meaning of the statute.[219] The court rejected Alcan's position, agreeing with the holdings of earlier courts[220] that both the plain meaning[221] and the legislative history[222] of the statute were to the contrary. CERCLA section 107(a)(3) imposes strict liability[223] on "any person who by contract, agreement, or otherwise arranged for disposal or treatment [of hazardous substances] . . . at any facility . . . from which there is a release, or a threatened release which causes the incurrence of response costs."[224] According to the *Alcan I* court, the plain meaning of this provision is that the plaintiff need not show that the defendant's wastes caused the release or incurrence of response costs, but only that the actual or "threatened release caused the incurrence of response costs, and that the defendant is a generator of hazardous substances at the facility."[225]

The court also noted that while early versions of CERCLA contained causation requirements, those provisions were deleted from the final version.[226] Further, the *Alcan I* court reasoned,

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[219] *Id.* at 264.

[220] *See id.* at 265-66 (citing cases); *supra* note 60 and accompanying text (citing cases holding that government is not required to show causation). The *Alcan I* court rejected as improperly decided Louisiana-Pacific Corp. v. ASARCO, Inc., 735 F. Supp. 358, 362 (W.D. Wash. 1990), which had imposed the causation requirement for which Alcan was arguing.

[221] *Alcan I*, 964 F.2d at 264. The *Alcan I* court explained that:

> [S]ection 107 imposes liability upon a generator of hazardous substances who contracts with another party to dispose of the hazardous substances at a facility "from which there is a *release, or threatened release which causes the incurrence of response costs.*" 42 U.S.C. § 9607 (emphasis supplied). The statute does not, on its face, require the plaintiff to prove that the generator's *hazardous substances* themselves caused the release or caused the incurrence of response costs; rather, it requires the plaintiff to prove that the *release or threatened release* caused the incurrence of response costs, and that the defendant is a generator of hazardous substances at the facility.

Id.

[222] *See id.* The court noted that H.R. 7020 would have imposed liability upon persons "who caused or contributed" to the actual or threatened release but that the final version as enacted "deleted the causation requirement and instead imposed liability upon a *class* of responsible persons without regard to whether the person specifically caused or contributed to the release and the resultant response costs." *Id.* at 264-65 (citations omitted).

[223] The statutory language does not expressly provide for strict liability. *See supra* note 46 and accompanying text (discussing CERCLA strict liability standard).

[224] 42 U.S.C. § 9607(a) (1988).

[225] 964 F.2d at 264.

[226] *Id.* at 265; *see supra* note 61 and accompanying text (discussing legislative history of

CERCLA contains three defenses to liability based upon causation;[227] thus, "[i]mputing a specific causation requirement would render these defenses superfluous."[228]

The *Alcan I* court concluded that CERCLA only requires the government to "prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the *release* caused the incurrence of response costs."[229] The *Alcan I* court recognized that this ruling, in conjunction with its ruling that CERCLA does not impose minimum quantity requirements in the definition of "hazardous substance," could have exceedingly harsh impacts upon defendants, for the rules "seemingly would impose liability upon every generator of hazardous waste, although that generator could not, on its own, have caused any environmental harm."[230] Nonetheless, the court was unable to dismiss the government's argument that individual defendants must be held liable for the environmental injury resulting from the actions of multiple defendants, even if each individual defendant's acts alone were insufficient to have produced the harm.[231] Otherwise, a plaintiff could be left without a remedy simply because its injury resulted from small cumulative acts of numerous defendants rather that the acts of a single or a few defendants.[232]

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causation requirement).

[227] 964 F.2d at 265; *see also* 42 U.S.C. § 9607(b) (1988).

[228] 964 F.2d at 265.

[229] *Id.* at 266 (emphasis added).

[230] *Id.* at 267. The court cited the following example:

> A very troublesome question arises where the acts of each of two or more parties, standing alone, would not be wrongful, but together they cause harm to the plaintiff. If several defendants independently pollute a stream, the impurities traceable to each may be negligible and harmless, but all together may render the water entirely unfit for use. The difficulty lies in the fact that each defendant alone would have committed no tort. There would have been no negligence, and no nuisance, since the individual use of the stream would have been a reasonable use, and no harm would have resulted.

Id. at 267 n.25 (quoting WILLIAM R. PROSSER, LAW OF TORTS, § 52, at 322 (4th ed. 1971)).

[231] *Id.* at 267.

[232] *Id.*

> [I]t is entirely possible for a hazardous waste facility to be comprised entirely of small amounts from many contributors. If each PRP could make [Alcan's] argument, *i.e.*, that its particular contribution did not warrant remediation and thus that it should not be liable for any costs, *no* party would be liable, despite

The *Alcan I* court determined that adoption of the *Restatement* approach to joint and several liability, as espoused by the *Chem-Dyne* court, would not only comport with congressional intent but also foster uniformity in the federal common law of CERCLA.[233] The court emphasized that the burden of proving divisibility rested upon the defendant in accordance with the *Restatement*'s goals of protecting an innocent plaintiff from difficulties of proof.[234]

However, the *Alcan I* court took a crucial step that distinguishes its holding from that of the *Chem-Dyne* line of cases. The court specifically rejected the EPA's contention that commingled waste is synonymous with indivisible harm.[235] Instead, the court found that Alcan was entitled to an opportunity to show that its liability was limited to the substances it contributed to the site.[236] Thus, the court held that if Alcan could prove that its waste "did not or could not, when mixed with other hazardous waste, contribute to the release and the resultant response costs, then Alcan should not be responsible for any response costs."[237] The court remanded the case for determination of whether there was a "reasonable basis" for apportioning Alcan's liability based upon its contribution to the harm incurred.[238] While the court noted that such a determination would be "factually complex as it will require an assessment of the relative toxicity, migratory potential and synergistic capacity of the hazardous waste at issue,"[239] it found that Alcan was nonetheless entitled to an "opportunity to avoid or limit liability."[240]

The *Alcan I* court emphasized that on remand the government need not show that Alcan's emulsion caused the release or

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> the fact that the site, as a whole, needed to be cleaned up and the government incurred costs in doing so.

Id. at 267-68 (quoting United States v. Western Processing Co., 734 F. Supp. 930, 937 (W.D. Wash. 1990)).

[233] *Id.* at 268 & n.26.

[234] *Id.* at 269 (quoting RESTATEMENT § 433B cmt. (b)(2)).

[235] 964 F.2d at 270 n.29.

[236] *Id.* at 270.

[237] *Id.* (emphasis deleted).

[238] *Id.* at 269.

[239] *Id.* (citing United States v. Monsanto Co., 858 F.2d 160, 172 n.26 (4th Cir. 1988); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 811 (S.D. Ohio 1983)).

[240] *Id.*

response costs.[241] The burden of proof remains on the defendant.[242] However, if Alcan could show that its emulsion, even when mixed with other substances, could not have contributed to the release and response costs, Alcan could not be held liable.[243] The court acknowledged that its holding "injected" causation into CERCLA analysis, but it shifted the burden of proof to the defendant, whereas common law principles would have placed it on the plaintiff.[244] The court justified its ruling by stating that the holding was consistent with the statutory scheme, "yet recognize[d] there must be some reason for the imposition of CERCLA liability."[245]

The *Alcan I* court then stated that the inquiry regarding divisibility of harm ought to be determined at the initial liability phase of the trial, not at a later contribution phase.[246] Otherwise, the court feared, "a defendant could easily be strong-armed into settling where other defendants have settled in order to avoid being held liable for the remainder of the response costs."[247] The court's ruling is significant because most CERCLA cases now proceed with bifurcated liability and allocation phases.[248] Under *Alcan I,* defendants have an earlier opportunity to limit or escape liability.

2. *Alcan II*

Alcan II[249] involved cleanup actions stemming from the disposal of the same type of emulsion wastes at issue in *Alcan I,* but at a waste disposal and treatment site in New York.[250] The EPA settled with eighty-two of eighty-three PRPs who had con-

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[241] *Id.* at 270.

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.* The court explained that its ruling seemed "particularly appropriate in light of the expansive meaning of 'hazardous substance.'" *Id.* at 270-71.

[246] *Id.* at 270 n.29. The court emphasized that even if in a given case the court determines that the harm is indivisible, the defendant will still be able to seek contribution from other, nonsettling defendants. *Id.*

[247] *Id.*

[248] *See, e.g., Bell,* 3 F.3d 889, 893 (5th Cir. 1993) (involving three phases: liability, recoverability of response costs, and apportionment of liability).

[249] 990 F.2d 711 (2d Cir. 1993).

[250] *Id.* at 717.

tributed waste to the site, recovering $9.1 million of the cleanup costs it had incurred. Alcan, again, was the lone hold-out, and the EPA sought to hold it liable for $3.2 million of unrecovered costs.[251] Both the government and Alcan moved for summary judgment. The government argued that Alcan was jointly and severally liable; Alcan argued that imposition of joint and several liability was improper because the harm was divisible.[252]

The district court granted summary judgment to the government and imposed joint and several liability upon Alcan for the full amount.[253] On appeal, the Second Circuit "essentially adopt[ed]" the reasoning of the Third Circuit in *Alcan I*, and held that Alcan could not be held liable if "its pollutants, when mixed with other hazardous wastes, did not contribute to the release or the resulting response costs."[254] It remanded for further factual determinations regarding apportionment.[255]

The first issue raised in *Alcan II* was identical to that raised in *Alcan I*: whether CERCLA imposes a minimum quantitative threshold for hazardous substances.[256] The Second Circuit noted that Alcan had presented it with "a parade of horribles" that Alcan argued necessarily flowed from a determination that CERCLA does not impose a minimum quantity requirement.[257] According to the *Alcan II* court, this view would find that "hazardous substances include breakfast cereal, the soil, and nearly everything else upon which life depends . . . [making] liable for response costs the butcher, the baker, and the candlestick maker."[258]

Although the court acknowledged that Alcan's argument had "some force," it was concerned that adopting a minimum quantity requirement could allow each defendant in a multi-polluter

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[251] *Id.*

[252] *Id.*

[253] *Id.* at 718. The court also granted Alcan's motion for summary judgment on Alcan's cross-claim for contribution against another defendant. *Id.*

[254] *Id.* at 717.

[255] *Id.* at 723.

[256] *Id.* at 720. Alcan raised three issues in *Alcan II*, all of which failed: "[A] polluter should not be held liable unless: a) the concentration of hazardous substances in its waste exceeds some minimum threshold; b) its wastes fall within certain EPA reporting requirements; and c) its wastes caused the government to incur response costs." *Id.*

[257] *Id.* at 716.

[258] *Id.*

context to avoid CERCLA liability by pointing to the low concentration of hazardous substances in its wastes.[259] The net result would be that the government would bear the cleanup costs, directly contravening Congress' intent that the polluters pay.[260] Ultimately, the *Alcan II* court was persuaded of the error of Alcan's approach by the plain language of the statute, noting that Congress had demonstrated that it knew how to draw such thresholds when it wanted to do so.[261]

Alcan then raised the same causation argument it had raised in *Alcan I*, with much the same results reached in the earlier case. Like the Third Circuit, the Second Circuit held that the EPA need not show that a particular defendant's waste caused incurrence of cleanup costs; rather, it need only show that an actual or threatened release caused the incurrence of response costs and that the defendant contributed hazardous substances to the waste site.[262] In reaching this result, the *Alcan II* court relied upon the same arguments used by the *Alcan I* court: the plain meaning of the statute, the legislative history, established case law, and the court's reluctance to render superfluous CERCLA's affirmative defenses.[263]

Nonetheless, the *Alcan II* court was worried by the specter of limitless CERCLA liability.[264] It noted that by adding the "common law gloss" of the *Restatement*'s joint and several liability standard onto CERCLA's statutory framework, the courts had avoided such a harsh result.[265] It found that adoption of the *Chem-Dyne/Restatement* approach would promote both the statutory ob-

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[259] *Id.*

[260] *Id.* at 716-17.

[261] *Id.* at 720 (citing B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1200 (2d Cir. 1992); *Alcan I*, 964 F.2d 252, 261 (3d Cir. 1992)). The court went on to state: "The absence of . . . quantity requirements in CERCLA leads inevitably to the conclusion that Congress planned for the 'hazardous substance' definition to include even minimal amounts of pollution." *Id.*

[262] *Id.* at 721; *see also* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 670 n.8 (5th Cir. 1989) (stating that "in cases involving multiple sources of contamination, a plaintiff need not prove a specific causal link between costs incurred and an individual generator's waste"); United States v. Monsanto Co., 858 F.2d 160, 170 (4th Cir. 1988) (explaining that Congress "allocated the burden of disproving causation to the defendant who profited from the generation and inexpensive disposal of hazardous waste"), *cert. denied*, 490 U.S. 1106 (1989).

[263] *Alcan II*, 990 F.2d at 721.

[264] *Id.*

[265] *Id.*

jectives and fairness.[266] Thus, the Second Circuit concluded that Alcan could escape liability if it could show that either: (1) its wastes, when commingled with other wastes, did not contribute to the release and subsequent response costs; or (2) its wastes contributed only to a divisible portion of the harm.[267]

The *Alcan II* court "candidly admit[ted]" that its first ground for avoiding liability permitted causation to be "brought back into the case — through the backdoor, after being denied entry at the frontdoor — at the apportionment stage."[268] The court attempted to limit the scope of its causation exception by stating that it would apply: (1) only to claims where the defendant's hazardous substances did not exceed background levels of contamination and could not concentrate; and (2) only in instances where no EPA thresholds existed.[269]

The *Alcan II* court was unwilling to adopt the *Alcan I* court's position on the timing of the divisibility issue. While the *Alcan II* court acknowledged that the *Alcan I* court's view was based on "common sense," it nonetheless "may be contrary to the statutory dictates of CERCLA."[270] The court found that a review of the legislative histories of CERCLA and SARA indicated that in order to facilitate speedy cleanup of contamination, liability was to be fixed immediately for purposes of enforcement.[271] Litigation would be permitted later to determine the amount of contribution owed by various parties.[272] Although the Second Circuit seemed inclined to believe that the *Alcan I* court's approach violated CERCLA's statutory requirements, it avoided the issue by allowing the trial court to determine when issues of divisibility and apportionment ought best to be handled in an individual case.[273]

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[266] *Id.* at 721-22.

[267] *Id.* at 722 (citing *Alcan I*, 964 F.2d 252, 270 (3d Cir. 1992)).

[268] *Id.*

[269] *Id.*

[270] *Id.* at 723.

[271] *Id.*

[272] *Id.* The court quoted the House Report, which stated that "[t]o avoid delay of cleanups and to minimize litigation, responsible parties would be allowed to challenge the cleanup remedy *after* acknowledging liability for the hazardous waste site." H.R. REP. 253, 99th Cong., 2d Sess., pt. 1, at 59, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841 (emphasis added).

[273] *See Alcan II*, 990 F.2d at 723.

With regard to the second ground for escaping liability, the *Alcan II* court, like the *Alcan I* court, explicitly rejected the assertion that commingling was synonymous with indivisible harm.[274] The court noted that apportionment is an "intensely factual determination."[275] While the defendant, not the government, bore that burden,[276] to defeat a motion for summary judgment on the divisibility issue, the defendant need only show the existence of genuine issues of material fact regarding apportionment.[277]

B. Proof of Harm: Bell

Alcan I and *Alcan II* stressed that joint and several liability did not necessarily follow automatically from the presence of commingled waste and that defendants were entitled to an opportunity to demonstrate divisibility of harm. *In re Bell Petroleum Services, Inc.*[278] has been touted as "pick[ing] up where the *Alcan* decisions left off."[279] *Bell* addressed the defendant's burden of proof on divisibility issues.

In *Bell*, groundwater was contaminated by chromium from rinse water that was disposed of at a nearby site.[280] The three defendants had operated sequential, mutually exclusive chrome-plating operations at the site.[281] Because only one hazardous substance — chromium — was involved, the synergistic effects of commingling (the most difficult issue presented in most CERCLA joint and several liability cases) was not at issue. Thus, *Bell* presented a much easier factual scenario than that found in most CERCLA cases.

The district court heard the case in three phases: liability

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[274] *Id.* at 722.

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] 3 F.3d 889 (5th Cir. 1993).

[279] Sive, *supra* note 17, at 17.

[280] *Bell*, 3 F.3d at 892.

[281] *Id.* at 903. The first defendant, John Leigh, had owned the site from 1967 to 1981, and had operated the plating activities there in 1971 and 1972. *Id.* The second defendant, Western Pollution Control Corp. (Bell), purchased the assets from Leigh and leased the site from 1972 to 1976, continuously conducting "similar, but more extensive" plating activities. *Id.* The third defendant, Sequa Corporation, purchased the assets from Bell, leased the property from Leigh, and conducted the plating activities from 1976 to 1977. *Id.*

(Phase I); recoverability of the EPA's response costs (Phase II); and apportionment of liability (Phase III).[282] The district court granted the government's motion for summary judgment on the issue of joint and several liability during Phase I.[283] During the hearing on Phase III, one of the defendants, Sequa, produced evidence as to the value of the chrome-plating activities undertaken by each defendant, as well as sales summaries.[284] In addition, Sequa presented expert testimony regarding volumetric apportionment of the activities.[285] The district court rejected Sequa's attempts to demonstrate divisibility of harm, noting that the records submitted were incomplete and that the opinions of the expert witnesses necessarily depended on assumptions.[286]

The district court concluded that the evidence presented to it indicated "there was no method of dividing up the liability among the defendants which would rise to any level of fairness above mere speculation."[287] Instead of using joint and several liability, the court apportioned liability based on equitable factors, assigning 35% to Sequa, and 30% and 35%, respectively, to the other two defendants.[288] The government settled with the other two defendants, leaving Sequa liable for more than $1.8 million in response costs.[289]

On appeal, the Fifth Circuit found that the district court had erred in imposing joint and several liability upon Sequa because Sequa had provided the requisite degree of proof regarding the divisibility of the harm.[290] The circuit court remanded the case to the district court for apportionment of liability.[291] The court characterized joint and several liability as a tool that could ameliorate the harshness of CERCLA's strict liability scheme.[292]

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[282] *Id.* at 893.

[283] *Id.*

[284] *Id.* at 903-04.

[285] *Id.* at 904.

[286] *Id.*

[287] *Id.* at 894.

[288] *Id.*

[289] *Id.* at 904. Bell settled for $1 million and Leigh for $100,000. *Id.*

[290] *Id.* at 903.

[291] *Id.*

[292] *Id.* at 897. The *Bell* court explained that:

> CERCLA, as a strict liability statute that will not listen to pleas of "no fault," can be terribly unfair in certain instances in which parties may be required to pay

Ultimately, the *Bell* court relied upon the *Restatement*'s exposition of joint and several liability as espoused by the *Chem-Dyne* court.[293]

Sequa argued that the district court and the EPA had, in effect, required the defendants to show a *certain* basis for apportionment.[294] However, as Sequa pointed out, the *Restatement* does not contemplate a standard of certainty, but rather one of reasonableness.[295] In deciding whether a rea-

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> huge amounts for damages to which their acts did not contribute. Congress recognized such possibilities and left it to the courts to fashion some rules that will, in appropriate instances, ameliorate this harshness. Accordingly, Congress has suggested, and we agree, that common-law principles of tort liability set forth in the *Restatement* provide sound guidance.

Id.

[293] *See id.* at 895-97. The *Bell* court reviewed CERCLA jurisprudence and found that the courts had fashioned three approaches to joint and several liability under the statute. First, the *Chem-Dyne* approach, based heavily on the *Restatement*, permits a defendant to escape joint and several liability if it can show the extent of harm caused by its waste. *Id.* at 901. Second, the *Alcan* approach permits a defendant to escape liability altogether if it can prove that its waste, even if commingled, did not cause the incurrence of response costs. *Id.* The *Bell* court distinguished the *Alcan* approach from the *Chem-Dyne* approach by noting that the former "recognized that, under the unique statutory liability scheme of CERCLA, the plaintiff's common law burden of proving causation has been eliminated." *Id.* The third approach, the "moderate" approach, also based on the *Restatement*, allows courts to consider equitable factors where a defendant is unable to prove divisibility. *Id.*

The court noted that the three approaches had some common elements: (1) none mandates imposition of joint and several liability under CERCLA; (2) all three are based upon the *Restatement*; and (3) all three permit defendants to prove a reasonable basis for apportionment (though the court noted that defendants rarely succeed). *Id.* The *Bell* court specifically rejected the moderate approach, finding that equitable factors are more appropriately considered in contribution than in joint and several liability actions. *Id.* The *Bell* court ultimately adopted the *Chem-Dyne* approach, stating:

> Although we express no opinion with respect to the *Alcan* approach, because it is not necessary with respect to the issues we are faced with in this case, we nevertheless recognize that the *Restatement* principles must be adapted, where necessary, to implement congressional intent with respect to liability under the unique statutory scheme of CERCLA.

Id. at 902 (footnote omitted).

[294] *Id.* at 903.

[295] The court noted that the *Restatement*'s example of the harm inflicted by cattle owned by two defendants, see *supra* note 32 and accompanying text, being divisible based upon proportionate ownership "suggests that apportionment is appropriate even though the evidence does not establish with certainty the specific amount of harm caused by each defendant's cattle, and even though there is a possibility that only one of the defendant's cattle caused all of the harm while the other defendant's cattle idly stood by." *Bell*, 3 F.3d at 903.

sonable basis for apportionment exists, the court must determine whether sufficient evidence regarding the amount of harm caused by each defendant exists. The courts should not find the task overly onerous, as they routinely apportion fault based upon reasonable evidence in the context of comparative negligence.[296] If "expert testimony and other evidence establishes a factual basis for making a reasonable estimate that will fairly apportion liability," then joint and several liability is inappropriate "in the absence of exceptional circumstances."[297] While "absolute certainty" might be lacking, "a reasonable and rational approximation of each defendant's individual contribution to the contamination" is possible.[298]

Where, as in *Bell*, the site is contaminated with a single hazardous substance with no synergistic effects, the court could reasonably assume that the harm created by each defendant was proportionate to the volume of hazardous substance each discharged into the environment.[299] Incomplete records, reliance upon assumptions in formulating expert opinions, and the existence of competing apportionment theories were not fatal to the defendant's claim for apportionment, provided the defendant could show by a preponderance of the evidence that a reasonable basis for such apportionment existed.[300] Sequa had "met its burden of proving that there is a reasonable basis for apportioning liability among the defendants on a volumetric basis."[301] As a result, imposition of joint and several liability was inappropriate.[302]

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[296] *See id.* at 903 n.16 (recognizing that factfinders frequently apportion fault under comparative negligence statutes without "evidence showing to a certainty the proportion of each party's fault").

[297] *Id.* at 903.

[298] *Id.* (stating that it was "reasonable to assume that the respective harm done by each of the defendants is proportionate to the volume of the chromium-contaminated water each discharged into the environment"). The court reasoned: "The fact that apportionment may be difficult, because each defendant's exact contribution to the harm cannot be proved to an absolute certainty, or the fact that it will require weighing of the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability." *Id.* at 901.

[299] *Id.*

[300] *Id.* at 904 & n.19.

[301] *Id.* at 904.

[302] *Id.*

Finally, the *Bell* court agreed with the *Alcan I* court that an "early resolution" of the apportionment issue was "preferable," but nonetheless adopted the *Alcan II* court's decision that the issue was best left to the "sound discretion" of the trial court.[303] Thus, the circuit court remanded to the district court for apportionment.[304]

C. Assessing the Impact on CERCLA Joint and Several Liability Jurisprudence

The specific outcomes of *Alcan I*, *Alcan II*, and *Bell* are remarkable only because they deviate from what we have come to expect in CERCLA cases. Defendants so rarely win even small victories in the CERCLA liability fray that the decisions in these three cases seem, at first glance, to be striking indeed. However, the aberrational nature of the outcomes can blind observers to the more fundamental questions: will these holdings alter the outcome of typical CERCLA cases or influence the reasoned development of joint and several liability under CERCLA?

Unfortunately, most CERCLA defendants will not find the answers to these questions reassuring. While the incremental gains achieved in these three opinions should not be dismissed, neither should these opinions be lauded as meaningful solutions to the myriad problems posed by CERCLA's joint and several liability scheme. The idiosyncratic factual patterns and restrained holdings of these three cases make the victories scored by these defendants more symbolic than real. Moreover, CERCLA's lack of principled theoretical underpinnings ensures that the impact of the decisions will remain slight.

Procedurally, the opinions in *Alcan I* and *Alcan II* are interesting both for what they did and did not say. In neither case did the court affirmatively find that the harm alleged was

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[303] *See id.* at 901.

[304] *Id.* at 892. On remand, the district court held Sequa liable for approximately $1.77 million in recovery costs and prejudgment interest. United States v. Bell Petroleum Serv., Inc., No. MO-88CA-05, slip op. at 1 (W.D. Tex. Mar. 11, 1994). The district court read the Fifth Circuit's opinion as precluding the introduction of new evidence on apportionment, but indicated that it believed such evidence would have shown Sequa's fair share to be much higher. *Id.* at 1 n.1.

divisible. In both instances the appellate courts remanded for additional factual findings regarding divisibility. On the positive side, both the Second and the Third Circuits emphasized that commingling is not synonymous with indivisible harm, thus reopening a door to apportionment that the government had sought to slam shut.[305] These courts explicitly recognized that defendants are entitled to an opportunity to provide whatever proof they can muster regarding divisibility of harm and that joint and several liability should not be automatically imposed upon defendants involved in multi-polluter sites. These messages have not been lost on subsequent courts, several of which have denied government motions for summary judgment on joint and several liability that in the past would have been routinely granted.[306]

Thus, *Alcan I* and *Alcan II* breathe life back into the oft-cited but little-honored axiom that imposition of joint and several liability is not automatic under CERCLA but depends upon a case-by-case factual inquiry.[307] Unfortunately, the impact of the decisions is likely to be only procedural. Summary judgment will be more difficult for plaintiffs to obtain and litigation costs will increase in a system already heavily criticized for its inefficiency and high transactions costs. In the final analysis, the courts' rulings are likely to have only a negligible impact on determinations of liability.

In *Bell*, on the other hand, the defendant actually managed to escape joint and several liability, making it unique among CERCLA defendants. *Bell* hardly gives CERCLA defendants cause for celebration, however. *Bell* involved a very unusual set of facts: a single contaminant discharged by only three

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[305] *See* Hatco Corp. v. W.R. Grace & Co., 836 F. Supp. 1049, 1088 (D.N.J. 1993) (following *Alcan I* in holding that commingled waste "is not synonymous with indivisible harm").

[306] *See, e.g.*, AM Int'l, Inc. v. Datacard Corp., 146 B.R. 391, 406 (N.D. Ill. 1992) (denying motion for summary judgment because of factual issues regarding divisibility); Catellus Dev. Corp. v. L.D. McFarland Co., 23 Envtl. L. Rep. (Envtl. L. Inst.) 21,487, 21,491 (D. Or. 1993) (same); *Hatco*, 836 F. Supp. at 1087 (finding commingled substances are not coterminous with indivisible harm).

[307] *See supra* note 145 and accompanying text (noting that courts repeatedly emphasize that joint and several liability is not automatically imposed).

defendants at a single site and at mutually exclusive times.[308] Moreover, records existed to illuminate at least in broad terms the extent of each defendant's activities.[309] Few CERCLA cases present such a tidy set of facts relating to divisibility of harm. As a result, *Bell* cannot be viewed as a portent of a shift in judicial attitudes toward CERCLA's joint and several liability rules.

Bell did make a small but important contribution to CERCLA liability jurisprudence when it rejected the government's proposed certainty standard in favor of the traditional *Restatement* reasonableness standard. If the court had applied the reasonableness standard in *United States v. Ottati & Goss, Inc.*,[310] for example, the defendants might have been able to meet their burden of proof. The defendants in that case were able to show how many drums of hazardous waste each had brought to the site.[311] Nonetheless, the court imposed joint and several liability upon the defendants because "the exact amount or quantity of deleterious chemicals or other noxious matter [could not] be pinpointed as to each defendant [and t]he resulting proportionate harm to surface and groundwater [could not] be proportioned with any degree of accuracy as to any individual defendant."[312] Under the *Bell* court's formulation, exactitude is not required. Divisibility might well be demonstrated by proving the number of barrels each defendant had contributed to a site.

Again, however, the unique factual context in which *Bell* arose makes the holding initially seem much more significant than it truly is. It is doubtful that *Bell* will assist defendants in the much more common commingled substances case, where various chemicals have mixed with synergistic effects and where a large portion of the substances cannot be traced to any particular contributor. Even in a single-contaminant case, *Bell*'s standard of reasonableness will do little for defendants who are unable to gather sufficient evidence of volumetric contributions

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[308] *Bell*, 3 F.3d 889, 903 (5th Cir. 1993).
[309] *Id.* at 904.
[310] 630 F. Supp. 1361 (D.N.H. 1985).
[311] *Id.* at 1396.
[312] *Id.*

to a site.

Since CERCLA's enactment, the courts, in accordance with congressional directive, have struggled to fit CERCLA's liability scheme within the parameters of common law tort doctrine. Unfortunately for the reasoned development of CERCLA case law, the task is akin to pushing a round peg through a square hole. Traditional tort law principles falter in the CERCLA context because CERCLA is so unlike a typical tort law cause of action.

In the traditional tort context, joint and several liability favors the innocent plaintiff over the culpable defendants by placing the burden of the entire injury upon each of the defendants in those situations in which proof is lacking as to the extent of the harm each defendant caused.[313] In effect, joint and several liability is seen as a mechanism for promoting fairness between an innocent, injured plaintiff, and two or more culpable defendants who contributed to the plaintiff's injury. Even in the context of strict liability, which may well encompass behavior by the defendant that it is not culpable in the sense that the acts are neither negligent nor intentional,[314] courts have indicated that, in certain types of activities,[315] fairness dictates that when both parties are innocent, the party who created the risk of harm or benefitted from the activity that caused the harm should bear the burden of loss.[316] Thus, even where culpability is not at issue, the imposition of joint and several liability is largely a question of

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[313] The classic statement of this rule is found in Summers v. Tice, 199 P.2d 1, 3 (Cal. 1948) (explaining that joint and several liability is imposed to avoid "the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all") (quoting 1 JOHN H. WIGMORE, SELECT CASES ON THE LAW OF TORTS § 153 (1912)).

[314] Strict liability is "liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence." PROSSER & KEETON, *supra* note 18, § 75, at 534.

[315] Traditionally, common law imposed strict liability on certain actions, such as hazardous activities or the manufacture and sale of products. *See generally* Oswald, *supra* note 46, at 591-92. The courts have determined that CERCLA's statutory language also calls for strict liability. *See supra* note 46 and accompanying text (citing cases interpreting CERCLA as imposing strict liability).

[316] *See* Oswald, *supra* note 46, at 593 & n.52.

fairness between the plaintiff and defendant.

In the traditional tort law context, imposition of joint and several liability may well produce an unfair result as between two or more defendants, but that unfairness is addressed through the right of contribution. Underlying the entire body of joint and several liability jurisprudence is the recognition that any inequity resulting from holding a single defendant liable for the entire harm to a plaintiff may be corrected in contribution proceedings, where equitable factors can be taken into consideration.[317] This procedure enables less blameworthy defendants to hold more blameworthy defendants liable for part of the damages, while simultaneously ensuring that the innocent plaintiff does not go uncompensated because of an impossibly high burden of proof. As such, contribution procedures promote fairness to both the plaintiff and the joint defendants.

The legal and factual complexity of CERCLA actions diminishes the weight of the fairness considerations that dominate in traditional doctrine. In both *Alcan I* and *Alcan II*, for example, the courts reiterated that the burden of proof regarding divisibility would remain upon the defendant.[318] Although common law would also place the burden of proving divisibility upon the defendant,[319] even-handed application of the burden of proof rule does not result in even-handed outcomes. The complexity of proving divisibility in the CERCLA context, particularly when a multi-polluter site is involved, is much greater than in most tort contexts. Typically, the wastes in commingled substance cases are difficult to identify in terms of both origin and toxicity, their migratory potential is unknown, and the harm inflicted by each substance is difficult, if not impossible, to calculate.[320] The practical problems of proving divisibility in such factually complicated

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[317] *See supra* note 190 and accompanying text (setting forth *Restatement* rule of contribution).

[318] *Alcan I*, 964 F.2d 252, 270 (3d Cir. 1992); *Alcan II*, 990 F.2d 711, 722 (2d Cir. 1993).

[319] *See supra* note 37 and accompanying text (explaining *Restatement* allocation of burden of proving divisibility).

[320] O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

scenarios are likely to prove intractable.

Moreover, CERCLA imposes retroactive liability, in direct contravention of traditional tort law principles.[321] Most cleanup actions involve activities that were perfectly legal when the defendants undertook them years or even decades earlier.[322] At the time the defendants engaged in the behavior that ultimately led to their liability under CERCLA, they had no reason to suspect that their actions would subject them to liability for cleanup costs in the future or to anticipate that their lack of record-keeping would ensure that the liability would be joint and several.

Most importantly, however, CERCLA departs from traditional tort law because it does not require proof of causation and because it bars contribution actions against settling parties. In order to fairly impose joint and several liability upon a defendant, the court must find a nexus between the defendant's activity and the plaintiff's injury. Traditional tort law provides the nexus by requiring the plaintiff to show that the defendant was a cause of the plaintiff's injury. That requirement is not relaxed even where strict liability is imposed.[323] However, CERCLA, with its "no causation" rule,[324] abolished that nexus requirement. The net result is that a defendant may be held jointly and severally liable for the entire cost of cleaning up a site even if the plaintiff fails to demonstrate that the defendant's wastes caused any part of the harm.

The *Alcan* courts recognized the potential unfairness inherent in linking CERCLA's joint and several liability standard with its no causation rule. Rather than addressing the issue directly, the courts skirted around the problem. Under the *Alcan* decisions, the plaintiff is still relieved of the burden of demonstrating that the defendant is responsible for the

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[321] *See supra* note 47 and accompanying text (citing cases interpreting CERCLA as imposing retroactive liability).

[322] *See, e.g.*, KATHERINE N. PROBST & PAUL R. PORTNEY, RESOURCES FOR THE FUTURE: ASSIGNING LIABILITY FOR SUPERFUND CLEANUPS: AN ANALYSIS OF POLICY OPTIONS 28 (1992) (finding that only 10% of NPL sites studied involved illegal operations at time activities were carried out).

[323] *See* PROSSER & KEETON, *supra* note 18, § 41, at 263-64 (plaintiff must prove that defendant's actions were proximate cause of plaintiff's injury).

[324] *See supra* notes 60-65 and accompanying text.

harm, in direct contravention of traditional tort doctrine.[325] On the other hand, the decisions provide defendants the opportunity to escape *all* liability for cleanup costs if they can prove their wastes, even when mixed with other substances, did not contribute to a release and subsequent cleanup costs.[326]

Causation may now be examined, not as a required element of the plaintiff's cause of action, but as a defense to liability. Thus, the *Alcan* decisions indirectly infuse a causation requirement into CERCLA liability analysis, albeit for a limited purpose and in a roundabout manner. Although the holdings represent a small but critical step forward in the development of reasoned CERCLA liability principles, the Second and Third Circuits ignored the far more difficult (and far more important) question of whether it is appropriate and legal to impose liability upon a defendant in the absence of a showing of causation — a question that merits further attention and consideration.

Not only does CERCLA create potentially unfair results between plaintiffs and defendants, it also creates potential unfairness among defendants themselves. CERCLA short-circuits the equitable contribution process by protecting settling PRPs from contribution actions by their fellow defendants. By doing so, CERCLA gives the government excessive power to force settlements.[327] This creates unacceptable risks of excessive liability for defendants who honestly dispute their responsibility for cleanup costs. Thus, the liability scheme may actually favor more culpable defendants over less culpable ones, and impose inequitable liability burdens.

It is not the courts' fault that *Alcan I*, *Alcan II*, and *Bell* do not go far enough in ensuring fairness to defendants under CERCLA. These courts went as far as they could while still remaining within the parameters of traditional common law doctrine. The problem is that there is a fundamental incompatibility between CERCLA's liability scheme and

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[325] CERCLA's lack of a causation rule is directly contrary to traditional legal doctrine, and carries disturbing signals regarding fairness to defendants.

[326] *See Alcan II*, 990 F.2d 711, 722 (2d Cir. 1993) and *Alcan I*, 964 F.2d 252, 270 (3d Cir. 1992).

[327] *See supra* note 11 and accompanying text.

traditional common law liability rules that underlie the imposition of joint and several liability. CERCLA's elimination of typical causation requirements, preemption of traditional contribution rights, imposition of retroactive liability, and limitations on defenses, when combined with the factual complexity that surrounds most CERCLA cleanup sites, render the statute lethal to defendants.

The courts are virtually powerless to alleviate most of the problems associated with CERCLA, short of rewriting traditional doctrine to fit the unique contours of the Act. That is essentially what the *A & F Materials* court, and other courts adopting the moderate approach, did. Instead of applying traditional *Restatement* rules regarding joint and several liability, they incorporated equitable factors normally considered in the contribution context. Although they achieved their goal of softening the harsh effects of CERCLA, they did so at an unacceptable cost. Once the courts determine that CERCLA requires deviations from traditional legal doctrines, the door is opened for the creation of other special liability rules that may work to expand CERCLA's reach in indefensible and unacceptable ways.

The better, and safer, approach is for Congress to amend the statute to recognize the difficult issues posed by cleaning up hazardous waste disposed of long before such behavior was regulated. The implications of statutory provisions regarding retroactivity and lack of causation need to be examined explicitly, as do the extremely limited defenses available under the statute and the unique problems posed by commingled substances cases. Although the "polluter pays" principle seems intrinsically fair, closer scrutiny quickly reveals that it is not easy to identify who the polluters are and what their fair share of the cleanup costs should be.

CONCLUSION

The fervor and enthusiasm with which the modest advances of *Alcan I*, *Alcan II*, and *Bell* were greeted is telling evidence of CERCLA's virtually unlimited sphere of liability. While the decisions in these three cases made important but small strides toward creating a rational, fair scheme for cleaning up hazardous

waste contamination, the courts are incapable of achieving this task on their own. Congress needs to clean up its own mess by redrafting the statute to eliminate the intolerable burdens that its onerous provisions have put on defendants.