Right to Contribution for Response Costs under CERCLA

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NOTES

The Right to Contribution for Response Costs Under CERCLA

In 1980, Congress addressed the increasing health and environmental problems associated with hazardous waste dumpsites by passing the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). CERCLA was designed to help meet these problems by authorizing the government, through the Environmental Protection Agency (EPA), to clean up dumpsites under certain conditions. Such cleanups would be financed by monies in a “Superfund.”

CERCLA authorizes the government to recover the cleanup or response costs from any “responsible” party. Furthermore, the Act authorizes both the EPA and the Coast Guard to issue administrative orders and to seek injunctive relief for the purpose of

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1 For a list of the major health and environmental problems associated with hazardous waste dumpsites, see 126 Cong. Rec. 26,337 (1980) (statement by Rep. Florio); id. at 26,339 (statement by Rep. Staggers); id. at 30,937 (statement by Sen. Moynihan on the Love Canal incident). Other members of Congress also spoke on the problems facing their home states and districts. See generally id. at 26,336-61 (initial debate by House on H.R. 85 and H.R. 7020); id. at 30,897-987 (Senate debate on CERCLA); id. at 31,950-82 (House debate on CERCLA).


4 See generally notes 35-52 infra and accompanying text for a discussion of when CERCLA applies to a waste dumpsite. See also CERCLA § 104, 42 U.S.C. § 9604 (1982).


6 See note 44 infra for a discussion of which response costs can be recovered under CERCLA.

7 See notes 48-50 infra and accompanying text for a list of the parties liable under CERCLA.

either preventing a hazardous chemical release or having a private party clean up a release.

Before cleaning up a dumpsite, the EPA generally seeks a settlement with the parties that are potentially liable under CERCLA.\(^9\) If a settlement can be reached, funds for a cleanup are available without draining the Superfund or litigating liability.

CERCLA was a hurriedly passed compromise bill.\(^10\) Its drafting left open many questions about the extent of liability of the various toxic waste generators, transporters, and dumpsite owners involved with a given waste disposal site. The courts have answered some questions, such as whether CERCLA imposes joint and several liability upon suitable parties\(^11\) and whether CERCLA requires courts to develop a federal common law,\(^12\) but have not answered others.

Questions remain in the area of contribution. The Act’s legislative history\(^13\) and the federal government’s implementation of CERCLA\(^14\) indicate that a right to contribution arises for response costs whenever joint and several liability exists under CERCLA. But when can a party sue for contribution? How should damages be apportioned? And how will a settlement with the EPA affect a future contribution suit? The EPA has stated that the answers to these questions will affect CERCLA’s proper implementation.\(^15\)

This note will examine these questions in light of recent court decisions and federal policy, and will suggest an overall framework for dealing with these and other problems regarding contribution.

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10 See notes 19-34 infra and accompanying text for a discussion of the legislative history of CERCLA.

11 See notes 70-85 infra and accompanying text.

12 See note 58 infra. See also notes 86-132 infra for a discussion of federal common law and contribution.

13 See notes 19-34 infra and accompanying text.


15 For example, the EPA believes that to meet CERCLA’s objectives it needs to be able to reach settlements with various parties. In order to reach settlements, the EPA wants to ensure that a settling party will not be sued later for contribution. A later suit, in the EPA’s opinion, could prevent some settlements and thus delay CERCLA’s implementation. EPA Chem-Dyne Brief, supra note 14, at 14.
I. History and Structure of CERCLA

CERCLA was designed to regulate the cleanup of hazardous waste dumpsites. Congress previously tried to regulate this problem through the Resource Conservation Recovery Act of 1976 (RCRA). The reporting and monitoring sections of RCRA, however, provided an inadequate solution, especially with respect to inactive dumpsites. CERCLA was designed to pick up where RCRA left off, by allowing the government to clean up abandoned dumpsites, and by imposing liability on certain parties for such cleanups.

A. Legislative History

The 96th Congress passed CERCLA in the final days of its 1980 "lame duck" session. Initially, three bills had been proposed to deal with the problem of the increasing number of dangerous toxic waste dumpsites. These bills were considered by

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18 See Bulk Distribution Centers, 589 F. Supp. at 1441.

19 The legislative history of CERCLA can be found in the congressional debate on the statute, and in the committee reports dealing with the earlier drafts of the final Act. See 126 Cong. Rec. 26,336-61 (initial debate by House); id. at 30,897-987 (Senate debate on CERCLA); id. at 31,950-82 (House debate on CERCLA); H.R. Rep. No. 1016 (Parts I & II), 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6119 and S. Rep. No. 848, 96th Cong., 2d Sess. (1980).


21 The two bills introduced in the House were H.R. 85, 96th Cong., 1st Sess. (1979) and H.R. 7020, 96th Cong., 2d Sess. (1980). H.R. 85 was entitled "Oil Pollution Liability and Compensation Act" and was introduced in January 1979. H.R. 85 would have established a comprehensive system of liability and compensation for oil spill removal costs and damage. H.R. 7020 was entitled the "Hazardous Waste Containment Act" and was introduced in April 1980. That bill was designed to regulate inactive hazardous waste dumpsites by using reporting, monitoring and cleanups of such sites. The bill introduced in the Senate was S. 1480, 96th Cong., 1st Sess. (1979). The bill was introduced in July 1979 and was entitled the "Environmental Emergency Response Act." It too dealt with the hazardous waste problem, but was the most far-reaching of any of the proposals. For a greater description of these bills, see Grad, supra note 20, at 3.
various committees, but were not enacted. Instead, Senate leaders drafted a compromise bill which later became CERCLA.

Although CERCLA incorporated parts of the earlier bills, it changed certain sections of those proposals. For example, it eliminated an explicit requirement of strict liability. Sections that would make such strict liability joint and several, and formulas for apportionment of contribution were also deleted.

Statements of Senator Randolph, one of the key sponsors of the compromise bill, however, described the content and meaning of the bill. His statements addressed the standard of liability and the type of law that would be used to fill in the "interstitial gaps".

22 See generally Grad, supra note 20.
23 The House had passed two of the bills before the Senate compromise was introduced. See note 25 infra.
25 The House had passed H.R. 7020 on Sept. 23, 1980, 126 Cong. Rec. 26,798 (1980), after earlier passing H.R. 85, 126 Cong. Rec. 26,369 (1980). Both of those bills were before the Senate when the compromise bill was introduced on Nov. 24, 1980.
26 See generally 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph). Senator Randolph was one of the chief sponsors of the compromise bill and was the floor manager during the Senate debate. The Senate bill also eliminated the Gore Amendment on apportioning liability. See note 27 infra. Additionally, it did not contain any extensive provisions dealing with oil spills.
27 One of the House bills, H.R. 7020, included an amendment that was proposed by Representative Gore outlining a formula that could be used for apportioning damages. See 126 Cong. Rec. 26,781 (1980). Although the Senate version deleted the formula, the district court in United States v. A & F Materials, 478 F. Supp. 1249 (S.D. Ill. 1984), cited the Gore Amendment with approval when it outlined its approach to joint and several liability. Id. at 1256. See also note 76 infra for the relevant portion of the Gore Amendment cited by the A & F Materials court.

In the summer of 1984, the House passed a bill to amend CERCLA. See H.R. 5640, 98th Cong., 2d Sess. (1984). In that bill, the House attempted to clarify the fact that CERCLA liability is "strict, joint and several as construed and applied under section 311 of the [Clean Water Act] and subsection (a) of section 107 [of CERCLA]." Id. § 116.

The bill also outlined what factors a court could use in apportioning damages among parties liable under the act. The factors a court could consider, among others, were:

(A) the amount of the hazardous substance or pollutant or contaminant involved;
(B) the degree of toxicity of the hazardous substance or pollutant or contaminant involved;
(C) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous substance or pollutant or contaminant, taking into account the characteristics of such hazardous substance or pollutant or contaminant; and
(D) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

28 For federal statutes, the federal courts have the responsibility of filling in the "interstitial gaps" left by the inevitable incompleteness of all statutes. United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983).
left by the legislation. The Supreme Court has held that such statements are important in interpreting a statute, especially when, as here, there is no formal report on the Act as passed. The leaders in the House made statements similar to those made in the Senate.

The Senate passed the compromise bill in essentially the same form as it was presented; the House of Representatives passed the Senate bill without amendment; and President Carter signed the bill into law on December 11, 1980.

B. Structure

CERCLA establishes a means of controlling and financing both governmental and private responses to hazardous releases from waste disposal sites. The most significant way in which this is ac-

29 On the issue of liability, Senator Randolph stated that:

[I]ssues 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.

126 CONG. REC. 30,932 (1980). Since under CERCLA § 113(b), 42 U.S.C. § 9613(b) (1982), federal district courts have exclusive original jurisdiction to hear CERCLA cases, it appears that the Act calls for the development of a federal common law, at least in the area of CERCLA liability. See also note 58 infra.

In discussing the relation between the bill and other laws, Senator Randolph also stated:

The fund, in recouping such costs, or any private damage actions, must rely on other law—common law or Federal or State statutory law—in lieu of the liability provisions of section 107 [of the bill]. The determination of exactly what liability standards, defenses, or other rules apply will be made on a case-by-case basis pursuant to regimes other than that of this bill.

126 CONG. REC. 30,932 (1980). The Senator thus indicated that it was for the federal courts to fill in any “interstitial gaps” that had been left in the legislation on a case-by-case basis.

30 The Supreme Court has indicated that such remarks are important to the interpretation of a statute, where as here, they form the relevant legislative history. See Federal Energy Admin. v. Algonguin SNG, Inc., 426 U.S. 548, 564 (1976) (“As a statement by one of the legislation’s sponsors, [the] explanation deserves to be accorded substantial weight in interpreting the statute.”).

31 See Grad, supra note 20, at 29.

32 Senator Helms proposed the most substantial amendment to the bill which limited the Hazardous Waste Trust Fund (“Superfund”) to $1.6 billion, a decrease from the $4.1 billion funding proposal in the original compromise bill. 126 CONG. REC. 30,936 (1980). See also Grad, supra note 20, at 20, 25.

33 126 CONG. REC. 31,981 (1980). The House had suspended its rules about allowing amendments to bills in order to ensure CERCLA’s passage before the session ended. Id. at 31,950, 31,982. See also Grad, supra note 20, at 29.


accomplished is through the "Superfund" the Act established. 36 This fund is financed by an excise tax imposed on chemical and petroleum product generators and operators of hazardous waste sites. 37 Some money also comes from general appropriations. 38 The money in the fund was intended to help finance private or governmental cleanups of hazardous waste releases. 39

Before either the government or a private party can make a claim against the Superfund, a "release" 40 of a "reportable quantity" 41 of a "hazardous substance" 42 must occur. When such a release occurs, either the government can clean up the site using the Superfund to finance it, 43 or a private party can perform the cleanup. 44 If a private party cleans up the release, then he may make a claim for partial payment of his response costs against other persons responsible under CERCLA. 45 If such a private claimant cannot get reimbursement from these persons, then he may apply


40 See CERCLA § 101(22), 42 U.S.C. § 9601(22) (1982). The term "release" is defined, in part, to mean "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." Id. The definition also lists a number of exclusions to the general definition. Id.

41 Although the term "reportable quantity" is not defined in CERCLA, the concept is necessary for CERCLA's implementation. Bulk Distribution Centers, 589 F. Supp. at 1442. The EPA regulations relating to CERCLA, 40 C.F.R. Part 300 (1984), refer to the Clean Water Act for any definitions not in CERCLA or in the regulations. 40 C.F.R. § 300.6 (1984).


43 See CERCLA § 104, 42 U.S.C. § 9604 (1982). If the Superfund finances a cleanup, the government can sue the parties that are responsible under CERCLA to replenish the fund. See CERCLA § 107, 42 U.S.C. § 9607 (1982). For a list of the parties responsible under CERCLA, see notes 48-50 infra and accompanying text.

For the government to clean up a dumpsite, the site must be on the National Priority List. See 40 C.F.R. § 300.68 (1984). That list is to be made in accordance with the National Contingency Plan outlined by the Act. See CERCLA §§ 101(31), 105, 42 U.S.C. §§ 9601(31), 9605 (1982).

44 The response costs that a party can recover are listed in CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1982). The EPA has also listed the costs it believes are recoverable. See EPA Memorandum, supra note 9, at 41:2868 (Appendix A). Before costs can be recovered, a "notice letter" must be sent to the potentially liable party. See CERCLA § 112(a), 42 U.S.C. § 9612(a) (1982). Such letters, however, do not determine liability. D'Imperio v. United States, 575 F. Supp. 248, 252 (D.N.J. 1983).

for payment of his expenses from the Superfund. If a payment is made, the Superfund then stands in the shoes of the private claimant and may sue the other responsible persons.

Parties potentially liable under CERCLA include present and former owners of hazardous waste disposal sites from which there are releases or threatened releases, those persons that arranged for the disposal or treatment of hazardous substances at the facility, and any person who selected such a facility and transported the hazardous waste to it. Congress broadly defined liability to spread the costs incurred in a cleanup among many parties.

Although CERCLA provides that private parties can recover response costs, most of the Act's language addresses government-sponsored cleanup efforts. This, coupled with the fact that Congress rushed through the final passage of CERCLA, means that those parts of the Act dealing with the rights of private parties who make claims against one another are ill-defined.

II. Liability for Response Costs Under CERCLA

The federal courts have been interpreting CERCLA to clarify the rights and duties of the various parties involved. Before a
court can reach the question of whether CERCLA allows contribution, however, it first must decide if CERCLA imposes joint and several liability. Contribution can be awarded only if joint and several liability exists.\(^5\) Congress, as noted earlier, left this question to the courts to decide.\(^5\) Courts generally examine whether CERCLA imposes strict liability before focusing on the question of joint and several liability.\(^5\) This note will examine both of these issues before exploring the contribution issues.

## A. Strict Liability\(^5\)

The term “liability” in CERCLA is defined\(^5\) by reference to section 311 of the Federal Water Pollution Control Act (“Clean

sponsorable for the danger. The liability provision is an integral part of the statute’s method of achieving this goal for it gives a private party the right to recover its response costs from responsible third parties . . . .

\(\text{id. at 1142-43.}\)

\(55\) Joint and several liability can be imposed where two or more persons cause a single and indivisible harm. \text{\textit{Restatement (Second) of Torts} \textsection{875} (1977).} On the liability of joint tortfeasors generally, see \text{\textit{W. Prosser \& W. Keeton, The Law of Torts} \textsections{46-52} (5th ed. 1984)} [hereinafter cited as \textit{Prosser}].

\(56\) See note 29 \textit{supra} for Senator Randolph’s statement on this point.


\(58\) The first step in determining whether to impose strict liability is to decide whether federal or state law applies when filling the gaps left by the CERCLA legislation. Arguably, state law should apply because the dumpsites are all within a state and traditionally state law applies to property law. Federal law, however, is more appropriate in CERCLA cases. \textit{See} comments of Senator Randolph, \textit{supra} note 29. \textit{See also United States v. Stringfellow, 14 \textit{Envtl. L. Rep. (Envtl. L. Inst.)} 20,385, 20,386 (C.D. Cal. Apr. 5. 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809 (S.D. Ohio 1983). Because Congress intended to solve what it saw as a “national” problem, the federal courts should follow that intent and give the problem a “national” solution. For that reason, the courts should try to fill the interstitial gaps in the CERCLA legislation with a uniform federal common law.

A uniform federal common law will also prevent excessive dumping in states that follow a less rigorous policy regarding the imposition of joint and several liability. This is especially true in light of the Supreme Court’s decision in \textit{City of Philadelphia v. New Jersey}, 437 U.S. 617 (1978), where the Court held that under the commerce clause New Jersey could not prevent the hauling of garbage from Philadelphia into the state. The Court stated that “whatever New Jersey’s ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.” \textit{id. at 626-27} (emphasis added).

The Court’s reasoning in \textit{Philadelphia} could easily be applied to hazardous waste dumpsites instead of only to landfill sites. States generally dispose of the chemical wastes generated by companies within their state at a location in the state. Thus, under \textit{Philadelphia}, the state could not prevent chemical waste dumping within the state solely because of its origin. In that case, a state might have to bring its joint and several liability laws into line with other states’ laws to prevent excessive dumping due to its weaker laws. \textit{See also 126 Cong. Rec. 31,965 (1980)} (comments by Rep. Florio) (“[CERCLA is] to discourage business[es] . . . from locating primarily in States with more lenient laws” by the further development of a federal common law); \textit{Philadelphia}, 437 U.S. at 629 (Rehnquist, J., dissenting).

\(59\) \textit{CERCLA} \textsection{101(32)}, 42 U.S.C. \textsection{9601(32)} (1982).
Prior to the enactment of CERCLA, a number of courts had interpreted section 311 as imposing strict liability and, in appropriate cases, joint and several liability. This, coupled with supportive statements made during the floor debate on CERCLA and the fact that there are only a limited number of defenses to a CERCLA action, makes it appear that Congress meant for the courts to impose strict liability under certain circumstances.

In a number of district court decisions to date, the EPA has convinced the court that the correct liability standard under CERCLA § 107 is strict liability. These courts have based their decisions on the Act's legislative history, CERCLA's reference to and interrelationship with the Clean Water Act, and the character of the environmental problems that CERCLA was meant to address.

Thus, it now appears to be widely accepted by courts and commentators that CERCLA imposes strict liability. The next question to be examined is whether such liability is joint and several.

B. Joint and Several Liability

Generally, courts impose joint and several liability when two or more persons independently cause a distinct or single harm. In

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60 33 U.S.C. § 1321 (1982). For more information on the Clean Water Act, see 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03 (1981); ARBUCKLE, supra note 3, at 81.


62 See, e.g., Senator Randolph's statement: "[w]e have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act . . . ." 126 CONG. REC. 30,932 (1980). Representative Florio also stated that "[t]he standard of liability in these amendments is intended to be the same as that provided in section 311 of the Clean Water Act; that is, strict liability." Id. at 31,965.

63 For a list of the only defenses to the statute, see CERCLA § 107(b), 42 U.S.C. § 9607(b) (1982). The only defenses listed are acts of God, acts of war, and certain third party defenses. Id.


66 See, e.g., Northeastern Pharmaceutical, 579 F. Supp. at 843; South Carolina, 14 ENVTL. L. REP. (ENVTL. L. INST.) at 20,274.

67 See, e.g., Northeastern Pharmaceutical, 579 F. Supp. at 844.


70 See RESTATEMENT (SECOND) OF TORTS § 433A (1977); PROSSER, supra note 55.
interpreting CERCLA, courts have noted that although the term "joint and several liability" was deleted from the final Act, that fact does not end the inquiry. The entire legislative history, examined in context, shows that those terms were deleted to avoid a mandatory liability standard which, if applied to all cases, could cause inequitable results. The courts which have held that joint and several liability may apply have noted that the burden of showing divisible harm will be on the party seeking apportionment. Some courts have examined a variety of factors in determining whether to impose joint and several liability.

71 For the changes made to the original bills, see notes 24-27 supra and accompanying text.
73 See notes 19-34 supra and accompanying text for the legislative history of CERCLA.
74 For example, if the harm could be traced to a single chemical, or even a single barrel, then holding all parties jointly and severally liable would not be fair. If the term had been kept in the statute, such results may have occurred. In H.R. 5640, supra note 27, the House proposed to amend CERCLA to include the term "joint and several strict liability" but it also would have allowed a court to apportion damages equitably between parties. Id. § 116.
75 The RESTATEMENT (SECOND) OF TORTS gives the following illustration of a situation where the burden of proof is on the tortfeasors to show how damages should be apportioned:

Through the negligence of defendants A, B, and C, water escapes from irrigation ditches on their land, and floods a part of D's farm. In D's action against A, B, and C, or any of them, each defendant has the burden of proving the extent to which his negligence contributed to the damage caused by the flood, and if he does not do so is subject to liability for the entire damage to the farm.

RESTATEMENT (SECOND) OF TORTS § 443B(2) comment d, illustration 7 (1977). This example is similar to the situation that exists when hazardous materials are released at a toxic waste site. As with the water from the ditches in the above example, the chemicals from the dumpsite also spread out and cause harm to neighboring areas. Unlike the illustration, however, the standard of liability for a hazardous release need not be negligence; as noted above, CERCLA imposes a strict liability standard rather than a negligence standard for a recovery to be allowed.
76 The district court in United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984) suggested that a more moderate approach should be taken with respect to joint and several liability. The court approved the language in the Gore Amendment, stating:

Under the Gore Amendment, a court had the power to impose joint and several liability whenever a defendant could not prove his contribution to an injury, however, a court could still apportion damages in this situation according to the following criteria:

(i) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;
(ii) the amount of hazardous waste involved;
(iii) the degree of toxicity of the hazardous waste involved;
(iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
(v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
(vi) the degree of cooperation with Federal, State, or local officials to prevent any harm to the public health or the environment.
The EPA maintains that CERCLA may impose joint and several liability in certain cases. All eight courts that have heard the EPA's arguments have found that if the harm is indivisible, then the defendants could also be jointly and severally liable for the cleanup costs.

In addressing this question, some courts have found that there are no indispensable parties under Rule 19 of the Federal Rules of Civil Procedure. In the cases where a defendant-generator has sought dismissal on the grounds that the government failed to join an indispensable party to the CERCLA action, the district courts have denied the motion. The courts have ruled that joinder was permissive, and not indispensable, when the liability involved is joint and several. Because all parties will not necessarily be joined in a government filed CERCLA action, seeking contribution in a separate suit may be the best way for a defendant to ensure that it does not pay more than its fair share for a cleanup.

Thus, the statutory history and purpose of CERCLA indicate that courts should impose strict liability and, in the appropriate circumstances, courts should impose joint and several liability. All cases decided to date have done so. This result seems consistent with the reasons for enacting CERCLA and the problems it was meant to solve.

Once a court has determined that the defendants are jointly

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Id. at 1256 (emphasis in original). The court in United States v. Stringfellow, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,385 (C.D. Cal. Apr. 5, 1984) agreed that such flexible approach should be taken. Id. at 20,387. See also note 27 supra for a discussion of the Gore Amendment and the list of criteria in the 1984 House bill to amend CERCLA.

77 See EPA Memorandum, supra note 9, at 41:2865.


81 See A & F Materials, 578 F. Supp. at 1260 (parties are not indispensable if they are joint tortfeasors because plaintiff can choose who to sue); Conservation Chemical, 14 ENVTL. L. REP. (ENVTL. L. INST.) at 20,209. The A & F Materials court, however, suggested that although a Rule 19 motion was not in order, a defendant could implead other parties under Rule 14.


83 See note 78 supra.

84 See generally note 1 supra and the sources cited therein for a list of the problems of hazardous waste, and how CERCLA was meant to meet them.
and severally liable, the question of contribution becomes relevant. Because such defendants will be liable for all the response costs for cleaning up a dumpsite, they will be concerned about recouping any overpayment of their equitable share. Thus, they will seek contribution from other responsible parties under CERCLA. The EPA has stated that it believes that some sort of contribution doctrine is not only fair, but necessary for the implementation of the statute.\textsuperscript{85}

### III. Contribution

Various aspects of the doctrine of contribution need to be examined. First, can a federal common law of contribution exist if the CERCLA statute is silent about such a right? Second, if this right exists, what type of contribution law should apply? Third, how should contribution costs be apportioned? Finally, when should a federal court hear a CERCLA contribution action? These questions will be addressed, in turn.

#### A. Federal Common Law of Contribution

The concept of contribution\textsuperscript{86} dates back to 1799, and the case of \textit{Merryweather v. Nixan}.\textsuperscript{87} From that early case grew the English rule that contribution was available to joint tortfeasors, as long as one of them had satisfied a judgment. A contribution action was barred, however, if the plaintiff in the action for contribution had committed an intentional tort.\textsuperscript{88}

Early American courts did not follow the holdings of their English counterparts that allowed contribution in some cases.\textsuperscript{89} Instead, with the exception of a few state courts,\textsuperscript{90} the courts held that no contribution was available for joint tortfeasors, regardless of any fault on their part.\textsuperscript{91} These rules have been changed in the last fifty years, by court decisions in a few states and by statute in others.\textsuperscript{92}

\textsuperscript{85} See \textit{EPA Chem-Dyne Brief}, supra note 14, at 2. (The availability of contribution “will directly affect the continued ability of the government to provide rapid Superfund responses . . . .”)

\textsuperscript{86} On the subject of contribution in general, see \textit{Prosser}, supra note 55, § 50.


\textsuperscript{88} For example, see the \textit{Merryweather} case itself. 101 Eng. Rep. 1337 (1799).

\textsuperscript{89} \textit{See}, e.g., Thweatt's Admin'r v. Jones, 22 Va. (1 Rand.) 328 (1825). \textit{See also} Reath, supra note 87, at 180.

\textsuperscript{90} \textit{See}, e.g., Ankeny v. Moffett, 37 Minn. 109, 33 N.W. 320 (1887).

\textsuperscript{91} \textit{See}, e.g., Union Stock Yards Co. v. Chicago Burlington & Quincy R.R., 196 U.S. 217 (1905).

\textsuperscript{92} Forty-four states and the District of Columbia recognize a right to contribution among joint tortfeasors, at least to some extent. In 10 jurisdictions court decisions initially changed the common law rule. \textit{See} George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219 (D.C. Cir. 1942); Skinner v. Reed-Prentice Div., 70 Ill. 2d 1, 374 N.E.2d 437 (1977); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Quatray v. Wicker, 178 La. 289, 151
The states, however, have not adopted a uniform approach to contribution. Thus, there is no uniform "American rule" upon which a federal court may draw if it finds a right to contribution exists under CERCLA.


93 For example, see PROSSER, supra note 55, at 338.

The American Law Institute took a position on contribution in the Restatement (Second) of Torts. The Restatement states in pertinent part:

Contribution Among Tortfeasors

(1) Except as stated in Subsections (2) [and] (3) . . . , 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.

(2) The right to 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 to contribution in favor of any tortfeasor who has intentionally caused the harm.

RESTATEMENT (SECOND) OF TORTS § 886A (1977). Although the Restatement takes a general position on contribution, it does not take a position on the effect of a release or a covenant not to sue. Id. § 886A caveat.

94 But see the EPA's reference to the Uniform Contribution Among Tortfeasors Act, notes 120-132 infra and accompanying text.
In two recent cases, the Supreme Court stated that a right to contribution under a federal statute could arise under certain circumstances. Although the Court did not find that a right to contribution existed under the particular statutes in those cases, it nevertheless approved the possibility that such a right could exist under other federal statutes.

In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Court held that no right of contribution existed under the federal antitrust statutes. The Court declared that neither the legislative history nor the intent of the statutes supported a federal common law right to contribution. The Court, however, also stated the circumstances under which a right to contribution could arise under a federal statute: "first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, second, through the power of the federal courts to fashion a federal com-

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The *Northwest Airlines* case involved an airline seeking contribution for its liability for discriminatory pay to women. The Supreme Court found that neither the language of the Equal Pay Act nor Title VII, nor the legislative history of either act created a private remedy of contribution. 451 U.S. at 94. In its opinion, the Court outlined the criteria for the creation of a right to contribution under a federal statute. *Id.* at 90. The Court, later in the same term, clarified these in *Texas Industries*. See notes 96-101 infra and accompanying text.


96 See *Texas Industries*, 451 U.S. at 638; *Northwest*, 451 U.S. at 90. See also note 101 infra and accompanying text.

97 See *Texas Industries*, 451 U.S. at 638; *Northwest*, 451 U.S. at 90. See also note 101 infra and accompanying text.


99 *Id.* at 639. The Court found that nothing in the legislative history of either § 1 of the Sherman Act, 15 U.S.C. § 1 (1982), or § 4 of the Clayton Act, 15 U.S.C. § 15 (1982), indicated that Congress had even considered the idea of a federal right to contribution. The Court also noted that when those acts were passed, 1890 and 1914 respectively, the concept of contribution was not yet recognized in the general American law of tort. 451 U.S. at 644 n.17.

In contrast, it should be noted that 44 states and the District of Columbia now allow some form of contribution. See note 92 supra. Furthermore, the legislative history of CERCLA indicates that a right to contribution should exist. See notes 19-34 supra and accompanying text for CERCLA's general legislative history; see notes 102-14 infra and accompanying text for a further discussion of the congressional intent with respect to contribution.

100 The Court looked at the nature of the antitrust laws, and found that the "very idea of treble damages reveals an intent to punish past, and deter future unlawful conduct . . . ." 451 U.S. at 639. It thus found that there was no reference to contribution because Congress was not concerned with "softening the blow" of the antitrust laws. *Id.*
mon law of contribution."

The EPA argues that CERCLA meets both of the independent tests of Texas Industries, and therefore a right to contribution exists under the Act. The EPA contends that the first test is satisfied because the legislative history could be found to expressly or impliedly grant such a right.

The EPA maintains that CERCLA expressly authorizes contribution for two reasons. First, CERCLA defines liability by referring to the Clean Water Act and a right to contribution has been found to exist under that Act. Second, the legislative history of CERCLA indicates that a right to contribution exists.

101 451 U.S. at 638 (citation omitted).
102 See generally EPA Chem-Dyne Brief, supra note 14.
103 Id. at 5. See also notes 105-08 infra and accompanying text. Compare H.R. 5640, supra note 27, § 116(f). The proposed amendments to CERCLA that were passed by the House in 1984 would have explicitly amended CERCLA § 107 to add a subsection allowing CERCLA contribution cases to be brought in federal court after adjudication of liability and recovery of costs and damages. Id.
104 EPA Chem-Dyne Brief, supra note 14, at 6. See also notes 109-14 infra and accompanying text.
105 Throughout its brief, the government refers to the fact that the court in United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983), had previously indicated that a right to contribution existed. See, e.g., EP4 Chem-Dyne Brief, supra note 14, at 3. See also Chem-Dyne, 572 F. Supp. at 807 n.3 ("42 U.S.C. § 9607(e)(2), which provides for contribution, was viewed as only having relevance in [the] joint and several liability context.") (emphasis added; citation omitted).
108 The legislative history of CERCLA § 107(e)(2) seems to indicate that a right to contribution exists. That section states:

Nothing in this title, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

CERCLA § 107(e)(2), 42 U.S.C. § 9607(e)(2) (1982). A similar provision was included in H.R. 7020, 96th Cong., 2d Sess. § 3071(e) (1980). In speaking about that section, Representative Gore stated that under the joint and several liability scheme of the statute, any defendant that paid all of the response costs to a plaintiff "would then have the right to go against the other 'non-apportioned' defendants for contribution . . . ." 126 CONG. REC. 26,785 (1980) (statement by Rep. Gore). The EPA argues that these facts indicate a congressional intent to allow contribution under CERCLA. See EPA Chem-Dyne Brief, supra note 14, at 5.

The Justice Department interpreted § 107(e)(2) as confirming a right of contribution. 126 CONG. REC. 31,966 (1980) (letter from Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs, Department of Justice to Rep. Florio) (§ 107(e)(2) "in our view confirms that a defendant held liable for response costs has the right to seek contribution from any other person responsible for a release or threat of release of a hazardous substance.").

One commentator has also stated that § 107(e)(2) guarantees contribution. See Note, Generator Liability Under Superfund for Clean-Up of Abandoned Hazardous Waste Dumpsites, 130 U.
CERCLA implies a right to contribution, the Agency asserts, because the legislative history implies that Congress intended to make the joint and several liability under the statute less harsh by allowing contribution. Furthermore, the EPA argues that Congress intended to widely spread the costs for cleaning up dump-sites. The EPA further argues that without a right to contribution, certain parties would avoid a settlement in a "Russian roulette" game with the Agency, waiting to see who would be sued. Because Congress did not want to delay the settlement process, such a result should not be read into the statute.

The EPA contends that CERCLA also meets the second test. It argues that Congress empowered the courts to develop such a remedy because such a remedy is needed "to protect uniquely federal interests." Under this argument, there are two federal

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109 See EPA Chem-Dyne Brief, supra note 14, at 6. The Supreme Court in Texas Industries stated that an implicit "congressional intent may be discerned by looking to the legislative history and other factors: e.g., the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief." 451 U.S. at 639 (citation omitted).

Compare Smith, A Right to Contribution In Superfund Cost-Recovery Actions, 8 CHEM. & RAD. WASTE LITIG. REP. 41, 52 (1984) ("no right to contribution may be implied from the statute").

110 In passing CERCLA, Congress removed the original requirement that any response costs would result in joint and several liability in order to make the results less harsh in those cases where apportionment was possible. See Chem-Dyne, 572 F. Supp. at 808. The EPA, citing that interpretation of the Chem-Dyne decision, states that without contribution, the liability scheme will be "harsher" than the schemes in the bills introduced before the compromise bill. Such a result would be harsh, since with joint and several liability, a few defendants could foot an entire cleanup bill, while some other responsible parties would pay nothing solely because the government did not sue them. Because CERCLA was meant to be less harsh than those bills, such a harsh result cannot be implied by the Act's passage. See EPA Chem-Dyne Brief, supra note 14, at 7.

111 In United States v. Price, 577 F. Supp. 1103 (D.N.J. 1983), the court found that "the legislative aims of CERCLA . . . [included] goals such as cost-spread[ing] and assurance that responsible parties bear their cost of the clean up." Id. at 1114 (citation omitted) (emphasis added).

112 EPA Chem-Dyne Brief, supra note 14, at 11.

113 Such a waiting game would delay the cleanup process because potential parties, especially smaller companies, would sit back and wait rather than get involved in a voluntary cleanup scheme.

114 The Chem-Dyne court, citing 1980 U.S. CODE CONG. & AD. NEWS 6119, 6119-20, stated: "CERCLA was enacted both to provide rapid responses to the nationwide threats posed by the 30-50,000 improperly managed hazardous waste sites in this country as well as to induce voluntary responses to those sites." 572 F. Supp. at 805 (emphasis added). These quick settlements are part of the aims of CERCLA. Furthermore, the EPA has written that when looking at whether Superfund monies should be spent, "response personnel should, to the extent practicable, . . . [conserve] Fund monies by encouraging private party clean-up." 40 C.F.R. § 300.61(C)(2) (1984).

115 See EPA Chem-Dyne Brief, supra note 14, at 11.

116 Id. at 12 (citing the language of Texas Industries, 451 U.S. at 640).
interests requiring protection. The first is finding a solution to the "enormous and complex problem of national magnitude" that releases from toxic waste dumpsites present. The second national interest is protecting the Superfund from depletion.

Therefore, a court will probably find that a federal common law right to contribution exists under CERCLA. Based on the legislative history and the problems that CERCLA was meant to address, this is a reasonable result. The problem then arises as to what law the courts should adopt as the federal common law. Because the states have a variety of contribution laws, this is an open question.

B. The Uniform Contribution Act

The EPA has argued that the courts should adopt the rules of the Uniform Contribution Among Tortfeasors Act (1955 version). The principles of section 4 of the Uniform Act have been adopted in eighteen states, including ten in the last decade.

117 Chem-Dyne, 572 F. Supp. at 808. The court distinguished the hazardous waste problem from other problems that were of more concern to the states, such as domestic relations and real property law. Id. Furthermore, the court noted that states have been unable to respond to this problem, so a "national" solution is in order. See generally sources cited in notes 1, 19 supra.

118 The Superfund receives money from three sources: (1) taxes on "hazardous" products; (2) money from general appropriations; and (3) monies from suits brought under CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1982). See notes 5, 36-47 supra and accompanying text. Since the third source of funding is necessary to keep the Superfund solvent after the fund is used for cleanups, the federal government has an interest in seeing that it is not depleted. Settlements, especially quick ones, further such an interest. See also notes 153-56 infra and accompanying text.

119 See notes 92-93 supra and accompanying text. It is possible that a federal court could use state contribution laws. See Smith, supra note 109, at 49. Federal common law, however, should be uniformly applied. See note 58 supra.

120 EPA Chem-Dyne Brief, supra note 14, at 14. See also Smith, supra note 109, at 50 (Uniform Act should be adopted as federal common law).

121 UNIF. CONTRIB. AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1975) (1955 version) [hereinafter cited as the "Uniform Act"].


123 See note 122 supra. The EPA argues that this shows that the act reflects a modern trend in the area of contribution law. EPA Chem-Dyne Brief, supra note 14, at 15.
The EPA has stressed the importance of section 4 of the Uniform Act to its implementation of CERCLA. Section 4 states that when a tortfeasor settles in good faith with the person to whom he is liable, that tortfeasor will be shielded from a contribution suit brought by a non-settling tortfeasor. In CERCLA cases, the United States generally would be the “person” to whom a tortfeasor, such as a toxic waste generator, would be liable. The EPA contends that this rule would allow it to vigorously seek and obtain settlements for cleaning up the dumpsites. To date, however, no court has ruled on the EPA’s proposal to adopt the Uniform Act.

While the EPA’s position does promote settlements, it has some drawbacks. By arguing that the courts should interpret CERCLA to include the Uniform Act, the EPA is asking for more than just the protection of settling parties mentioned in section 4. The concept of pro rata apportionment is also included. As well, section 1(d) of the Uniform Act states that a person who settles for less than the full liability is not allowed to recover contribution from anyone else.

124 Section 4 of the Uniform Act, supra note 121, states in pertinent part:
When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

125 EPA Chem-Dyne Brief, supra note 14, at 14 (“policies and objectives of CERCLA will most likely be achieved through the adoption of the [Uniform Act]”).
126 See note 124 supra.
127 EPA Chem-Dyne Brief, supra note 14, at 14. The EPA believes that the protection of the settling tortfeasor will induce settlements because a party will be able to save the costs of two trials, a CERCLA suit and a contribution suit, and will not have to pay more than the amount of his settlement. Id. This same rationale applies if a private person sues the responsible parties. See notes 44-47 supra and accompanying text for when a private party may sue under CERCLA. See also Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 236, 132 Cal. Rptr. 843, 846 (1976) (“[flew things . . . discourage settlement of disputed tort claims, [more] than the knowledge that such a settlement lacked finality and would lead to further litigation”).
128 As of this writing, the Chem-Dyne case has not been settled or fully litigated.
129 See §§1(b) and 2 of the Uniform Act, supra note 121. Section 1(b) states that the “right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability . . . .” Id. § 1(b). Section 2 states that the “relative degrees of fault [of the tortfeasors] shall not be considered” in determining the pro rata share. Id. § 2. For reasons not to follow such an approach, see notes 133-49 infra and accompanying text.
130 See § 1(d) of the Uniform Act, supra note 121. That section states:
A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful
This latter restriction means that while a settling party is shielded from suits, he cannot bring a suit to recover any settlement that is more than his equitable share. Such a rule may actually hurt the EPA's implementation of CERCLA by delaying or preventing some settlements. A party afraid of settling for an amount greater than his equitable share may bargain longer with the EPA to ensure he makes no overpayment. The resulting delays would frustrate the quick resolutions that the EPA seeks.

On the other hand, if settling parties were allowed to sue other non-settling parties after a court had determined the latter's liability, then such a delay could be avoided. A party could settle quickly, secure in the knowledge that if he overpaid, he could still recoup the overpayment in a contribution suit. The non-settling parties could not complain about such a procedure, since they would end up paying no more than their equitable share of the cleanup costs.\textsuperscript{131}

For these reasons, if a court accepts the EPA's argument that the principles of section 4 of the Uniform Act are part of the federal common law under CERCLA, it should also decide that the principles of section 1(d) are not part of the common law. A court should find that any law under CERCLA for contribution allows a settling party to sue non-settling parties to ensure that such a party does not pay more than his equitable share. Thus, a court should find that while some of the principles of the Uniform Act can be applied, the entire Act is not suited for adoption as the federal common law under CERCLA.\textsuperscript{132}

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\textsuperscript{131} For a further discussion of the factors involved in determining what is an equitable share, see notes 133-49 infra and accompanying text. A court could take the reasons for the settlement into account when deciding what is an equitable share.

Although the contribution laws of most states would prevent such a later suit, they should be allowed under CERCLA. The Act requires joint and several liability in appropriate cases. See notes 58-85 supra and accompanying text. Congress, however, did not want too harsh a result to come from such liability and also wanted to spread the costs of any cleanups. See notes 110-11 supra and accompanying text. As a result, federal common law should reflect the special problems in this area and should allow a different rule to be used to further the goals of the statute.

\textsuperscript{132} The principles of the Uniform Act, supra note 121, should also be followed in two other cases. Section 1(c) of that Act states: "There is no right of contribution in favor of any tortfeasor who has intentionally [willfully or wantonly] caused or contributed to the injury or wrongful death." Id. § 1(c). Such a principle should be followed in CERCLA cases. Although CERCLA was designed to spread some of the costs of cleanups, see note 111 supra, it surely was not designed to reduce any cleanup costs of a party who intentionally or willfully created a health hazard.

The principles embodied in § 3(d) of the Uniform Act should also be followed. Under that section, if a party pays the entire amount of a liability through a settlement, then he can seek contribution from the other parties. Id. § 3(d). The rationale for following this rule is
C. Apportionment

Once a court has decided that a right to contribution exists under CERCLA, it must then address the question of apportioning that contribution. Presently, there is no uniform American rule on how to equitably apportion contribution. Some states have used the rule that "equality is equity" and require that each tortfeasor pay an equal pro rata share. Other states use comparative fault to determine the amount that each tortfeasor should pay. Under that approach, each person pays an amount based on his percentage of fault for a given result. The comparative fault approach represents the trend in the area of contribution.

The legislative history and the aims of the Act indicate that courts should opt for the comparative fault approach in CERCLA cases. Court decisions and the recent proposed amendments to CERCLA adopted by the House support such an approach. The same as for allowing a contribution suit even where a party settles for less than the full cleanup cost. See notes 130-31 supra and accompanying text.
approach. These sources suggest that a court should use its broad equitable powers to determine the “fair share” owed by each party.

A court should consider such factors as the role of each party at the dumpsite, the amount of hazardous waste each party contributed to the dumpsite, the degree of toxicity of such waste, the degree of care exercised by the parties, and the degree of cooperation between the parties and the various government authorities.

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142 See note 27 supra for a discussion of the recent House bill to amend CERCLA. The EPA uses a variety of factors in deciding whether to pursue a recovery claim in the event that it receives no answer to a demand letter. See EPA Memorandum, supra note 9, at 41:2867. The relevant factors the Agency will examine include:

(a) the strength of evidence connecting the potential defendant(s);
(b) the availability and merit of any defense. Possible defenses under Section 107 of CERCLA are generally that the release and consequent response action was the result of:
(1) an act of God;
(2) an act of war; or
(3) an act or omission by an unrelated third party as to whom the owner/operator had no contractual relations and did not fail to exercise appropriate care against the foreseeable acts and omissions of that third party.
(c) the quality of release, remedy and expenditure documentation by the Agency, a state or third party;
(d) the financial ability of the potential defendant(s) to satisfy a judgment for the amount of the claim or to pay a substantial portion of the claim in settlement; and
(e) the statute of limitations.

Id.

143 See H.R. 5640, supra note 27, § 116(e), subs. (C); Gore Amendment, supra notes 27, 76, subs. (iv). Under CERCLA, there are four possible roles of a party at a dumpsite: present owner, past owner, transporter, and generator. See notes 48-50 supra and accompanying text. In addressing this factor, a court should examine the length of time that a party was associated with the site and the extent of that party’s involvement with the site. In looking at this latter factor, a court might examine how closely a party worked with the other parties and what type of financial interest (including profits) he had in the site.

144 See H.R. 5640, supra note 27, § 116(e), subs. (A); Gore Amendment, supra notes 27, 76, subs. (ii). One court has ruled that the amount of waste contributed alone is not a satisfactory means of apportioning liability, at least in the joint and several liability context. See United States v. South Carolina Recycling and Disposal, Inc., 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,272, 20,275 (D.S.C. Feb. 23, 1984).

145 See H.R. 5640, supra note 27, § 116(e), subs. (B); Gore Amendment, supra notes 27, 76, subs. (iii). This factor is important because the toxicity of the waste can affect both the health hazard and the cleanup costs of a release. Under the recent House bill, the committee report stated:

[W]here several companies disposed of waste at a site where the harm was held to be indivisible and one company disposed of a low toxicity waste in small volume at the site, the court [under H.R. 5640] should use its equitable powers to limit the damages paid by the one defendant in relation to other liable parties.

H.R. REP. No. 890 (Part I), supra note 27, at 56.

146 See the Gore Amendment, supra notes 29, 76, subs. (v). H.R. 5640, supra note 27, does not speak directly of “due care,” but seems to imply that it can be taken into account. Id. § 116(e), subs. (C). On how to treat intentional, wilful, or wanton conduct, see note 132 supra.

147 See H.R. 5640, supra note 27, § 116(e), subs. (D); the Gore Amendment, supra notes
Because these factors will vary with each case, one general formula is inappropriate for all dumpsites. Therefore, courts should adopt a flexible approach to contribution. Such an approach, while complicating matters by not providing a "bright line," should actually help the EPA to reach settlements because a party will know that the amount he will ultimately pay will depend on numerous factors. Thus, a party will look towards finding a "realistic" formula for distributing the cleanup costs among the responsible parties rather than trying to hold out for paying only a pro rata share.

D. Timing of a Contribution Suit

Timing of a contribution suit is also significant. Originally, contribution suits were brought after the completion of the underlying litigation. The practice later developed to allow impleading of the other potential parties in order to decide all the issues in a suit simultaneously. Courts must decide which of these approaches to use in CERCLA suits.

One of the purposes of CERCLA is ensuring that toxic waste dumpsites can be cleaned up in the future using the monies in the Superfund. Apparently, the intent of the statute is to quickly replenish the funds that are used to finance a cleanup. Replenishment would be accomplished by suing those parties that are liable under section 107. This point is important because reports show that the cost for cleaning up all of the hazardous waste dumpsites in the United States exceeds the amount in the

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27, 76, subs. (vi). This approach would reward parties that helped to further the public policy goal of CERCLA of quickly cleaning up a release to prevent a continued threat to public health or environmental damage. Whether a party tried in good faith to reach a settlement would also be a factor.

148 The list of factors is not exhaustive, but merely reflects the type of information a court should examine. Since each dumpsite is unique, other factors may be more relevant in a given setting. Whatever factors a court decides to use, they should be weighed in a way that a "fair and equitable" apportionment will be reached.

149 The EPA already uses some of these factors in deciding whether to bring a suit. See note 142 supra. The EPA should adopt the rest of the factors in any settlement negotiations in which it is involved because of the equitable nature of such a multiple factor approach.

150 See, e.g., Booth v. Manchester St. Ry., 73 N.H. 527, 63 A. 577 (1906) (no common law right to join another party who would only be liable for contribution).

151 The term "implead" means to bring a new party into an action on the ground that the new party is, or may be, liable to the party bringing him in, for all or part of the original claim. BLACK'S LAW DICTIONARY 679 (5th ed. 1979).

152 See, e.g., FED. R. CIV. P. 14.

153 See notes 19-34 supra and accompanying text for the legislative history and purposes of CERCLA. See also note 114 supra.

154 For a list of the parties potentially liable under CERCLA, see notes 48-50 supra and accompanying text.

Because a court struggle over contribution would delay replenishing the fund, any district court asked to decide the contribution issue together with the issue of liability to the Superfund should consider a number of factors prior to allowing a joint action. Before joining a contribution claim with a CERCLA suit brought by the EPA, a court should examine the amount of time that the contribution claim would add to the trial length. If it would cause a significant delay, then the court should separate the issues. This would ensure that the liability to the Superfund is handled first in order to regenerate the funds by prompt repayment. Thus, a court should carefully examine the question of when a contribution action should be brought, and generally should conclude that a contribution action belongs in a subsequent, separate trial.

Another timing question has arisen in several recent cases: can a potentially liable party sue for contribution towards "response" costs if the government has not approved its cleanup plan? In the cases where this issue has arisen, one party sued another party who was potentially liable under CERCLA because he believed that if he did not act, it would be sued by federal, state, or local environmental agencies and possibly prosecuted for violation of environmental statutes. In those declaratory judgment actions, the courts held


157 The EPA agrees with this approach. See EPA Chem-Dyne Brief, supra note 14, at 3 (footnote) ("[C]ontribution claims should not be tried at the same time as the main action, for the delay and complication that would ensue would assuredly defeat the congressional goals of rapid recovery of Superfund costs and expeditious cleanup of hazardous waste sites."). See also H.R. 5640, supra note 27, § 116(f). The proposed amendments to CERCLA passed by the House in 1984 would explicitly authorize a contribution suit after adjudication of liability and recovery of costs and damages.


159 Bulk Distribution Centers, 589 F. Supp. at 1440; Wickland Oil Terminals, 590 F. Supp. at 73. In Bulk Distribution Centers, the plaintiff had received a warning notice from the county environmental board. Neither the Florida Department of Environmental Regulation, the county board, nor the EPA had actually instituted legal proceedings against the plaintiff. 589 F. Supp. at 1440. The state and county environmental agencies, however, had turned down Bulk Distribution Centers' cleanup plan for the site in question. Id.

In Wickland Oil Terminal, the plaintiff instituted the declaratory action after the California Department of Health Services placed the former dumpsite on its hazardous waste site
that no recovery is possible before the government approves the cleanup plans and a party begins to incur actual expenses in cleaning up the site.\textsuperscript{160}

This result is fair because it delays the procedure for declaring the liability for a cleanup until after the government approves the cleanup plan. This will help prevent a site from undergoing two separate cleanups, one under a private plan, and, should the EPA find that the private cleanup was inadequate, a second under a government plan.\textsuperscript{161} Such a delay promotes CERCLA's general purpose of expediting dumpsite cleanups. In addition, having only one cleanup will save all of the parties money. Also, if a party wishes to seek a declaratory judgment on the liability of the other parties, he may still seek some relief in a state court under state tort law or under a state superfund scheme.\textsuperscript{162}

IV. Conclusion

The Congress enacted CERCLA to solve what it saw as a national problem.\textsuperscript{163} Because of its hurried passage, however, that statute contains certain gaps\textsuperscript{164} that the federal courts\textsuperscript{165} must fill.\textsuperscript{166} The courts have "filled" some of those holes and are presently trying to fill others, including those dealing with the right to contribution for response costs. The focus of this note has been to analyze this right in light of the purposes and history of CERCLA, as well as recent court decisions and EPA policy interpreting the Act.

It is now settled that a strict liability standard applies under
CERCLA\textsuperscript{167} and that liability can be joint and several under appropriate conditions.\textsuperscript{168} Finally, some of the issues with respect to contribution for response costs, such as whether such a right could exist, are also decided.\textsuperscript{169}

Some of the issues that are still open include the exact federal common law that should be used,\textsuperscript{170} the manner in which damages should be apportioned,\textsuperscript{171} and the timing of a contribution action.\textsuperscript{172} In deciding these questions, courts should look to the purposes of CERCLA and to the way that the EPA has attempted to implement the Act.\textsuperscript{173} By using these as guidelines, courts should be able to fashion decisions that lead to quick cleanups, quick repayment of expended Superfund monies, and equitable payments for liable parties. Such results would comport with CERCLA and with the intent of Congress to clean up dangerous waste dumpsites as quickly and effectively as possible.

\textit{Kristian E. Anderson}

\begin{itemize}
\item \textsuperscript{167} See notes 58-69 \textit{supra} and accompanying text.
\item \textsuperscript{168} See notes 70-85 \textit{supra} and accompanying text.
\item \textsuperscript{169} See notes 105-19 \textit{supra} and accompanying text. Although no court has actually had to rule on this question, it seems likely that given the EPA's position in favor of contribution, see, e.g., the \textit{EPA Chem-Dyne Brief, supra} note 14, a court would probably rule in favor of the Agency's position. The \textit{Bulk Distribution Centers} court stated that the EPA's interpretation of CERCLA is entitled to considerable weight. 589 F. Supp. at 1448 (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)).
\item \textsuperscript{170} See notes 120-32 \textit{supra} and accompanying text.
\item \textsuperscript{171} See notes 133-49 \textit{supra} and accompanying text.
\item \textsuperscript{172} See notes 150-62 \textit{supra} and accompanying text.
\item \textsuperscript{173} See notes 9, 14 \textit{supra} and accompanying text for examples of how the EPA is implementing CERCLA.
\end{itemize}