

# Joint and Several Liability for Generators Under Superfund: A Federal Formula for Cost Recovery\*

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## INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)<sup>1</sup> has been widely acclaimed as an important tool in the effort to clean up hazardous waste sites.<sup>2</sup> However, commentators<sup>3</sup> and the judiciary<sup>4</sup> alike agree that the statutory language—the legacy of a last minute political compromise—is poorly constructed and fraught with ambiguity.<sup>5</sup> A study

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\* Just prior to the printing of this article, the President signed into law the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499 (Oct. 17, 1986). Those amended sections which significantly affect the issues dealt with in this article will be discussed.

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1. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-57 (West Supp. 1980).

2. See, e.g., Note, *Joint and Several Liability for Hazardous Waste Releases under Superfund*, 68 VA. L. REV. 1157, 1158 (1982).

3. Note, *Generator Liability Under Superfund for Clean-Up of Abandoned Hazardous Waste Dumpsites*, 130 U. PA. L. REV. 1229, 1266 (1982) [hereinafter cited as Note, *Generator Liability*].

4. *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (Newcomer, J.); *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 579 F. Supp. 823, 838-39 n. 15 (W.D. Mo. 1984) (Clark, C.J.).

5. Most acknowledge that the legislative drafting is a result of last-minute compromises that enabled CERCLA's passage in the final days of the 96th Congress. See *Wade*, 577 F. Supp. at 1331; Note, *The Comprehensive Environmental Response, Compensation and Liability Act of 1980: Is Joint and Several Liability the Answer to*

of the legislative history merely adds to the confusion.<sup>6</sup>

The most obvious example of Congress' ineffective drafting is found in CERCLA's liability provisions.<sup>7</sup> Although the statute clearly provides for liability among various types of defendants, it does not specify the allocation mechanism.<sup>8</sup> For example, section 101(32) defines "liability" under CERCLA by reference to "the standard of liability which applies under [section 311 of the Federal

*Superfund?*, 18 NEW ENG. L. REV. 109, 128 (1982) [hereinafter cited as Note, *Joint and Several Liability*].

Similarly, the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986) [hereinafter cited as Amendments] was enacted in the waning days of the 99th Congress, and only after conference committee action. However, the Amendments appear to have clearly faced some of the difficult issues, as will be discussed below.

6. Will Rogers once observed, "If we didn't have to stop and play politics, any administration could almost make a Garden of Eden out of us." These remarks are echoed in the complaint of Justice Rehnquist contained in a decision involving a statutory provision in the health and safety area. "If Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislation is formulated. But that is the very essence of legislative authority under our system. It is the hard choices . . . which must be made by the elected representatives of the people," *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring).

7. Section 101(32) states: "'Liable' or 'Liability' under this subchapter shall be construed to be the standard of liability which obtains [sic] under Section 1321 of Title 33." 42 U.S.C. § 9601(32) (1982). Section 107 provides:

(a) Notwithstanding any other provisions 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 (otherwise subject to the jurisdiction of the United States) 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 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 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 not inconsistent with the national contingency plan; and

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(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 a release.

42 U.S.C. § 9607(a) (1982). These provisions were not changed or clarified by the Amendments, *supra* note 5.

8. *See infra* Part III.

Water Pollution Control Act]."<sup>9</sup> However, the relevant provision of the Federal Water Pollution Control Act (FWPCA),<sup>10</sup> does not provide an allocation scheme where multiple defendants contribute to a similar harm.<sup>11</sup> Furthermore, section 107 of CERCLA, which sets forth the classes of liable parties and liability defenses and limitations, does not describe the method of allocation of liability among the various possible defendants.

Most courts, however, have found Congress intended to apply joint and several liability in appropriate circumstances.<sup>12</sup> In deciding this issue, though, the federal district courts have not applied a uniform rule.<sup>13</sup> Two lines of cases have emerged, reflecting different interpretations of CERCLA's ambiguous allocation scheme.<sup>14</sup> One line of cases holds that joint and several liability under CERCLA should follow the traditional common law approach.<sup>15</sup> At common law, joint and several liability provided that a plaintiff could fully recover from any one defendant or any combination of defendants. These cases, however, do not establish a defendant's right to recover from other defendants any disproportionate payments made to plaintiff.<sup>16</sup> The second line of cases allows the court to apportion

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9. 42 U.S.C. § 9601(32) (1982).

10. 33 U.S.C. § 1321 (1982).

11. Section 311 of the FWPCA provides: "Except where an owner or operator can prove that a discharge was caused solely by [various defenses are listed], . . . such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under Section (c) of this section for the removal of such oil or substance by the United States Government. . . ." 33 U.S.C. § 1321(f)(1) (1982).

12. See *infra* note 93 and accompanying text. This Article focuses on cost recovery actions under section 104. Questions of liability in abatement actions under section 106 are beyond the scope of this Article.

13. See *infra* notes 106-120 and accompanying text. The obvious implication is that the conflict in the judicial approaches means that at least one group of decisions under CERCLA reduces the effectiveness of the provision for generator liability.

14. Even among these two lines of cases, the courts have imposed varying standards and methods for apportionment, and have not always adopted sweeping rules for Section 104 cost recovery actions. See generally 9 CHEM. & RAD. W. LIT. REP. 340 (February 1985) (outline of cases by David Ledbetter).

15. See *infra* notes 106-113 and accompanying text.

16. *Id.* The imposition of joint and several liability can be severe in a claim under section 104 of CERCLA. It appears well settled that liability is generally retroactive. See, Note, *Generator Liability*, *supra* note 3, at 1260; 9 CHEM. & RAD. W. LIT. REP. at 337 (citing cases). The significance of the impact of joint and several liability, taken together with its retroactive effect, cannot be overstated. The ultimate burden will likely be imposed on the commercial insurance industry, already reeling from a period of substantial claims for damages in a variety of areas. See generally 50 Fed. Reg. 33903, 33907 (1985). Additionally, the scope of the standard pollution exclusion, used with comprehensive general liability insurance policies in the commercial context, has

damages prior to recovery by plaintiff.<sup>17</sup> Under these cases, with minimal involvement, the court protects the defendant from the harshness of joint and several liability.

As this article was being prepared for final printing, Congress passed a comprehensive set of amendments to CERCLA.<sup>18</sup> These amendments somewhat clarify the allocation issue by creating a right to contribution among liable parties. However, the amendments do not specify a method for allocation.<sup>19</sup> Therefore, many unanswered issues remain, and so the courts will continue to bear the burden of gleaning congressional intent from ambiguous statutory language and conflicting interpretations of legislative history. Meanwhile, it is currently estimated that EPA's CERCLA enforcement activity will accelerate rapidly in the next several years: 2,500<sup>20</sup> to 10,000<sup>21</sup> sites are projected as likely candidates for the National Priorities List.<sup>22</sup> As the federal government pursues efficient cleanup, responsible parties will be exposed to a greater degree

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been given narrow interpretation in a recent line of cases. See *Beyond the Pollution Exclusion: Emerging Parameters of Insurance Coverage for Superfund Liability*, 9 CHEM. & RAD. W. LIT. REP. 30 [hereinafter cited as *Pollution Exclusion*]. One industry analyst has commented, "[s]uperfund will ultimately gag on its transaction costs, and the road to meaningful reform will be paved with bankrupt businesses and insolvent insurers." Cheek, *Comments*, NAT'L UNDERWRITER, Nov. 8, 1985 at 6.

Whatever conclusion one may reach concerning the legitimacy of the concerns raised by the insurance industry, the question of fairness in the allocation of liability among defendants cannot be ignored and is given substantial attention in this article.

17. See *infra* notes 114-120 and accompanying text. This line of cases is not actually applying joint and several liability in its traditional sense, as explained later in this article.

18. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986).

19. Generally, the Amendments, *supra* note 5, added new provisions to CERCLA section 113. These provisions clearly establish a right of contribution among liable parties, and provide that such actions will be governed by federal law. See CERCLA § 113(f)(1). Also parties to a settlement may be discharged from claims for contribution, while non-settling parties will not. See CERCLA § 113(f)(2)-(3). However, these new provisions still require the federal courts to determine the appropriate allocation formula, "using such equitable factors as the court determines are appropriate." CERCLA § 113(f)(1).

20. Inside E.P.A. Weekly Report, Dec. 14, 1984 at 10. This estimate is a result of the § 301(a)(1) studies initiated by CERCLA. See 42 U.S.C. § 9651(d) (1982). The cost to clean up these sites is estimated to reach from \$11.7 billion, to possibly \$22.7 billion. Furthermore, these sites, and the costs involved, do not include sites not presently abandoned which may later require government assisted cleanup.

21. 9 CHEM. & RAD. W. LIT. REP. 752, 754 (study prepared by Office of Technology Assessment (March 1985)).

22. Sites must be on the National Priorities List to qualify for CERCLA funded remedial actions. 42 U.S.C. §§ 9604(a)(1), 9605 (1982); OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL, 304 (March 1983) [hereinafter cited as OTA Report].

of potential liability.<sup>23</sup>

The purpose of this article is to propose a consistent and comprehensive approach to joint and several liability under CERCLA. Part I explains why ensuring generator liability is essential to realizing the legislative goals of the statute. Part II examines the common law approaches to joint and several liability, and the interrelated issues of contribution and release, and concludes there is a great deal of inconsistency. Part III describes how the federal district courts, in applying common law principles in CERCLA cases, reflect the divergent approaches of the states. Finally, part IV proposes a uniform rule that facilitates the determination of joint and several liability, yet provides for equitable contribution and releases.

### I.

#### CERCLA: STATUTORY SOLUTION TO A COMPLEX PROBLEM

CERCLA is popularly known as "Superfund" because it establishes a multi-billion dollar "hazardous substance response trust fund" to finance government cleanup of hazardous chemical waste sites.<sup>24</sup> CERCLA gives the federal government broad authority to

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23. The insurance industry, a likely target for ultimate payment of cleanup costs, is particularly dismayed by this prospect. One analyst expects "huge multi-party law suits, arising under principles of contribution and indemnity." See Cheek, *Comments, NAT'L UNDERWRITER*, *supra* note 16, at 6. In one recent CERCLA case, the presiding judge suspended discovery based on counsel's request to allow for expedited negotiation. The judge agreed with counsel's estimate that the litigation costs appeared to outstrip the remedial costs for which the action was brought. See 9 CHEM. & RAD. W. LIT. REP. at 371 (February 1985).

24. CERCLA, 42 U.S.C. § 9631. The March 1983 OTA report, discussing the original version of CERCLA states that:

CERCLA authorizes the Federal Government to respond directly in the event of chemical spills and releases of *hazardous substances* into the environment. The framework for coordinated Government response is established by the National Contingency Plan (NCP). To pay for emergency response and cleanup actions, CERCLA created the Hazardous Substance Response Trust Fund financed by a tax on crude oil, imported petroleum, and certain chemicals. The collection of the Superfund tax is authorized for 5 years (until the end of fiscal year 1985) or until the total unobligated balance in the Response Trust Fund established under CERCLA reaches \$900 million or a total of \$1.38 billion has been collected, whichever occurs first. The total amount expected to be available in the Superfund trust fund is \$1.6 billion.

CERCLA also created a second fund, the Post-Closure Liability Trust Fund, to pay for post-closure care, remedial action, and damages from releases at qualifying hazardous waste facilities. The \$200 million post-closure trust fund is financed by a tax on hazardous waste received at treatment or disposal facilities and which will remain in the facility after closure.

OTA Report, *supra* note 22, at 300.

Although the Amendments, *supra* note 5, change the funding amount and funding

take remedial<sup>25</sup> and abatement<sup>26</sup> actions whenever there is an actual or threatened release of a hazardous substance at a disposal site. One of the most important CERCLA provisions allows the government to recover the costs of response and remedial actions. CERCLA section 107(a) names as liable parties the owner or operator of a disposal facility, persons who arranged for disposal, treatment or transportation, and transporters of hazardous wastes.<sup>27</sup> This provi-

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mechanisms, the basic approach establishing a large fund for cleanup of sites on the National Priorities List remains intact.

25. Normal cleanup actions are authorized by 42 U.S.C. § 9604 (1982) under the following language:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action, relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare of the environment. . .

42 U.S.C. § 9604(a)(1).

This section authorizes the President to take whatever action is deemed necessary to remove, arrange for removal, provide remedial action, or any other necessary action. See OTA Report, *supra* note 22, at 302. Removal and remedial actions are distinguished by the time necessary to mitigate the damages at the site. A removal action is a short-term emergency response action, with "Superfund" expenditures limited to \$1 million or 6 months duration. See 42 U.S.C. § 9601(23); OTA Report, *supra* note 22, at 300. A remedial action is a long-term action directed at a permanent remedy, and is limited to sites on the NPL. See 42 U.S.C. § 9601(24) (1982); OTA Report, *supra* note 22, at 300.

26. In extreme circumstances, CERCLA provides for administrative and judicial abatement actions to compel cleanup by responsible parties. CERCLA provides:

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected States, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect health and welfare and the environment.

42 U.S.C. § 9606(a).

The authority granted under this provision is subject to dispute, and is beyond the scope of this article. One commentator has stated that EPA's current use of its abatement authority conflicts with congressional policy and judicial precedent, and represents a failure to properly exercise its responsibility under CERCLA. Dorge, *After "Voluntary" Liability: The EPA's Implementation of Superfund*, 11 ENVTL AFFAIRS 443, 448, 467-474 (1984). The Amendments, *supra* note 5, did not change this component of CERCLA's enforcement scheme.

27. See *supra* note 7 and accompanying text. The liability of defendants under CER-

sion is significant because it imposes liability on the "deep pocket" generators of the hazardous substances found at the waste site, primarily chemical manufacturers.<sup>28</sup> In effect Congress has provided for imposition of financial responsibility on the chemical industry for cleanup costs incurred under CERCLA.<sup>29</sup>

Examination of the reality surrounding the typical hazardous waste site reveals the logic behind interpreting CERCLA to impose the brunt of liability on hazardous waste generators. There are often dozens, if not hundreds, of potentially responsible parties at a site.<sup>30</sup> Many of these parties, particularly the transporters and owner/operators, are thinly capitalized and therefore do not offer much hope for recovery by plaintiff.<sup>31</sup> Furthermore, even if parties were financially responsible, attributing the harm to any particular

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CLA section 107(a) is the subject of considerable dispute, and is beyond the scope of this article. The general test for whether a defendant is liable under section 107(a) is whether the defendant decided to put the waste into the hands of a facility that contains hazardous wastes. See *United States v. A & F Materials Co., Inc.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984); *United States v. Ward*, 618 F. Supp. 884, 895 (E.D. N.C. 1985).

28. 42 U.S.C. 9607(a)(3) (1982) is construed as referring to generators. See Note, *Joint and Several Liability*, *supra* note 5, at 128 n.127; see generally, Note, *Generator Liability*, *supra* note 3, at 1230. Generators are regarded as the cheapest cost avoider and therefore the best target in the context of efforts to remedy the harm caused by hazardous wastes. See G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970), 135-140. However, fairness considerations should not be ignored. *Id.* at 26.

29. *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1252 (S.D. Ill. 1984); Note, *Generator Liability*, *supra* note 3, at 1232.

30. *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1252-1253 (S.D. Ill. 1984). In one leading CERCLA case, the site contained hazardous waste from 289 generators and transporters. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 811 (W.D. La. 1983).

31. See Miller, *Defending Superfund and RCRA Imminent Hazard Cases*, 15 NAT. RESOURCES LAW. 483, 489 (1983) [hereinafter cited as Miller, *Defending Superfund Cases*]; Note, *Generator Liability*, *supra* note 3, at 1230. Indeed, CERCLA was enacted in large part to remedy the shortcomings of RCRA, which did not provide for remedies where the perpetrator was unknown, insolvent or bankrupt. See *Hazardous and Toxic Waste Disposal: Joint Hearings on S.1341 and S.1480 before the Subcommittees on Environmental Pollution and Resource Protection of the Senate Committee on Environment and Public Works*, (part 4), 96th Cong., 1st Sess. 7, 43 (1979); H.R. REP. NO. 1016, PART I, 96th Cong., 2d Sess. 22 reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6119, 6125.

For a general discussion of these and other practical realities creating the current hazardous waste problem, see Note, *Joint and Several Liability*, *supra* note 7, at 114-20. Additionally, the problem of unavailable or insolvent defendants is discussed in Comment, *The Case of the Disappearing Defendant: An Economic Analysis*, 132 U. PA. L. REV. 145 (1983).

The issue of how to factor in the liability of the "unavailable" defendant would seem to be best resolved by not considering it at all, and forcing the available defendants to share that liability. Otherwise, a defendant can dispatch with a portion of the cost recovery claim by filing for bankruptcy, as was allowed in *Ohio v. Kovacs*, 469 U.S. —, 105 S. Ct. 705 (1985). See Drabkin, Moorman, and Kirsch, *Bankruptcy and the*

party is complicated by the commingling of the hazardous waste and the existence of wide variations in volume and toxicity of the hazardous substances at a site.<sup>32</sup> However, the problem of identifying a financially responsible defendant is largely solved by the inclusion of generators as defendants.<sup>33</sup>

Unfortunately, CERCLA's silence on allocating liability hampers the effectiveness of this approach. Because of the potential liability of the large number of generators as well as the owners, operators, and transporters, each having a different relationship with the site, the question of how to allocate liability continually arises.<sup>34</sup> However CERCLA provides no guidance on this central issue.<sup>35</sup> CERCLA's legislative history<sup>36</sup> is as ambiguous as the statutory

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*Cleanup of Hazardous Waste: Caveat Creditor*, 15 ENVTL. L. REP. (ENVTL. L. INST.) 10,168, 10,173-174 (June 1985).

32. The inability to fingerprint a given hazardous waste is at the crux of the joint and several liability issue. Given the present state of technology, a solution to this problem at hazardous waste disposal sites is unavailable. See *United States v. Wade*, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983). In order to help plaintiffs overcome problems of causation, CERCLA draws on developments in product liability actions involving multiple defendants in other contexts, where novel theories have been applied to facilitate recovery by plaintiff. See S. REP. NO. 848, 96th Cong., 2d Sess. 12-15, 31-34 (1980). See also D'Arcy, *Joint and Several Liability Under Superfund*, 13 LOY. U. CHI. L.J. 489, 519 and note 160 (1982). For a detailed discussion of some of these contemporary tort theories, see Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980) and Note, *Beyond Enterprise Liability in DES Cases—Sindell*, 14 IND. L. REV. 695, 701 (1981). Two rationales for this evolution in tort law are the policy of spreading the costs to those responsible for the harm and the policy of spreading the cost to those most likely to be able to pay, policies which also underlie CERCLA. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 58, 607 P.2d 924, 936, cert. denied, 449 U.S. 912 (1980) (product liability action); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-06.

33. In eight CERCLA cases examined in this article, there were an average of ten defendants, of whom eight were generators. Usually these are the parties plaintiff has chosen, most likely because of their ability to satisfy judgment. Proof of this observation is found in the frequent motions by defendants to add indispensable parties under FED. R. CIV. P. 19. See *United States v. Conservation Chemical Co.*, 20 ENV'T REP. CAS. (BNA) 1427, 1431 (W.D. Mo. 1984) (only five defendants named, yet motion under FED. R. CIV. P. 19 identified 46 other contributing generators).

34. Litigation over issues of divisibility of harm, joint and several liability, apportionment among settling defendants, apportionment among all parties, etc., all slow down the process of cost recovery as well as create varying approaches to resolution by the courts. See Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 VA. L. REV. 1157, 1158 (1982); D'Arcy, *Joint and Several Liability under Superfund*, 13 LOY. U. CHI. L.J. 489, 496-97.

35. CERCLA gives some indication that joint and several liability applies, but the existence and character of joint and several liability is subject to question. See *infra*, notes 97-102 and text accompanying.

36. See, e.g., *United States v. Stringfellow*, 20 ENV'T REP. CAS. (BNA) 1905, 1907 (C.D. Cal. 1984); *Universities Research Assn., Inc. v. Coutu*, 450 U.S. 754, 770 (1980); *Cort v. Ash*, 422 U.S. 66, 78 (1975).

language.<sup>37</sup> Because the statute is a compromise measure, its legislative history is elusive and conclusions must be carefully drawn.<sup>38</sup> Generally, however, courts have concluded that the legislature desired traditional and evolving principles of common law to govern CERCLA's liability provisions<sup>39</sup> and that application of these principles should be flexible with due regard for fairness to the parties.<sup>40</sup>

However, the traditional and evolving principles of common law are unsurprisingly non-uniform.<sup>41</sup> In particular, the rules on joint and several liability lack uniformity regarding whether such liability applies, and how to apportion damages once liability is determined. In deciding joint and several liability under CERCLA a court must therefore give added weight to the explicit legislative aims of CERCLA. In general, CERCLA's main objectives are to facilitate the recovery of cleanup costs and to deter improper disposal.<sup>42</sup> The

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37. See *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 579 F. Supp. 823, 839, n. 15 (W.D. Mo. 1985).

38. CERCLA's legislative history has been repeatedly reviewed, dissected, and analyzed by the courts and the commentators. There is enough material in the multi-volume set of records covering the 18 months of Congressional debates to support either view on any particular issue. This state of affairs has led one court to remark that "[a]ny attempt to divine the legislative intent behind many of [CERCLA's] provisions will inevitably involve a resort to the Act's legislative history. Unfortunately, the legislative history is unusually riddled by self-serving and contradictory statements." *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (Newcomer, J.). A thorough analysis of the legislative history is presented in Note, *Generator Liability*, *supra* note 3, at 1267-78. That commentator suggests that the only conclusive message to be gleaned from the congressional record in CERCLA is that Congress intended that the courts develop a federal common law of allocation of liability consistent with the general purposes of the statute.

39. See, e.g., *United States v. Chem-Dyne Corp.*, 527 F. Supp. 802, 807 (S.D. Ohio 1983); *United States v. Conservation Chemical Co.*, 20 ENV'T REP. CAS. (BNA) 1427 (W.D. Mo. 1984) (expressly following *Chem-Dyne*); *United States v. South Carolina Recycling and Disposal, Inc.*, 20 ENV'T REP. CAS. (BNA) 1753, 1759 (D. S.C. 1974); *United States v. Wade*, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983); *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1254 (S.D. Ill. 1984). The commentators agree. See, e.g., Note, *Joint and Several Liability for Hazardous Waste Release Under Superfund*, *supra* note 34, at 1165-66.

The recent Amendments, *supra* note 5, state that contribution actions under CERCLA will be governed by federal law, which presumably will incorporate common law principles. (§ 113(f)). Additionally, those allocation issues which were not specifically addressed in the Amendments must continue to be examined in light of existing common law.

40. See Note, *Generator Liability*, *supra* note 3, at 1277-78. The argument for flexible application of liability under CERCLA naturally flows from the equivocal nature of section 107 with regard to allocation. Most courts have read Congress' compromise version to mean that flexibility and fairness were intended by the legislature. see e.g., *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984).

41. See *infra* notes 54-92 and accompanying text.

42. In addition to the implicit policy of flexibility and fairness in the application of

statute maintains an aggressive stance towards all those responsible for the environmental harm caused by hazardous substances.<sup>43</sup> Although these policies should not lead to blind adoption of the most oppressive rules of liability, they certainly must be given significant consideration when determining the proper liability scheme.

## II.

### ALLOCATION AT COMMON LAW

Traditionally, under tort law, courts have adjusted the liability among co-defendants relative to their liability to plaintiff.<sup>44</sup> Two standard means of accomplishing this are apportionment of causation<sup>45</sup> and provision for an action for contribution between defendants.<sup>46</sup>

Only rarely do courts impose joint and several liability.<sup>47</sup> How-

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CERCLA's liability provisions, more explicit legislative goals are found in the legislative history and in the structure of the Act. A number of aims regarding the broad liability standard are found in the committee report on the final Senate bill:

- (1) to provide an incentive for maximum care in the prevention of release
- (2) to assure that responsible parties bear the full cost of their activities
- (3) to encourage compensation of innocent victims by removing difficult proof burdens
- (4) to encourage the internalization of health and environment costs
- (5) to place incentives for greater care on the parties with the best knowledge of risks inherent in the wastes and in the best position to control and supervise their disposal
- (6) to spread costs
- (7) to encourage efficient resource allocation.

S. REP. NO. 848, 96th Cong., 2d Sess. 12-15, 31-34 (1980).

The cumulative weight of these goals suggests an aggressive policy to promote cleanup of all existing sites, and to impose such onerous burdens on responsible parties in recovering cleanup costs that they will modify their behavior to avoid these hardships in the future. *See also* Note, *Joint and Several Liability for Hazardous Waste Releases under Superfund*, *supra* note 34, at 1173.

43. *See supra* note 42.

44. In the case law of the tort of nuisance, the common law analog of statutory environmental laws, equity has always played a large role in the disposition of disputes. *See, e.g.,* *Smith v. Staso Milling Company*, 18 F.2d 736 (2d Cir. 1927) (court "balanced the equities" in nuisance action for pollution of a stream); *Village of Wilsonville v. SCA Services, Inc.*, 86 Ill. 2d 1, 146 N.E.2d 824 (1981) (court balanced conflicting interests in nuisance action for hazardous waste disposal in a coal mine).

45. KEETON, PROSSER, & KEETON ON TORTS § 52 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

46. *Id.* at § 50.

47. At early common law, joint and several liability was applied only when defendants acted together in concert. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 47 (4th ed. 1971). This rule was later expanded by the American courts to allow joinder of defendants who were vicariously liable, or who violated a common duty. *Id.* Only

ever, in situations similar to hazardous waste disposal, where two or more persons commit independent wrongful actions which combine to form a single, indivisible injury, courts have imposed joint and several liability.<sup>48</sup> Furthermore, in those situations, courts have refused to allow a right of contribution among tortfeasors.<sup>49</sup> Because of this harsh result, courts have only reluctantly determined that an injury is indivisible.<sup>50</sup>

But, in recent years, the courts and legislatures have expanded the scope of liability and have eased the burdens on plaintiffs in many areas of tort law. Consequently, although it may be easier to hold tortfeasors jointly and severally liable in many jurisdictions, in several cases there still is no right to contribution.<sup>51</sup> This development in tort law creates a difficult task for a court trying to equitably apply the common law to CERCLA actions.

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recently have courts begun to permit the joinder of defendants where their acts have combined to produce an indivisible result.

48. Note, *Joint and Several Liability*, *supra* note 5, at 134. One court has applied joint and several liability in a CERCLA case because the defendants acted in concert. *U.S. v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 845, 579 F. Supp. 823, n.4 (W.D. Mo. 1984). However, that case involved only one generator, one transporter and one site owner. Most CERCLA cases involve a multitude of defendants, most of which are generators of the hazardous waste found at the site. See *supra* note 29 and accompanying text.

49. It has been pointed out that the extension of the "no contribution rule" to unintentional torts was a result of widespread misapplication of the seminal case of *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). This case involved an intentional tort and set forth the sweeping "no contribution rule," which has been erroneously applied in cases involving other than intentional torts. See *Knell v. Feltman*, 174 F.2d 662, 663-64 (D.C. Cir. 1949) ("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 willful or intentional wrongdoers.").

While considerations of fairness do not compel a court to allow contribution among intentional wrongdoers, it is anomalous to apply the same harsh rule to joint tortfeasors which are liable due to indivisible injury under a strict liability standard. Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, *supra* note 34, at 1167-69. See generally PROSSER AND KEETON, *supra* note 45, at § 50; HARPER AND JAMES, *THE LAW OF TORTS*, 716-22 (1956) [hereinafter cited as HARPER AND JAMES]; 18 AM. JUR. 2D *Contribution* §§ 33-34 (1965, Supp. 1985).

50. A "theoretical divisibility" approach was widely applied. Under this approach, if a court found a theoretical basis for separating one defendant's contribution to the harm from another's contribution, then the court would not impose joint and several liability. Note, *Joint and Several Liability*, *supra* note 5, at 136; see generally PROSSER AND KEETON, *supra* note 45, at § 52; HARPER AND JAMES, *supra* note 49, at § 10.1.

51. See *infra* note 73.

## A. Joint and Several Liability at Common Law

In any tort action, particularly in a hazardous waste disposal case, joint and several liability among tortfeasors can be the key to full recovery by the plaintiff.<sup>52</sup> This "deep pocket" approach is a successful strategy, and is commonly allowed in four situations. Joint tortfeasors are normally found where there is: (1) concerted action, (2) a breach of a common duty, (3) a special relationship involving vicarious liability, or (4) an indivisible harm.<sup>53</sup> The most frequently used situation in hazardous waste cases is the fourth category—indivisible harm—and discussion here will be limited to that concept.

### 1. Indivisible Harm

What constitutes indivisible harm is an unsettled question. The general test is whether the harm is reasonably capable of apportionment among joint tortfeasors. One line of cases takes a literal reading of the test and will find harm to be divisible, thereby precluding joint and several liability, whenever there are facts to support a conclusion that one of several defendants' conduct was a cause in fact.<sup>54</sup> It has been suggested that this "theoretical divisibility" approach had its origins in early common law where there was no right to contribution among joint tortfeasors.<sup>55</sup>

A second line of cases takes a more practical approach.<sup>56</sup> In

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52. Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, *supra* note 34, at 1193.

53. See generally HARPER AND JAMES, *supra* note 46, at § 10.1; PROSSER AND KEETON, *supra* note 45, at 50.

54. This means that as long as it is apparent that one defendant caused *some* harm, then that harm is *a priori* divisible from the total harm. These cases view the "reasonably capable of apportionment" standard in a very broad light. See, e.g., *Watson v. Pyramid Oil Co.*, 198 Ky. 135, 136, 248 S.W. 227, 228 (1923) (harm is divisible even where the "difficulty or impossibility of separating the damage" is present); *Snarley v. City of Goldendale*, 10 Wash. 2d 453, 117 P.2d 221 (1941) (pollution of a stream); *Williams G. Roe & Co. v. Armour & Co.*, 414 F.2d 862 (5th Cir. 1969) (applying Florida law to action for damage to crops); *O'Neal v. Southern Carbon Co.*, 216 La. 96, 43 So. 2d 230 (1949) (air pollution).

55. Prosser and Keeton make this suggestion in order to explain the puzzling traditional rule. See PROSSER & KEETON, *supra* note 45, at 348. See also HARPER & JAMES, *supra* note 49, at 693-94 (indivisible harm is based more in judicial policy than in the scope of the definition of joint tortfeasors).

56. See, e.g., *Michie v. Great Lakes Steel*, 495 F.2d 213 (6th Cir. 1974), *cert. denied*, 419 U.S. 997 (1974) (applying Michigan law to nuisance claim for air pollution); *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976) (nuisance action for damage to property); *Thorson v. City of Minot*, 153 N.W.2d 764 (N.D. 1967) (nuisance action for flooding of land); *State v. Ventron Corp.*, 182 N.J. Super. A.D. 210, 440 A.2d 455 (1981) (nuisance action for damage to land); *Landers v. East Texas Salt Water Disposal*

many instances, particularly those involving harm to property, it is theoretically possible to divide the harm. Practically speaking, however, a plaintiff is often unable to attribute any particular harm to a given defendant. The second line of cases, therefore, will find the harm to be indivisible on practical grounds, thereby triggering joint and several liability. Alternatively, some courts merely shift the burden of showing divisibility to defendant.<sup>57</sup> This line of cases is part of the evolving approach in tort law which adjusts the burdens of the parties in favor of the plaintiff.<sup>58</sup>

The Restatement (Second) of Torts does not provide a definite resolution of the divisibility issue, although it generally favors plaintiffs by making a finding of indivisibility likely. Importantly, the

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Co., 151 Tex. 251, 248 S.W.2d 731 (1952) (nuisance action for damage to fish stock from dumping oil and salt water into lake); *Phillips Petroleum Co. v. Hardee*, 189 F.2d 205 (5th Cir. 1951) (applying Louisiana law to nuisance action for pollution of creek); *D & W Jones, Inc. v. Collier*, 372 So. 2d 288 (Miss. 1979) (damage to fish in pond); *Comar Oil Co. v. Sipe*, 133 Okla. 222, 271 P. 1010 (1928) (nuisance action for water pollution); *Polzin v. Nat'l Co-op Refinery Ass'n*, 175 Kan. 531, 266 P.2d 293 (1954); *Phillips v. Hassett Mining Co.*, 244 N.C. 17, 92 S.E.2d 429 (1956) (stream pollution); *Schindler v. Standard Oil Co.*, 166 Ohio St. 391, 143 N.E.2d 133 (1957) (subsurface drinking water damaged by gasoline); *Doe v. Saracyn Corp.*, 138 Conn. 69, 82 A.2d 811 (1951) (contamination of a well).

57. See cases cited in Prosser, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 438 n.163 (1939).

Some people criticize the "practical divisibility approach" because courts refuse to find that harm is divisible even though there has been a kind of apportionment in unrelated aspects of the litigation. For example, when plaintiff settles its claim with one defendant, to a certain extent, the plaintiff has apportioned part of its total claim. Additionally, courts will frequently make a preliminary assessment of apportionment at early stages of the trial. However, this begs the question of divisibility of harm. The law retains a distinction between apportionment of damages, and allocation of liability. See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), *reh'g denied*, 444 U.S. 889 (1979); *United States v. South Carolina Recycling Co.*, 20 ENV'T REP. CAS. (BNA) 1753, 1759 (D. S.C. 1984). The former is properly addressed in settlement or in an action for contribution, the latter is the fundamental question when joint and several liability of defendants is at issue. The two should not be confused.

The Amendments, *supra* note 5, have embraced this distinction by requiring EPA to make a preliminary allocation of responsibility among liable parties based on a number of factors, but specifically excluding the use of this assessment as "a statement on the divisibility of harm" (§ 122(e)(3)(6)).

58. See Note, *Joint and Several Liability*, *supra* note 3, at n.215, quoting the seminal "market share" liability case, *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 610, 607 P.2d 924, 936 (1980), *cert. denied*, 449 U.S. 912 (1980):

in our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products or to fashion remedies to meet these changing needs.

Of course, the concepts of proximate cause under *Sindell* and injury to plaintiff in CERCLA are distinct; however, the general approach to tort law is similar.

Restatement shifts the burden of proving divisibility to defendants.<sup>59</sup> Also, several of the Restatement rules and comments support a finding of indivisibility in the hazardous waste site context. First, harm to tangible property that is incapable of practical division is indivisible,<sup>60</sup> as for example, the discharge of a hazardous substance into a stream which results in damage to land.<sup>61</sup> Second, contrary examples in the Restatement are inapposite, because the examples showing capability of apportionment involve homogeneous effluents into streams, which are factually distinct from a hazardous waste site.<sup>62</sup> Finally, the Restatement allows the court to disregard defendant's persuasive evidence on divisibility to avoid unfair results to plaintiff.<sup>63</sup>

Countervailing authority is found in the Restatement comments which indicate that rough apportionment is sufficient,<sup>64</sup> and that pollution by multiple parties may be divisible.<sup>65</sup> This restrictive definition of indivisibility reflects the traditional "balance" reached at common law: the plaintiff's door to joint and several liability was narrow, but once inside, the defendants had no room for relief from other responsible parties. In sum, although case law defining "indivisible harm" is split, modern courts seem more likely than their forebears to find harm to be indivisible.

## 2. Policy Considerations

Joint and several liability is widely supported as an efficient method of encouraging responsible behavior<sup>66</sup> and allocating costs.<sup>67</sup> Business behavior is modified by the increased risk of loss due to the threat of joint and several liability in two important respects: it deters inadequate levels of care by the party in that

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59. RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965).

60. RESTATEMENT (SECOND) OF TORTS §§ 875, comment b, and 881, comment a (1965). Both sections refer to § 433A for the proper test. Section 433A, although somewhat equivocal, distinguishes harm to tangible property from other types of injury in comment i.

61. RESTATEMENT (SECOND) OF TORTS § 433A, comment i, illustration 14 (1965).

62. See, e.g., RESTATEMENT (SECOND) OF TORTS, § 881 illustrations 1-2; § 433, comment c (1965).

63. *Id.* at § 433A, comment h.

64. *Id.* at § 433A, comment b.

65. *Id.* at § 433A, comment d.

66. See generally, Comment, *The Case of the Disappearing Defendant: An Economic Analysis*, 132 U. PA. L. REV. 145 (1983) [hereinafter cited as Comment, *Disappearing Defendants*]; Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1980) [hereinafter cited as Sykes, *Vicarious Liability*].

67. See generally Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584 (1981).

party's own business operations,<sup>68</sup> and it encourages greater scrutiny of the actions of others with whom the party may be jointly and severally liable.<sup>69</sup>

For instance, the threat of CERCLA liability for substantial cleanup costs and for protracted litigation will heighten hazardous waste generators' concern over choice of transporters and disposal sites. Also, the threat of liability will likely lead to business arrangements between transporters, disposers, and generators involving contract terms concerning stricter standards of care and methods of quality control. Moreover, generators will be more likely to enhance their own in-house efforts to monitor the operations related to the disposition of hazardous wastes.<sup>70</sup>

To the extent that rational economic behavior is not followed, joint and several liability is regarded as an efficient way to spread costs.<sup>71</sup> Analogous reasoning is used in product liability actions, where the courts have imposed strict liability and apportioned causation.<sup>72</sup> Accordingly, from a policy prospective, joint and several liability is part of a growing trend in the law to spread costs of harm and to guide future conduct.

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68. Comment, *Disappearing Defendants*, *supra* note 66, at 166-67. This is particularly true when the standard is strict liability. *Id.* at 154-56, 159-60.

69. Sykes, *Vicarious Liability*, *supra* note 66, at 1231 n. 1, 1238-39. Factors such as the transporter's likelihood of insolvency or of exercising less than due care will influence the generator when selecting and enforcing contract terms. *Id.* at 1241-42, 1244.

70. An alternative source of pressure on handlers of hazardous waste is the commercial insurance industry. Insurance companies are requiring a formal "environmental risk assessment" before a pollution liability insurance policy will be issued. See Telego, *Corporate Risk Management Strategy Against Pollution Liability*, HAZARDOUS SUBSTANCE JOURNAL, February 1986, at 4. In the environmental context, a risk assessment involves analysis of several components of the care used in handling and disposing of hazardous substances, including the type of chemical substances, the sources of release, transport methods, and the ultimate fate of pollutants. The purpose is to survey the probability and severity of potential loss exposure through liability under various laws and regulations, such as CERCLA.

71. The policy reasons for this method of spreading costs are clear: as against an innocent, injured plaintiff, an industry which profited from the manufacture of a product that caused harm should pay for the damage.

72. For instance, in the litigation over liability for harm caused by Diethylstilbestrol ("DES") prescribed to pregnant women, plaintiffs have prevailed under a strict liability theory and the courts have applied novel theories of causation. See *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 611, 607 P.2d 924, 936 (1980), *cert. denied*, 449 U.S. 912 (1980). ("Market share" is basis for apportioning causation, because defendant manufacturers were "better able to bear the cost of injury . . . , and their conduct in marketing the product . . . played a significant role in creating the unavailability of proof.")

## B. Contribution and Release: Rights Between Joint Tortfeasors at Common Law

Although joint and several liability works efficiently to compensate plaintiffs and encourage responsible behavior, the rule imposes a severe hardship on those defendants against whom the plaintiff chooses to execute judgment. Traditionally there was no right to contribution among joint tortfeasors, and this rule remains in effect today in some jurisdictions.<sup>73</sup> However, most jurisdictions have modified the old rule.<sup>74</sup> For example, the Uniform Contribution Among Tortfeasors Act provides for a right to contribution among joint tortfeasors and has been substantially adopted in more than twenty states.<sup>75</sup>

However, even in those jurisdictions that allow for a more equitable imposition of liability, several fundamental issues remain unsettled. Jurisdictions vary as to when a right to contribution accrues, and how to measure the contribution amount due.<sup>76</sup>

For example, courts take divergent views of the impact on plaintiff's claim against non-settling defendants when plaintiff releases less than all of the defendants.<sup>77</sup> Moreover, jurisdictions differ on the effect of partial releases on the released tortfeasor's right to con-

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73. PROSSER & KEETON, *supra* note 45, at 336-41; HARPER & JAMES, *supra* note 409, at 715-16; 18 AM. JUR. 2D *Contribution* §§ 33-34 (1965, Supp. 1985).

74. See sources cited *supra* note 73. However, the states have adopted varying approaches to contribution. Prosser & Keeton note that some states limit contribution between defendants against whom a judgment has been rendered, whereas others leave the question completely to the courts. PROSSER AND KEETON, *supra* note 45, at 338. Similar differences are noted in 18 AM. JUR. 2D *Contribution* §§ 35-40 (1965, Supp. 1985). At the present time there are at least thirty-nine states which have adopted some form of contribution remedy for joint tortfeasors. See *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 86-88 (1981).

75. Uniform Contribution Among Tortfeasors Act § 1, 12 U.L.A. 63 (1975) (Supp. 1984 at 59) [hereinafter cited as UCATFA]. See also Annot. 34 A.L.R. 2d 1107 (1954).

76. PROSSER AND KEETON, *supra* note 45, at 338-41; HARPER AND JAMES, *supra* note 49, at 719-23; 18 AM. JUR. 2D *Contribution* §§ 44-47 (1965, Supp. 1985). See also Annot. 34 A.L.R. 3d 1378.

77. Prosser and Keeton note that although plaintiff's claim is preserved in most jurisdictions, there is no agreement on when and how to reduce plaintiff's claim against the non-settling defendants. PROSSER & KEETON, *supra* note 45 at 334-36. See also 18 AM. JUR. 2D *Contribution* §§ 69-70 (1985).

Given that settlement does affect plaintiff's total claim in some way, the question becomes how adjustment should be made. Various methods are possible. Plaintiff's claim may be reduced pro-rata (based on number of defendants), pro-tanto (based on volume of waste, or some other estimate of causation), or by a relative fault allocation (based on culpability). The courts follow all of these approaches. The Restatement expressly takes no position on this issue, see RESTATEMENT (SECOND) OF TORTS § 885 comment 3. Prosser & Keeton note that no method is completely satisfactory, see PROSSER & KEETON, *supra* note 45, at 340.

tribution,<sup>78</sup> and on the non-settling tortfeasor's right to contribution.<sup>79</sup> Furthermore, the courts adopt different approaches to determining the validity of releases and release terms.<sup>80</sup>

The significance of these different approaches can be seen in the following illustration. A variety of hazardous wastes found at a waste disposal site have leached into nearby streams and contaminated an underground aquifer. The plaintiff claims \$1,000,000 to recover cleanup costs. The wastes are attributable to 100 generators, but only ten are named as defendants. These defendants have arranged for the disposal of a total of 1000 barrels of waste at the site, but the degree of hazard in each defendant's waste is different. Specifically, Generator A is responsible for 500 barrels of moderately hazardous waste, Generator B is responsible for 55 barrels of extremely hazardous waste, and Generators C-J are responsible for 55 barrels each of very hazardous waste. The court, finding that defendants are jointly and severally liable, is willing to apportion the harm for purposes of contribution. These facts, and possible schemes for apportionment of liability are summarized in the table below:

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78. Most jurisdictions preserve the settling defendant's contribution claim, but only where the settlement payment exceeds defendant's "equitable share" of liability. The courts differ on the method of determining shares of liability, adopting the various methods of adjusting plaintiff's claim mentioned *supra* note 77. See PROSSER & KEETON, *supra* note 45, at 339-41; 18 AM. JUR. 2D, *Contribution* § 70-72 (1985).

79. In addition to the various methods of adjusting plaintiff's claims mentioned *supra* note 77; there is a fourth method. The court may credit the settling defendant's liability to plaintiff by the amount paid to plaintiff. The question is whether the defendant has "satisfied" his proportion of liability to plaintiff, in which case he would not be liable in contribution. See RESTATEMENT (SECOND) OF TORTS § 886A(2), stating the general rule.

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.

However, the Restatement takes no position on the proper method to apply. RESTATEMENT (SECOND) OF TORTS § 886A caveat. See also RESTATEMENT (SECOND) OF TORTS § 886A comments h, m (discussing apportionment methods). Additionally, the UCATFA has vacillated on this point, providing alternative approaches in the 1939 version, but adopting a pro-rata standard in the 1955 version. See Annot. 53 A.L.R. 3d 184, 197. In any case, statutory application of the UCATFA in this respect has not been uniform. See Annot. 24 A.L.R. 4th 553-54.

The relative fault method is applied primarily in comparative negligence jurisdictions, and a good survey of the law is found in Annot. 53 A.L.R. 3d 184.

80. See, e.g., hybrid release agreements discussed in Annot. 65 A.L.R. 3d 602, 606-608.

<u>Generators:</u>	<u>A</u>	<u>B</u>	<u>C-J (8)</u>
Number of Barrels	500	55	440 (55 each)
Degree of Hazard	Moderate	Extremely Hazardous	Very Hazardous
Apportionment:			
Pro-rata	\$100,000	\$100,000	\$800,000 (100,000 each)
Relative fault (ad hoc analysis)	250,000	500,000	250,000
Pro-tanto proportion of barrels	500,000	50,000	450,000 (approx.)

If judgment is entered against all defendants, and plaintiff collects the \$1,000,000 entirely from Generator A, contribution can be determined in one of several ways. In some jurisdictions, the award would be apportioned pro-rata, in which case Generator A would be able to recover \$900,000 from the other nine co-defendants.<sup>81</sup> In other jurisdictions, the court may allow Generator A to recover \$750,000, based upon a relative fault allocation<sup>82</sup> or \$500,000, based upon a pro-tanto allocation.<sup>83</sup> The lack of uniformity among jurisdictions translates into inconsistent application of liability under Superfund.

The issues become more complicated, and the importance of a uniform approach becomes more significant, when some of the parties settle with plaintiff prior to trial. Although the rules should serve to encourage settlement while retaining the equities of the contribution scheme, often they do not. In some states, for instance, plaintiff's release of less than all defendants extinguishes

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81. "Pro-rata" apportionment allocates an equal amount of liability to each defendant. The UCATFA (1955), *supra* note 75, adopts this approach.

82. "Relative fault" apportionment is applied primarily in comparative negligence jurisdictions. *See generally* Annot. 53 A.L.R. 3d 184, 191-97. The UCATFA (1955), *supra* note 72-75, rejected this approach.

On the facts of this hypothetical, fault is measured by factors in addition to volume, such as toxicity. Under a rough balancing approach, a reasonable observer might conclude that Generator A is responsible for twenty-five percent of the harm, or \$250,000.

83. "Pro-tanto" apportionment is a generic denomination for any method that allocates liability by some causal factor, such as relative toxicity, volume of materials, or any combination of such factors.

On the facts of this hypothetical, each generator is apportioned liability by volume of materials disposed. Because Generator A is responsible for one-half of the barrels found on the site, Generator A is responsible for one-half the dollar amount of the cleanup.

plaintiff's claims against all remaining defendants.<sup>84</sup> Other states preserve plaintiff's claim, but extinguish the non-settling tortfeasor's right to contribution from the settling tortfeasor.<sup>85</sup> Both of these approaches can lead to undesirable results. For example, if plaintiff's claim can be extinguished by partial release, plaintiff will not pursue settlement.<sup>86</sup> On the other hand, if the non-settling parties' contribution rights are denied, then a high-risk/large quantity generator defendant can avoid significant liability to both plaintiff and defendants by settling for a small portion of the total claim.<sup>87</sup>

In some jurisdictions, plaintiff's claim is merely reduced, and the non-settling tortfeasor's right to contribution is retained.<sup>88</sup> Although this scheme reduces a defendant's incentive to settle, it appears to be an appropriate balancing of settlement incentive and equity between liable defendants. Even so, other issues remain: what is the appropriate method of reducing plaintiff's claim, and how do you measure the settling tortfeasor's liability in contribution to other tortfeasors?<sup>89</sup>

When a defendant is released, plaintiff's claim can be debited in one of several ways, each with varying degrees of fairness. The court may debit plaintiff's claim by the settling party's pro-rata share of fault, pro-tanto share of fault, share of relative fault, or the amount paid by the settling party. In the illustration, each apportioning technique renders a different result.

If Generator A settles for \$90,000:

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84. PROSSER AND KEETON, *supra* note 45, at 334-35. This is the rule in very few jurisdictions. See also 66 AM. JUR. 2D *Release*, § 37.

85. PROSSER AND KEETON, *supra* note 45, at 338-39; 18 AM. JUR. 2D *Contribution* §§ 70-71. Again, this is a minority rule.

86. Plaintiffs will not seek settlement if far greater return may be obtained under the joint and several liability rule. See PROSSER & KEETON, *supra* note 45, at 332-33.

87. For example, if one defendant is 90% liable yet settles for only 30% of plaintiff's total claim, the settling defendant may escape payment of 67% of its liability.

88. See *supra* note 84.

89. See *supra* notes 76-79. It is well established that a defendant may not be compelled to pay more than his equitable share of liability. 18 AM. JUR. 2D *Contribution* §§ 9, 11; RESTATEMENT (SECOND) OF TORTS § 886A(2) (1965).

	<u>Plaintiff's Adjusted Total Claim<sup>90</sup></u>
Amount Paid	910,000
Pro-rata	900,000
Relative fault	750,000
Pro-tanto	500,000

The split in approaches reflects the tension between the goal of equitably distributing liability (met by use of pro-tanto or relative fault methods, in this example) and the goal of facilitating recovery by plaintiff (met by using the amount paid by settling defendants).

Similar tensions exist in determining the measurement of the non-settling tortfeasor's contribution rights against the settling parties. The differing approaches lead to varying results. When Generator A settles for \$90,000, plaintiff executes the remainder of the judgment against Generator B, and Generator B seeks contribution:

	<u>Amount Available from Generator A<sup>91</sup></u>
Amount paid and	
a. pro-rata apportionment	\$10,000
b. relative fault apportionment	\$160,000
c. pro-tanto apportionment	\$410,000

Settlement is somewhat discouraged by not shielding a settling defendant from further liability, yet unfair results may follow if other methods are used.<sup>92</sup>

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90. The calculations are as follows:

1. Amount paid:  $\$1,000,000 - 90,000 = \$910,000$
2. Pro-rata:  $(\$1,000,000 - 100,000 \text{ [see previous table]}) = \$900,000$
3. Relative fault:  $\$1,000,000 - 250,000 = \$750,000$
4. Pro-tanto:  $\$1,000,000 - 500,000 = \$500,000$

These calculations assume that the remaining 90 defendants are not joined as parties. If they were joined, the results would change accordingly.

91. Wherever the amount paid is less than the amount of liability apportioned by one of the various techniques, the other defendants should have access to the settling defendant through contribution. Here, the calculations are:

- a. pro-rata apportionment:  $\$100,000 \text{ [liability to plaintiff]} - \$90,000 \text{ [amount in settlement]} = \$10,000$
- b. relative fault:  $\$250,000 - \$90,000 = \$160,000$
- c. pro-tanto:  $\$500,000 - 90,000 = \$410,000$

92. For example, a settling defendant may be able to buy off large amounts of liability at bargain rates in certain circumstances. See *supra* note 87.

## III. THE EMERGING LAW OF LIABILITY UNDER CERCLA

The few court decisions addressing the liability issue to date have generally agreed that liability should be strict, and that CERCLA permits joint and several liability by following common law principles.<sup>93</sup> However, in their attempt to apply joint and several liability, district courts have adopted multiple variations of state court approaches. In order to remedy these inconsistencies in the law under CERCLA, courts should rely instead on two sources of authority: the Federal Water Pollution Control Act (FWPCA)<sup>94</sup> and the traditional and evolving principles of common law.

## A. Joint and Several Liability and FWPCA

FWPCA prohibits the discharge of oil or hazardous substances into navigable waters by owners or operators of vessels containing those substances.<sup>95</sup> Although the standard and scope of liability are not specified by FWPCA, the decisions to date agree that liability is strict, and joint and several.<sup>96</sup> The range of liable parties is limited, however, and does not include generators, the more popular "deep pocket" defendants named in CERCLA cases.

CERCLA's clearest expression of the standard and scope of liability is its mere reference to FWPCA in the statute's definition of "liability."<sup>97</sup> Because the liability provisions of the two statutes are similar, the courts have applied a strict liability standard to CERCLA cases.<sup>98</sup> However, the courts have refused to adopt the joint and several liability rule wholesale, for a number of reasons.<sup>99</sup>

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93. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983); *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983); *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249 (S.D. Ill. 1984); *United States v. NEPACCO*, 579 F. Supp. 823 (W.D. Mo. 1984); *United States v. Conservation Chemical Co.*, 20 Env't Rep. Cas. (BNA) 1427 (W.D. Mo. 1984); *United States v. South Carolina Recycling and Disposal, Inc.*, 20 Env't Rep. Cas. (BNA) 1753 (D. SC. 1984); *United States v. Stringfellow*, 20 Env't Rep. Cas. (BNA) 1905 (C.D. Cal. 1984); *United States v. Argent Corp.*, 8 CHEM. & RAD. W. LIT. REP. 103 (D. N. Mex. May 4, 1984).

94. 33 U.S.C. § 1321 (1983).

95. 33 U.S.C. §§ 1311, 1321 (1983).

96. *See, e.g.*, *In re Berkley Curtis Bay Co.*, 557 F. Supp. 335, 338 (S.D.N.Y. 1983); *United States v. M/V Big Sam*, 681 F.2d 432, 439, 443 (5th Cir. 1982); *United States v. Hollywood Marine, Inc.*, 519 F. Supp. 688, 692 (S.D. Tex. 1981); *United States v. Bear Marine Services*, 509 F. Supp. 710 (E.D. La. 1980).

97. 42 U.S.C. § 9601(32) (1983); *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1259 (S.D. Ill. 1984).

98. *See, e.g.*, *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809-10 (S.D. Ohio 1983).

99. *Id.* The Court stated: "While the complementary policies and comparable language of FWPCA and CERCLA are persuasive points, a blanket adoption of the joint

First, the absence of liability for generators under FWPCA makes those cases factually distinct to a large extent.<sup>100</sup> Second, liability under CERCLA is more extensive, and the courts have hesitated to adopt an absolute rule when Congress itself stopped short of mandating a specific joint and several liability rule.<sup>101</sup>

The courts do uniformly rely on FWPCA as a source of *power* to impose joint and several liability, and it seems clear that this was the intent of Congress. Beyond that, FWPCA does little to answer the many open questions created by CERCLA's liability provisions.<sup>102</sup>

#### B. Joint and Several Liability, the Common Law, and the CERCLA Cases

In the handful of cases litigated under CERCLA, the courts have allowed joint and several liability in cost recovery actions.<sup>103</sup> They have, however, adopted varying approaches to reach that result. These approaches reflect different interpretations of statutory intent and conflicting common law authority. The lack of an established line of cases has serious implications for the development of the law under CERCLA.

The unifying theme of these cases—that CERCLA permits joint and several liability—is based on the courts' agreement that the pollution and nuisance cases which allow joint and several liability provide an appropriate analogy to hazardous waste site litigation.<sup>104</sup> The cases also show overwhelming support for the Restatement approach to determining whether joint and several liability should be imposed.<sup>105</sup> If defendants cannot prove that the harm is divisible,

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and several liability standard of § 1321 [FWPCA] would be inconsistent with the legislative history of CERCLA." 572 F. Supp. at 810.

100. See *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1254 (S.D. Ill. 1984).

101. See, e.g., *United States v. Stringfellow*, 20 Env't Rep. Cas. (BNA) 1905, 1910 (C.D. Cal. 1984).

102. Few FWPCA cases mention a right to contribution in the context of joint and several liability under FWPCA, see *In re Berkley Curtis Bay Co.*, 557 F. Supp. 335, 338 (S.D. N.Y. 1983) and *United States v. Bear Marine Services*, 509 F. Supp. 710, 716 (E.D. La. 1980).

103. A separate but related issue is liability under § 106 actions. However, that issue is beyond the scope of this article.

104. There are a host of such cases applying joint and several liability in the pollution context, see, e.g., *supra* note 56. There are equally many contrary cases, and this contrast reflects the conflict in the common law over the "indivisible harm" test.

105. See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 811 (S.D. Ohio 1983). The "practical divisibility" test stands as a useful and necessary test in these complex factual circumstances. One counter-argument is that prior settlement with

the court accepts the plaintiff's allegation of indivisible harm and recognizes joint and several liability. The district courts generally believe that this approach eases the burden on plaintiff and advances CERCLA's legislative objectives.

Beyond this basic agreement, however, the courts are divided. One line of cases applies the earlier, traditional rule: plaintiff may recover all or any part of the judgment against any defendant held jointly or severally liable.<sup>106</sup> This rule may be grossly unfair to a defendant who has only contributed a small amount of the harm. However, several rationales support this approach. First, the tort rule itself was developed primarily to shift the burdens to those most likely to be able to bear the cost of compensation for the harm.<sup>107</sup> CERCLA adopted joint and several liability precisely for this reason, indicating the special legislative interest in the area of hazardous waste disposal. Secondly, the severity of the liability and the fairness problem is mitigated by defendant's ability to bring an action for contribution.<sup>108</sup>

The leading case applying this approach is *U.S. v. Chem-Dyne Corp.*<sup>109</sup> The court held, on summary judgment, that defendants would be jointly and severally liable unless they could apportion their harm in some meaningful way.<sup>110</sup> To justify its decision, the court made some mention of an action for contribution,<sup>111</sup> but gave more emphasis to the legislative objectives of CERCLA and the need to favor plaintiffs on the divisibility of harm issue.<sup>112</sup> This imbalance in the court's decision is troubling. The court's mere pass-

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some defendants indicates plaintiff's ability to allocate the liability. One court dismissed such reasoning, however, and found that the harm was indivisible as a matter of law. *See United States v. South Carolina Recycling and Disposal, Inc.*, 20 Env't Rep. Cas. (BNA) 1753, 1759 (D. S.C. 1984).

106. *See United States v. Wade*, 577 F. Supp. 1326, 1337-39 (E.D. Pa. 1983); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807-11 (S.D. Ohio 1983); *United States v. South Carolina Recycling and Disposal, Inc.*, 20 Env't Rep. Cas. (BNA) 1753, 1758-60 (D. S.C. 1984); *United States v. Conservation Chemical Co.*, 20 Env't Rep. Cas. (BNA) 1427, 1430-31 (W.D. Mo. 1984); *United States v. NEPACCO*, 579 F. Supp. 823 (W.D. Mo. 1984).

107. *See supra* note 47 and text accompanying.

108. Several CERCLA cases seem to rely on this justification when deciding to apply the common law rule. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983); *United States v. South Carolina Recycling and Disposal, Inc.*, 20 Env't Rep. Cas. (BNA) 1753, 1759-60, note 8 (D. S.C. 1984). However, even after passage of the Amendments, *supra* note 5, the question remains as to how the federal courts will apply this right.

109. 572 F. Supp. 802 (S.D. Ohio 1983).

110. *Id.* at 811.

111. *Id.* at 807, 810.

112. *Id.* at 805-806, 811.

ing reference to defendant's right to contribution, a mechanism which is critical to an equitable application of tort principles to CERCLA, is an incomplete implementation of "traditional and evolving common law." This problem is alleviated somewhat by the statutory provision for contribution in the recent CERCLA Amendments.<sup>113</sup> However, the underlying concern remains: courts developing federal law on this issue must be cognizant of the need for an equitable application of liability under CERCLA.

A second line of cases construing CERCLA follows no distinct rule of tort law, but is, instead, a creation of statutory interpretation by Chief Judge Rubin in *U.S. v. A & F Materials Co., Inc.*<sup>114</sup> In *A & F Materials*, Judge Rubin views joint and several liability under the Restatement principles as a mere "starting point."<sup>115</sup> After joint and several liability is determined, but before plaintiff can execute judgment, the court may apportion damages under the Gore Amendment criteria although the Gore Amendment was deleted from the final version of CERCLA.<sup>116</sup> Judge Rubin's analysis in *A & F Materials* relies heavily on the deletion of a mandatory joint and several liability rule in Congress' final compromise version of CERCLA. From this, he infers a statutory intent to avoid unfair application of Section 107, particularly with regard to small quantity generators.<sup>117</sup> This approach does have certain equitable appeal, but a fair result can also be reached through a right of contribution among defendants once plaintiff has obtained a judgment.<sup>118</sup> Furthermore, Judge Rubin's reasoning is a strained reading of CERCLA, because it requires the use of the Gore Amendment factors, which were deleted from the final version of CERCLA. These two deleted provisions—mandatory joint and

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113. *Supra* note 19.

114. 578 F. Supp. 1249 (S.D. Ill. 1984).

115. *Id.* at 1256.

116. *Id.* These Gore Amendment Criteria are:

- (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 the hazardous waste involved;
- (iii) the degree of toxicity of the hazardous waste involved;
- (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (vi) the degree of cooperation by the parties with federal, state, or local officials to prevent any harm to the public health or the environment.

117. *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984).

118. *See infra* Section IV.

several liability and apportionment using the Gore Amendment criteria—are thereby transmuted into an inseparable set of principles that operate with the statute's liability provision. Furthermore, the *A & F Materials* analysis ignores the original political trade-off, the deletion of a mandatory scheme in exchange for shifting to defendants the burden to show divisibility of harm under the common law test. The effect of Judge Rubin's approach is to give defendants two chances to apportion *before* plaintiff may execute judgment, a result which seems contrary to the purpose of the statutes.<sup>119</sup>

Even if we concede that it is within the statutory precepts to use the Gore Amendment factors to apportion damages before plaintiff executes judgment, the factors themselves have significant weaknesses. For instance, one factor, the ability of a party to distinguish its contribution to the harm, repeats the Restatement test for determining joint and several liability.<sup>120</sup> A second factor, the degree of culpability of a defendant, conflicts with CERCLA's strict liability scheme.<sup>121</sup>

The *Chem-Dyne* line of cases addresses the fairness issue more appropriately. Those cases preserve plaintiff's right to obtain a judgment under joint and several liability and establish a clear federal right to contribution.<sup>122</sup> As a part of the decision to impose a traditional joint and several liability rule, *Chem-Dyne* itself gave recognition to an implied right to contribution in CERCLA cost recovery actions.<sup>123</sup> Now that Congress has resolved any doubt that CERCLA's liability allocation scheme includes a right of contribution among responsible parties, the *Chem-Dyne* view should prevail. By applying this approach, the legislative aim remains intact, while fairness in apportioning liability among generator defendants is preserved.

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119. The Amendments, *supra* note 5, support this view. A similar set of "factors" is established in section 122(e)(3)(A), for use by the Environmental Protection Agency in settlement negotiations. However, Congress clearly precludes the use of these factors in resolving any question of joint and several liability. (§ 122(e)(3)(C)).

120. *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984).

121. Relative fault may be a valid apportionment method for the purposes of contribution, but it has no place in determining liability to plaintiff. *See supra* note 57.

122. *See, e.g., Wehner v. Syntex Agri-Business Corp.*, 22 Env't Rep. Cas. (BNA) 1732 (E.D. Mo. 1985); *Colorado v. ASARCO, Inc.*, 22 Env't Rep. Cas. 1926 (D. Colo. 1985); *Mola Development Corp. v. United States*, 22 Env't Rep. Cas. (BNA) 1443 (C.D. Cal. 1985).

123. 572 F. Supp. 802, 810.

### C. Balancing the Equities Through a Federal Right to Contribution

The Supreme Court has recently established rules regarding federal statutory creation of a right to contribution.<sup>124</sup> In *Northwest Airlines* and *Texas Industries*, the Court stated that a right to contribution may arise under a federal statute by "affirmative creation" or by federal common law.<sup>125</sup> To determine whether a right of action for contribution has been affirmatively created either expressly or by clear implication, several factors must be considered: the statutory language, the legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede existing state remedies.<sup>126</sup> On the other hand, a right to contribution may be fashioned from the federal common law if a federal rule is necessary to protect uniquely federal interests or if Congress has given the courts the power to develop substantive law.<sup>127</sup>

Congress' recent CERCLA amendments<sup>128</sup> clearly establish a right to contribution among responsible parties under CERCLA section 113(f), which provides:

(f) CONTRIBUTION.—

(1) CONTRIBUTION—Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal Law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.

However, Congress' recent enactment still leaves open the question of how to apply the right to contribution, although clearly the Congressional directive under CERCLA is for adoption of uniform

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124. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 101 S. Ct. 1572 (1981); *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 101 S. Ct. 2061 (1981).

125. 451 U.S. at 90, 101 S. Ct. at 1580; 451 U.S. at 638-44, 101 S. Ct. at 2066-2068.

126. *Id.*

127. *Id.*

128. *Supra* note 5.

and consistent federal rules of liability.<sup>129</sup> The lack of specific guidance by CERCLA has previously led to results which belie the legislative purpose, although efforts at seeking fair results were worthy ones.

Therefore, once the power to recognize an action in contribution under CERCLA is established, the courts must face the more difficult task of deciding the substance of the apportionment scheme in a well reasoned manner. The absence of any uniform and consistent set of rules to date necessitates a revisitation to this area of federal law, and adoption of a distinct federal rule. Such a rule should work harmoniously with the rule adopted as to joint and several liability. Further, the rule should advance the purposes of CERCLA, which include speedy remedial action at hazardous waste sites, recovery of cleanup costs, and flexibility in imposing liability on responsible parties. Finally, the nature of the right to contribution should encourage settlement and generally maintain equities when plaintiff releases one or more responsible parties. The following Section proposes a rule designed to accomplish these results.

#### IV. JOINT AND SEVERAL LIABILITY AMONG GENERATORS UNDER CERCLA: A PROPOSED UNIFORM AND CONSISTENT APPROACH TO ALLOCATION

##### A. A Uniform Rule of Liability

There is a general consensus that CERCLA permits joint and several liability. This is highlighted by the recent CERCLA amendments, which have given silent approval to the overall judicial interpretation in favor of joint and several liability under CERCLA as originally enacted.<sup>130</sup> Accordingly, the focus turns to the threshold tests for whether multiple generators are joint tortfeasors at a particular disposal site. The Restatement (Second) of Torts provides a good foundation for the "indivisible harm" rule proposed in this article. If each defendant's contribution to the total harm cannot be determined, then the harm is "indivisible" and defendants are jointly and severally liable.

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129. See, e.g., *United States v. Wade*, 577 F. Supp. 1326, 1337 (E.D. Pa. 1983); *Generator Liability*, *supra* note 3 at 1275, n.225.

130. The courts' development of federal common law on the issues related to joint and several liability have been implicitly endorsed by the CERCLA Amendments, *supra* note 5. Although the CERCLA Amendments do not specifically direct the courts to develop federal common law in the area of joint and several liability, they do guide the courts to apply federal common law in actions for contributions (§ 113(f)(1)) and therefore imply that joint and several liability exists under CERCLA.

Under this proposed rule, hazardous substances contaminating a site are presumed to cause indivisible harm, and the burden is on defendants to show that the harm is not indivisible.<sup>131</sup> Furthermore this article endorses the "practical divisibility" test for determining whether harm is indivisible. Division of the harm should be more than theoretical. The mere fact that volumetric contribution is known or that some of the parties have settled with plaintiff should not prove divisibility.<sup>132</sup> To determine plaintiff's claim based on these and related factors would effectively read joint and several liability out of the statute. However, once plaintiff's claim has been satisfied, these indicators may be useful for apportioning damages.<sup>133</sup> Additionally, the courts should reserve the right to exercise equitable powers in this context by refusing to divide the liability where a large number of insolvent defendants threaten plaintiff's recovery.<sup>134</sup> In sum, in developing federal common law in this area, the courts should settle the conflicting rules in the Restatement and among the states by favoring the rule of indivisible harm under the "practical divisibility" test, particularly where there is harm to tangible property by a variety of harmful agents found at the hazardous waste site.<sup>135</sup> Applying this approach will generally favor a

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131. RESTATEMENT (SECOND) OF TORTS § 433A, B; *See, e.g.*, *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 676-77 (D. Idaho 1986).

132. The CERCLA Amendments, *supra* note 5, have endorsed this position by allowing EPA to prepare a nonbinding preliminary allocation of responsibility at the early stages of investigation of a Superfund site (§ 1221(e)(3)) while prohibiting the use of such preliminary allocation as evidence in any proceeding on the issue of apportionment or divisibility of harm.

133. The recent CERCLA Amendments, *supra* note 5, directly invoke the equitable powers of the court in deciding issues of apportionment. (§ 113(f)(1)).

134. A recent decision by the Supreme Court has enhanced the ability of defendants to rely upon the Bankruptcy Code to escape liability under CERCLA, *Ohio v. Kovacs*, 469 U.S. —, 105 S. Ct. 705 (1985) although the effect of that opinion on governmental claims for environmental harm is an unsettled area. *See Midlantic National Bank v. New Jersey Department of Environmental Protection*, 54 U.S.L.W. 4138 (January 27, 1986); and *Penn Terra Limited v. Pennsylvania Department of Environmental Resources*, 733 F.2d 267 (3rd. Cir. 1984); *See also United States v. F.E. Gregory and Sons, Inc.*, (Civil No. 85-962, W.D. Pa. February 27, 1986); *United States v. Robinson*, 46 Bankr. Rptr. 136 (U.S. Bankr. Ct., M.D. Fla. No. 84-44-BK-J-GP, February 4, 1985), *reversed*, Case No. 85-331-Civ-J-14 (M.D. Fla., August 16, 1986). The "rough apportionment" standard in the Restatement, Section 433A, comment b, should not be applied in CERCLA cases because it effectively eliminates the joint and several liability rule; also, the Restatement provides ample authority for a practical divisibility test in Sections 875, comment b, and 881, comment a, as well as in comment d of Section 433A. *See United States v. Ottoti & Goss, Inc.*, 630 F. Supp. 1361, 1395-96 (D.N.H. 1985).

135. The recent CERCLA Amendments, *supra* note 5, by specifically including right to contribution and requiring courts to apply federal common law under equitable prin-

determination of joint and several liability. A rule more protective of defendants, such as theoretical divisibility, is only necessary where no right to contribution exists.

#### B. Furthering the Legislative Purpose of CERCLA

This approach best serves CERCLA's legislative purpose for several reasons. First, it avoids the awkward method of narrowing the scope of circumstances in which joint and several liability is found, to compensate for possible draconian liability. It sustains the broad liability provisions intended by the legislature, while adjusting defendants' obligations once plaintiff's claim is satisfied. To that extent, it follows the majority of jurisdictions confronting joint and several liability in indivisible harm cases, where the anomalous rule denying contribution was only short-lived. Those jurisdictions now strongly favor defendant's right to contribution, and equal support can be found for the less restrictive Restatement approach to joint and several liability.

Second, the recent CERCLA amendments make it clear that absent grounds for certain divisibility of harm, apportionment should only occur after plaintiff's claims have been satisfied.<sup>136</sup> The Gore Amendment factors,<sup>137</sup> and any other relevant criteria, should serve as guidance only in a post-judgment apportionment of damages scheme. Judicial apportionment of damages prior to plaintiff's full satisfaction of judgment runs counter to the legislative goal of quick recovery of cleanup problems. Such a misguided approach, as used in the *A & F Materials* line of cases,<sup>138</sup> has been adopted out of frustration with the unbalanced scheme used in *Chem-Dyne* and others,<sup>139</sup> which is especially harsh on small quantity generators. The courts should apply the approach proposed here because it protects the rights of these defendants, as sought in *A & F Materials*, without sacrificing the efficacy of the statute, as preserved in *Chem-Dyne*.

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ciples (§ 113(f)(1)) manifests Congressional intent to follow the general common law approach in this area of the law.

136. Section 122(e)(3) in the recent CERCLA Amendments, *supra* note 5, prohibits the use of EPA's preliminary allocation of responsibility as an apportionment or other statement on the divisibility of harm or causation.

137. *Supra* note 116.

138. *Supra* note 114-21.

139. *Supra* notes 109-12. The *Chem-Dyne* line of cases imposes joint and several liability without explicitly requiring a right to contribution.

### C. Contribution and Related Allocation Issues Under Federal Common Law

CERCLA vests the federal courts with the power to recognize a federal action for contribution governed by federal common law.<sup>140</sup> Because contribution is based on equitable principles, immutable rules of application are inappropriate. However, a set of consistent and uniform rules should apply in a typical CERCLA cost recovery action.

First, the right to contribution should attach when plaintiff brings an action against the defendant.<sup>141</sup> This allows the courts to permit impleader under the Federal Rules of Civil Procedure, Rule 14. The new CERCLA amendments clearly intend this result: "any person may seek contribution from any other person who is liable *or potentially liable* under [sections 106-107]." (Emphasis added).<sup>142</sup>

It is vitally important that defendants be allowed to implead other potentially responsible parties. If impleader is allowed, a defendant will not be subject to delay in recovering amounts overpaid to plaintiff while the separate contribution actions proceed, and duplicative litigation on the issues of causation and liability will be avoided. Additionally, a defendant will not have to rely on execution of a judgment by plaintiff against him before a contribution action can be initiated. This encourages settlement by the parties, which also leads to more cleanups and faster recovery of cleanup costs.

Second, the courts should be sensitive to the proportion of harm caused by individual defendants in measuring contribution amounts. Post-recovery methods of apportionment should not ex-

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140. Amendments, *supra* note 5, at § 113(f)(1); *See supra* notes 124-29 and accompanying text.

141. Professor Moore generally endorses this view. 3 MOORE'S FEDERAL PRACTICE ¶ 14.03[3]. Several cases decided before the recent CERCLA amendments made this an unsettled question. *See Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 608 F. Supp. 1272 (N.D. Cal. 1985); *United States v. New Castle County*, 24 Env't Rep. Cas. (BNA) 1705 (D. Del. July 17, 1986). In *Levin Metals*, the court dismissed a third-party claim under section 107(a)(4)(B) because the third-party plaintiff did not allege that it had incurred response costs. In *New Castle*, the court rejected the same argument by the third-party defendants, because the third party claim was in the nature of an action for contribution, not a claim under section 107(a)(4)(B). The distinction made in *New Castle* between a claim under section 107(a)(4)(B) and one for contribution is puzzling, and may be due to the lack of any reference to "contribution" in section 107(a)(4)(B). This problem is now corrected by new section 113(f)(1), and *New Castle's* allowance of a contribution action regardless of the third-party plaintiff's actual incurring of response costs is the rule which should be followed in future CERCLA litigation of the issue.

142. Amendments, *supra* note 5, at § 113(f)(1).

clude established qualitative techniques of measurement such as relative fault or relative causation. Accordingly, pro-rata and other strictly quantitative techniques for apportionment which offend the equitable approach of contribution should be avoided, especially in the typical hazardous waste site case where a multitude of causal factors are at play.<sup>143</sup> However, if qualitative criteria such as relative fault or causation, or degree of toxicity, are indeterminable, an alternate calculation using quantitative and qualitative factors may be desirable. The Gore Amendment provides a number of useful factors in such a circumstance.<sup>144</sup> A similar set of criteria may be gleaned from the amended version of CERCLA section 122(3), and any guidelines developed by EPA thereunder.<sup>145</sup>

Third, courts should be sensitive to the impact of allocation on settlement incentives. Under the new CERCLA amendments, plaintiff's claim will be reduced by the amount of the settlement,<sup>146</sup> and a settling defendant's liability in contribution to non-settling defendants will be extinguished.<sup>147</sup> The settling of defendant's right to contribution against other defendants should be preserved; however, this should be allowed only to the extent that a defendant pays more than his apportioned share of liability. This rule simply promotes equity among the defendants. However, it raises a significant procedural issue: When should apportionment occur?

The simplest solution is possible only if the courts allow impleader of all the parties which the named defendants reasonably believe will be liable in a contribution action. Then the trial should

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143. *But see* UCATFA, *supra* note 75, at § 1(b), commissioner's comment b, suggesting a simple pro-rata approach because it found that a relative fault approach had little relevance in a contribution action. However, Congress has directed otherwise in Section 113(f)(1) of the CERCLA Amendments, *supra* note 5.

144. In one CERCLA case, a Special Master determined that the use of the Gore Amendment criteria, *supra* note 116, would unnecessarily complicate and prolong the apportionment phase of the trial, and he recommended that only evidence on volume and toxicity be allowed. *See* 9 CHEM. & RAD. W. LIT. REP. at 81 (November 1984) (noting broad equitable authority of the court in a contribution action). *See also* United States v. Ottati & Goss, Inc., 24 Env't Rep. Cas. (BNA) 1152 (D.N.H. March 3, 1986).

145. "[T]he President may include such factors . . . as: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, inequities and aggravating factors." Amendments, *supra* note 5, at § 122(3)(A).

146. "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." Amendments, *supra* note 5, at § 113(f)(2). *See also* § 122(h)(4).

147. *Id.*

be bifurcated, with plaintiff's case determined in a liability phase first, after which plaintiff may collect judgment under the joint and several rule. The second phase should involve all claims for contribution, apportionment and damages.<sup>148</sup> There is a possibility that some parties who will later seek contribution will not implead contribution-defendants. But the avoidance of the added expense of separate litigation is a strong incentive to participate in the apportionment phase.

However, courts face a more difficult situation if all or some of the parties settle prior to trial, then bring a contribution action before the resolution of plaintiff's case. In that case, the court should postpone a determination of apportionment of liability, and hence, contribution liability, until a convenient time for all interested parties. A convenient time would most likely be shortly after the liability phase, although time may be needed for insurers and trustees/debtors-in-possession to prepare for trial. This is a question of case management and, as in all complex litigation, the circumstances of each case should govern the approach taken.

Fourth, courts should preserve the intent of CERCLA, as recently amended, in deciding issues which are likely to arise under settlement agreements, and which will likely affect the final allocation of liability. CERCLA now makes it clear that plaintiff's claim may be reduced or credited to the extent of the amount paid by the settling defendants.<sup>149</sup> However, there are several possible excep-

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148. This approach has been adopted in several CERCLA cases. See, e.g., *United States v. Wade*, 20 Env't Rep. Cas. (BNA) 1853 (1984); *Conservation Chemical, 9 CHEM. & RAD. W. LIT. REP.* at 81 (December 1984). A good model to follow, including establishment of a defendant's "steering committee," is found in *The Enviro-Chem Settlement: Superfund Problem Solving*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,402 (December 1983).

An interesting approach suggested in one case is the use of alternative dispute resolution. See *Towards a Cost-Effective and Just Resolution of Potential Third-Party Claims Under Superfund—The Laskin Proposal*, 9 CHEM. & RAD. W. LIT. REP. at 640 (April 1985) (litigants' effort to reduce the high cost of certain litigation, in *United States v. Laskin*, No. C84-2035y (N.D. Ohio)).

149. "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in this settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." Amendments, *supra* note 5, at § 113(f)(2) (emphasis added). As discussed *infra*, although the recent statutory amendments permit EPA to release certain parties from CERCLA liability, such releases may not necessarily be absolute, and their effective date may not occur until severally years after a settlement agreement is reached with EPA. Therefore the statutory language quoted here does not create an absolute rule on release, but only operates to the extent the defendant has obtained a full and final release.

tions to this general rule. First, a settlement agreement need not grant the settling defendant an absolute release.<sup>150</sup> The CERCLA Amendments give EPA discretion in deciding when and how to include a covenant not to sue in a settlement agreement.<sup>151</sup> Such releases are only allowed under certain circumstances,<sup>152</sup> and must normally contain a "reopener" clause, allowing additional liability if "such liability arises out of conditions which are unknown at the time" that the settlement occurred.<sup>153</sup> Additionally, the effect of

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150. "Whenever the President has entered into an agreement under this section, the liability to the United States under this Act of each party to the agreement, including any future liability to the United States, arising from the release or threatened release that is the subject of the agreement shall be limited as provided in the agreement pursuant to a covenant not to sue in accordance with Subsection (f)." Amendments, *supra* note 5, at § 122(c)(1) (emphasis added).

151. "The president may, at his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this Act, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action whether that action is on-site or off-site. . . ." Amendments, *supra* note 5, at § 122(f)(1) (emphasis added). See also § 122(h)(4).

With respect to the possibility that a settling defendant may later be required to pay additional response costs under conditions of the release agreement, the statute implies that any initial allocation in a contribution action would have to be revised accordingly. See § 122(c)(1) ("A covenant not to sue may provide that future liability to the United States of a settling potentially responsible party under the agreement may be limited to the same proportion as that established in the original settlement agreement. . . . In determining the extent to which the liability of parties to an agreement shall be limited pursuant to a covenant not to sue, the President shall be guided by the principle that a more complete covenant not to sue shall be provided for a more permanent remedy undertaken by such parties.") and § 122(c)(2) ("If an agreement has been entered into under this section, the President may take any action under section 106 against any person who is not a party to the agreement, once the period for submitting a proposal under Section (e)(2)(B) has expired. Nothing in this section shall be construed to affect either of the following: (A) the liability of any person under Section 106 or 107 with respect to any costs or damages which are not included in the agreement. . . ." (emphasis added)).

152. The conditions are:

- (A) The covenant not to sue is in the public interest.
- (B) The covenant not to sue would expedite response action consistent with the National Contingency Plan under Section 105 of this Act.
- (C) The person is in full compliance with a consent decree under 106 (including a consent decree entered into in accordance with this section) for response to the release or threatened release concerned.
- (D) The response action has been approved by the President.

Amendments, *supra* note 5, at § 122(f)(1).

Importantly, the statute also requires that EPA give an overriding consideration to the permanence of the remedy to be undertaken by the settling parties when determining when and how to grant a covenant not to sue in a settlement agreement. See Amendments, *supra* note 5, at § 122(c)(1).

153. "[A] covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant that allows the President to sue such person concerning future liability resulting from the release or threatened release that is

the release of liability is postponed under certain circumstances identified in the new CERCLA Amendments.<sup>154</sup> Finally, the settle-

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the subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies under paragraph (3) that remedial action has been completed at the facility concerned." Amendments, *supra* note 5, at § 122(f)(6)(A).

Despite its importance to allocation of liability, this reopener clause has little utility in the view of many practitioners, unless it is given an expansive reading consistent with the general intent of CERCLA. First, there is the perennial problem at waste sites of "how clean is clean." See *Superfund: Litigation and Cleanup*, (BNA Special Report), 16 ENV'T. REP. (BNA) No. 19, at 50-51 (June 26, 1985). The CERCLA amendments attempt to resolve this issue through section 121, "Cleanup Standards." However, that section rests the final analysis and determination of the chosen degree of cleanup with EPA, even if the state where the waste site is situated would impose stricter cleanup standards. A state may challenge such a determination under Section 122(f)(2)(B), but based upon the statute alone there are several hurdles a state must overcome, such as demonstrating that EPA's finding was not supported by substantial evidence and by making this showing on the administrative record gathered by EPA. Courts should consider these limitations in light of the public interest purpose of CERCLA when deciding state challenges to EPA decisions on this issue. Of course, the most productive solution would result if EPA applied state cleanup standards. This is not antithetical to a federal formula for cost recovery because in many areas of federal environmental protection more stringent state standards are allowed. See, e.g., Section 3009 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6929.

A second problem with the reopener clause involves a second question: "how permanent is permanent?" See *Current Developments*, 17 ENV'T REP. (BNA) at 1167 (November 14, 1986). It is difficult to conclude, at least where there has been proven groundwater pollution at a hazardous waste site, that any given solution will be a permanent solution, until a period of time has elapsed and extensive groundwater or other monitoring has taken place. Therefore, from the public's perspective, the utility of an absolute covenant not to sue is questionable. A potentially responsible party's insistence upon such a clause in a Superfund settlement is therefore worthy of close scrutiny by all interested parties. Moreover, if such a clause is used, the reopener concept embodied in the CERCLA Amendments, *supra* note 5, should also be given careful attention in the preparation of the settlement and in interpretation of these agreements by the courts. Under Amendments, *supra* note 5, section 122(f)(6), the reopener only applies to conditions which are "unknown" at the time the remedial action has been certified complete. Therefore, parties working on settlement agreements with these reopener provisions must give careful attention to the description of the facts concerning conditions at the site so that it is clear which conditions are known at the time of the agreement, and at the time of the certification by EPA that the remedial action is complete. Courts will undoubtedly likewise focus on this issue, and in so doing should consider the legislative goal of permanent cleanups.

154. Amendments, *supra* note 5, at § 122(f)(3) ("A covenant not to sue concerning future liability to the United States shall not take effect until the President certifies that remedial action has been completed in accordance with the requirements of this Act at the facility that is the subject of such covenant.") and § 122(f)(5) ("Any covenant not to sue under this section shall be subject to the satisfactory performance by such party of its obligations under the agreement concerned."). See also § 121(c) ("If the President selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the President shall review such remedial action no less often than each five years after the initiation of such remedial action to assure that

ment is subject to later invalidation by a court.<sup>155</sup>

Therefore, there are a number of issues involving interpretation of EPA's settlement agreements which will affect a court's decision regarding allocation of liability in a contribution action, and these should be considered by the courts during the apportionment phase.

#### CONCLUSION

CERCLA represents a major attack on the problem of hazardous waste disposal. The statutory scheme mandates a broad concept of liability; however, Congress failed to specify the allocation of liability among defendants. Because the common law provides a variety of allocation schemes, courts must be careful to follow a uniform approach consistent with general court principles in the pollution and hazardous waste context. The dual goals of CERCLA can be achieved only by application of a broad joint and several liability test, accompanied by development of uniform and thoughtful rules governing the federal right of contribution. Such an approach will allow recovery of cleanup costs and promote responsible disposal policies without treating the parties inequitably.

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human health and the environment are being protected by the remedial action being implemented. . . .").

155. Amendments, *supra* note 5, at § 122(c)(3) ("Nothing in this section shall limit or otherwise affect the authority of any court to review in the consent decree process under Subsection (d) any covenant not to sue contained in an agreement under this section. . . ."); § 122(m) ("In the case of consent decrees and other settlements under this section (including covenants not to sue), no provision of this Act shall be construed to preclude or otherwise affect the applicability of general principles of law regarding the *setting aside or modification of consent decrees or other settlements.*") (emphasis added). See, e.g., *In re Waverly Accident*, 502 F. Supp. 1 (M.D. Tenn. 1979).

Additionally, the consent decree is subject to a structured method of public participation and comment under the new CERCLA Amendments. See Amendments, *supra* note 5, at § 122(d)-(i).

