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WHAT WILL HAPPEN TO ANYWHERE, U.S.A.?: THE NEED TO BREAK THE LOG JAM AND ACHIEVE REAL REFORM OF SUPERFUND JOINT AND SEVERAL LIABILITY FOR THE TWENTY-FIRST CENTURY

*For agony and spoil
Of nations beat to dust,
For poisoned air and tortured soil
And cold, commanded lust,
And every secret woe
The shuddering waters saw—
Willed and fulfilled by high and low—
Let them relearn the Law¹*

I. INTRODUCTION

Imagine living in your home, going about your daily business, raising your family, and contending with the various challenges of life, only to have your seemingly tranquil world devastated by the discovery that your household water is polluted, or that the soil beneath your home is contaminated by hazardous waste which was buried many years ago.² Such an unwelcome discovery could occur anywhere. Often, the pernicious results of hazardous waste disposals do not manifest themselves until years later.³ Such results are demonstrated in the

¹ RUDYARD KIPLING, *Justice* (1918), in THE OXFORD DICTIONARY OF QUOTATIONS 300 (3d ed. 1979).

² This general proposition was written by the author and is meant to illustrate how the release of hazardous waste knows no boundaries.

³ See DANIEL MAZMANIAN & DAVID MORELL, BEYOND SUPERFAILURE: AMERICA'S TOXICS POLICY FOR THE 1990S 27 (1992) (stating that "[T]he effects of these chemicals might at times be obvious and immediate . . . even more frightening for some people, the toxins could be slow to appear, [only showing up] long after the time when anything could be done to prevent trouble"). See also BRADFORD F. WHITMAN, SUPERFUND LAW AND PRACTICE: A HANDBOOK ON THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT AND CLEANUP LAWS OF NEW JERSEY 4 (1991) (maintaining that "[T]he behavior of chemicals underground unseen by the public and Congress . . . was poorly understood and difficult to measure or predict"). See also CRAIG E. COLTEN & PETER N. SKINNER, THE ROAD TO LOVE CANAL: MANAGING INDUSTRIAL WASTE BEFORE E.P.A. 46 (1996) (stating that in the 1940s and 1950s, hazardous waste disposals were made with efficiency as the main concern; consequently, this practice resulted in the creation and subsequent discovery of many hazardous waste sites with many remaining to be discovered).

legacies of the Valley of the Drums⁴ and the Love Canal.⁵ The problem posed by the disposal of hazardous waste is very significant because no one can guarantee immunity from the adverse effects of such disposals. Indeed, the nearby town of Anywhere, U.S.A., is currently battling with the aftermath of such disposals.⁶

Anywhere, U.S.A., has a population of about 15,000. It is not quite a small city, but it is larger than a typical rural town. The closest city, Responsibility, with a population of 200,000, is twenty miles away. Anywhere is rarely visited by the city dwellers since it is a small suburb lacking in points of interest. Strangers are, therefore, something of a rarity in Anywhere. The town is small enough for people to nod and give a smile of recognition to one another while walking the local streets or shopping in the local stores. The town's public schools are highly rated, and many parents are actively involved in the PTA. The citizens of Anywhere take pride in their community. They have established a neighborhood crime watch program and believe that their efforts have assisted in maintaining a safe community known for a virtually non-existent rate of serious crime. A large number of residents are blue-collar workers who commute daily to jobs in the nearby city of Responsibility.

⁴ See 1 ALLAN J. TOPOL & REBECCA SNOW, *SUPERFUND LAW AND PROCEDURE* 3 (1992). The Valley of the Drums refers to an area in Kentucky where users threw approximately twenty thousand drums into a ravine. *Id.* These drums contained hazardous substances which leaked into the soil, permeated the ground, and adversely affected the groundwater. *Id.* The negative effects upon the nation's groundwater are especially important since close to 50% of water used for consumption nationwide is groundwater. *Id.*

⁵ See *id.* at 4. See also MAZMANIAN & MORELL, *supra* note 3, at 3. The Love Canal, located in Niagara Falls, New York, was used as a burial site for toxic chemicals during the 1940s and early 1950s by Occidental Petroleum's Hooker Chemical & Plastics Corporation. *Id.* The Hooker Chemical & Plastics Corporation disposed of over twenty thousand tons of hazardous waste at this site before selling it to the Niagara Falls Board of Education in 1953. *Id.* The school district then sold lots for family homes and built an elementary school on the site, but in 1977 the Niagara River overflowed, flooding the canal area and forcing contaminated groundwater into the homes of area residents. *Id.* The groundwater contained more than two hundred toxic chemicals, including benzene, trichloroethylene, and dioxin. *Id.* Residents were forced to evacuate their homes after President Carter designated Love Canal an emergency disaster area. *Id.* The federal government eventually spent more than \$30 million to purchase the homes of those in the area. This figure does not include the cost of the cleanup. *Id.* See also Richard L. Revesz & Richard B. Stewart, *The Superfund Debate*, in *ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW* 3, 5 (1995) (explaining Love Canal and its effects on public awareness, including the mention of the New York State Health Commissioner's report on the Love Canal crisis, termed "Love Canal: Public Health Time Bomb").

⁶ This hypothetical and the ensuing names are a product of the author's imagination and will be carried throughout this paper to concretely illustrate how a populace can be affected by hazardous waste, and, more pointedly, how the responsible parties can be held legally liable for their actions.

Responsibility has three major companies located within its limits, and most of Anywhere's residents who commute to Responsibility are employed in some capacity at one of these three companies. One company is Lacquer Paint which has been in Responsibility for thirty years; another is Acme Plastics which has been in the city for nineteen years; and the third is Beaker Chemicals which has operated there for only ten years. Each company generates hazardous waste and disposes of this waste by depositing it in sealed containers at the Glorious Waste Site located three miles outside of Anywhere.⁷ For many years these disposals attracted little attention. Recently, however, government officials have made a disturbing discovery: the containers stored at the Glorious Waste Site have leaked, releasing hazardous wastes into the nearby soil and polluting the drinking water supply of Anywhere. The government has initiated a lawsuit against the generator companies, all of which transport their own waste to the site.

Such scenarios are not uncommon, and their effects are very real.⁸ Public awareness of the need to address hazardous waste disposal increased dramatically in the early 1980's in the aftermath of environmental disasters such as the well-publicized Love Canal and the Valley of the Drums.⁹ Such examples attracted widespread public attention, and the nation grew increasingly worried about the effects of

⁷ Lacquer Paint disposes of ketones and various organic solvents; Acme Plastics disposes of benzene and styrenes; and Beaker Chemicals disposes of a large variety of organic compounds. All of these substances are hazardous to varying degrees, and each company transports its own wastes to the Glorious Waste Site, where the sealed containers are buried.

⁸ See *supra* notes 4-5 and accompanying text. See also *School Was Considered as a Superfund Site*, N.Y. TIMES, Oct. 10, 1997, at A19 (discussing how a building previously used as a dry-cleaning plant was supposed to be used as an elementary school in Harlem, New York City, beginning in the 1997 school term). The plans to use the building as an elementary school came to an abrupt halt once environmental officials detected alarming levels of potentially hazardous fumes. *Id.* The environmental officials told New York City officials that the solvent perchloroethylene, used by the dry-cleaning plant, had leaked through the concrete floor and permeated the soil underneath. *Id.* Environmental officials took action to halt the opening of the school because studies have shown that perchloroethylene has negative effects upon the kidneys, the liver, and the nervous system. It is also thought to cause cancer. *Id.* The school is currently being considered as an addition to the list of Superfund sites which need cleanup. *Id.*

⁹ See MAZMANIAN & MORELL, *supra* note 3, at 27. Public awareness indeed peaked in the 1980s, as illustrated through the results of a CBS News-Harris National poll, in which 86% of Americans wanted to prioritize the need for federal action in relation to hazardous waste sites and chemical spills. *Id.* at 28. See generally 1996 BRIEFING BOOK ON ENVIRONMENTAL AND ENERGY LEGISLATION 78 (1996) [hereinafter 1996 BRIEFING BOOK] (addressing the public's insistence that the government take action regarding hazardous waste).

hazardous waste.¹⁰ This concern pervaded the Congress as well, for “members of Congress were not willing to gamble away their political futures on predictions that the hazardous waste issue would go away anytime soon or that they could rely on the private sector to provide a full remedy.”¹¹

Motivated both by the very real dangers of hazardous waste disposal as well as by public and political pressure, Congress began considering ways to address the situation. As a result, Congress passed the Superfund, more formally known as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹² After a lame duck session of Congress passed this legislation, President Carter signed CERCLA to make it law on December 11, 1980.¹³ President Carter’s signing of CERCLA was one of his final acts before Ronald Reagan assumed office.¹⁴ CERCLA included a five year, \$1.6 billion trust fund, known as the Superfund, that would pay the expenses involved in cleaning hazardous waste sites, chemical spills, and other types of released environmental contaminants.¹⁵ From the beginning of its hasty

¹⁰ See MAZMANIAN & MORELL, *supra* note 3, at 29. The authors portray the nationwide sentiment as one of agitation, stating that the United States became a “highly charged atmosphere.” *Id.* See also Revesz & Stewart, *supra* note 5, at 5 (stating that the public perceived hazardous waste as a national crisis after witnessing environmental disasters such as the Valley of the Drums and Love Canal).

¹¹ See MAZMANIAN & MORELL, *supra* note 3, at 29. See also TOPOL & SNOW, *supra* note 4, at 1 (stating that Congress was discontented with the potential political ramifications which could result if it did not address the need for hazardous waste legislation); Revesz & Stewart, *supra* note 5, at 5 (speaking of the bipartisan consensus for the need to legislate in order to address the immediacy of the hazardous waste crisis).

¹² Pub. L. No. 96-510, 94 Stat. 2767 (1980), 42 U.S.C.A. §§ 9601-75 (West 1998).

¹³ The Superfund statute, Pub. L. No. 96-510, 94 Stat. 2767 (1980), also known as CERCLA, was passed by a vote of 274 to 94 in the House of Representatives and 78 to 9 in the Senate. Revesz & Stewart, *supra* note 5, at 5. The act passed despite the fact that President Carter had lost the Presidential election to Reagan, and the Democrats had lost control of the Senate to the Republicans. *Id.* See also MAZMANIAN & MORELL, *supra* note 3, at 29 (suggesting that the reason the legislation passed so quickly was the apprehension over what position the upcoming Reagan administration would adopt). For further support of this view, see KATHERINE N. PROBST & PAUL R. PORTNEY, ASSIGNING LIABILITY FOR SUPERFUND CLEANUPS: AN ANALYSIS OF POLICY OPTIONS 1 (1992).

¹⁴ TOPOL & SNOW, *supra* note 4, at 2.

¹⁵ 1996 BRIEFING BOOK, *supra* note 9, at 78. The money for the Superfund originated chiefly from taxes on crude oil and other chemicals. See UNITED STATES GENERAL ACCOUNTING OFFICE, SUPERFUND: TRENDS IN SPENDING FOR SITE CLEANUPS 2 (1997) [hereinafter TRENDS]. The Superfund also contained a variety of other provisions, including:

1. call[ing] for a state-by-state inventory and evaluation of inactive hazardous waste disposal sites;
2. set[ting] priorities for cleanup of sites based on the danger they presented;

Congressional enactment, intense controversy has plagued the Superfund, both among public interest groups and the private sector.¹⁶ Public interest groups remain dissatisfied with the pace of cleanups, while potentially liable public and private entities contend that the liability provisions under Superfund are unnecessarily harsh.¹⁷ Congress has considered several proposals to reform Superfund; however, the only reform effort which has succeeded was the Superfund Amendments and Reauthorization Act of 1986 (SARA).¹⁸ Although SARA was the only successful Superfund reform proposal, it did not specify an approach for addressing the issue of joint and several liability.¹⁹ This

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3. establish[ing] an emergency removal program to contain dangerous releases from the sites;
 4. call[ing] for the eventual elimination of unsafe hazardous waste disposal sites; and
 5. provid[ing] a 'systematic method of funding' to identify inactive hazardous waste sites, evaluate those sites, and contain or take other remedial action to protect the public health and the environment in a cost-effective manner.

1996 BRIEFING BOOK at 78.

¹⁶ See PROBST & PORTNEY, *supra* note 13, at 1 (1992) (stating that "perhaps befitting this frenzied origin, Superfund has been a controversial statute almost from the start"). See also Robert F. Blomquist, *SARA's Offspring: Some First Principles for Superfund Reform in the 1990s*, 9 J. NAT. RESOURCES & ENVTL. L. 237 (1993-94) (maintaining that the Act was "hardly a work of legislative craftsmanship" because it provided little legislative history and was actually a "gerry-built consensus law"); VALERIE M. FOGLEMAN, *HAZARDOUS WASTE CLEANUP, LIABILITY, AND LITIGATION: A COMPREHENSIVE GUIDE TO SUPERFUND LAW 2* (1992) (stating that although Congress passed CERCLA, its passage was "fraught with difficulties").

¹⁷ See PROBST & PORTNEY, *supra* note 13, at 1. Public interest groups argue that the Act provides neither a fast enough cleanup procedure nor a steadfast enough procedure through which permanent remedies can be effectively achieved. *Id.* Public and private entities, on the other hand, argue that liability should not be imposed upon them retroactively; that is, if the disposal was legal at the time the entity carried it out, it should not be held liable for the future possible ramifications resulting from the disposal. *Id.* Also, these entities resent bearing the burden of site cleanup costs while other potentially responsible parties, or PRPs, involved in the chain of disposal wait to see if they will be sued by a PRP being forced to pay, or by the Environmental Protection Agency itself. *Id.* This note specifically addresses joint and several liability in Superfund suits. For a definition of joint and several liability, see BLACK'S LAW DICTIONARY 914 (6th ed. 1990). Joint and several liability holds a responsible party "[r]esponsible together and individually. The person who has been harmed can sue and recover from both wrongdoers or from either one of the wrongdoers [but if the person who has been harmed] goes after both of them, [the person] does not, however, receive double compensation." *Id.*

¹⁸ Pub. L. No. 99-499, 100 Stat. 1613-1782 (1986), 42 U.S.C.A. §§ 9601-75 (West 1998). The SARA Amendments did not address the issue of joint and several liability, but they did create measures pertaining to cleanup techniques, community involvement, and enforcement provisions. See TRENDS, *supra* note 15, at 2

¹⁹ See Pub. L. No. 99-499, 100 Stat. 1613-1782 (1986), 42 U.S.C.A. §§ 9601-75 (West 1998). See also *supra* note 17 and accompanying text.

Note will focus on the issue of joint and several liability with regard to the Superfund.

This Note will address the lack of specific language in the Superfund regarding the imposition of joint and several liability and explain the varying approaches federal courts have used in attacking the problem. The federal courts generally follow one of two specific approaches.²⁰ Because no uniform approach exists with regard to the liability question in a Superfund suit, the Superfund liability scheme is commonly considered draconian.²¹ The lack of a uniform approach with regard to how a court should impose joint and several liability has led to inconsistent results.²² This lack of consistency perpetuates uncertainty and seemingly inequitable results because the result largely depends upon which federal court hears the case.²³ This Note will offer a uniform approach towards the imposition of joint and several liability in Superfund suits.²⁴ By implementing a uniform approach, consistent decisions in such suits can be achieved.

Section II of this Note will set out the necessary background for understanding basic principles of joint and several liability, including the development of joint and several liability principles under the traditional common law and under the Restatement.²⁵ Section II will then explain the rationale behind the enactment of CERCLA and outline who may be held liable under the statute.²⁶ Finally, Section II will address the lack of a specific joint and several liability provision in the original Superfund statute, and show how its absence has sparked much controversy among multiple responsible polluters.²⁷ Section III will explain the two major alternate positions which federal courts have taken with regard to joint and several liability in Superfund suits and analyze these positions through case law.²⁸ Section IV will consider various proposals to reform

²⁰ See *infra* notes 86-131 and accompanying text.

²¹ THOMAS W. CHURCH & ROBERT T. NAKAMURA, *CLEANING UP THE MESS: IMPLEMENTATION STRATEGIES IN SUPERFUND* ix (1993). The authors refer to the Superfund as "America's unique statutory scheme to use the more draconian elements of tort law to compel private businesses and public entities to clean up hazardous waste sites." *Id.* Superfund is riddled with much uncertainty as to how joint and several liability should be imposed, in the absence of a specific statutory provision. See *supra* notes 16-17 and accompanying text, and *infra* notes 86-131 and accompanying text.

²² See *infra* notes 86-131 and accompanying text.

²³ *Id.*

²⁴ See *infra* notes 151-68 and accompanying text.

²⁵ See *infra* notes 32-63 and accompanying text.

²⁶ See *infra* notes 64-81 and accompanying text.

²⁷ See *infra* notes 82-85 and accompanying text.

²⁸ See *infra* notes 86-131 and accompanying text.

Superfund joint and several liability, but will focus mainly upon how the current political climate is affecting the reform process.²⁹ Section IV will also discuss an immediate environmental problem and, through its use, illustrate why political compromise is essential.³⁰ Finally, Section V will propose a uniform approach towards the imposition of joint and several liability in a Superfund suit.³¹

II. JOINT AND SEVERAL LIABILITY PRINCIPLES

A. *Joint and Several Liability Under the Common Law: A Historical Context*

The principles of joint and several liability have developed considerably since their English origins.³² Initially, joint and several liability applied only to situations in which parties acted in concert while committing some trespass.³³ In these instances, each person involved consciously took some individual action to further the common venture of all participants.³⁴ Consequently, each individual was a joint tortfeasor.³⁵ Each individual was held liable for the full amount of resulting damages as punishment for acting in concert to commit an unlawful act.³⁶ These damages could not be apportioned among the

²⁹ See *infra* notes 132-50 and accompanying text.

³⁰ See *infra* notes 146-50 and accompanying text.

³¹ See *infra* notes 151-68 and accompanying text.

³² See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 322 (5th ed. 1984) [hereinafter PROSSER & KEETON] (tracing the development of modern tort law); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 2 (1987) (providing an overview of the origins of tort law, beginning with its unwritten tradition in England and discussing its adoption into American law); PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 20 (1988) (addressing how American tort law is rooted in English common law).

³³ See PROSSER & KEETON, *supra* note 32, at 322-23; ORIN KRAMER & RICHARD BRIFFAULT, CLEANING UP HAZARDOUS WASTE: IS THERE A BETTER WAY? 54 (1993) (addressing why joint and several liability was traditionally an issue only when parties acted in concert).

³⁴ PROSSER & KEETON, *supra* note 32, at 322-23. This concept can be illustrated through the use of the hypothetical from the beginning of this note. If Lacquer Paint, Acme Plastics, and Beaker Chemicals together decided to unite and harm a common customer, each individual company would be liable for the actions of every company, even if one company only played a minor role by comparison to the others. The hypothetical customer is Nicholas Lawrence. If a representative from Lacquer Paint intended to break Lawrence's leg with a piece of iron while a representative from Acme Plastics held him still, and a representative from Beaker Chemicals was going to call Lawrence to get him to come to the spot of the planned attack under pretense of a business meeting, the representatives have acted in concert to promote a common plan.

³⁵ See *id.*

³⁶ See *id.* (stating that parties were equally liable when they acted "in pursuance of a common plan or design to commit a tortious act, actively [took] part in it . . . further[ed] it

parties according to degree of wrongdoing or involvement.³⁷ The theory was that each individual perpetuated, and thus was responsible for, the entire wrongdoing.³⁸ Therefore, under this interpretation, a joint tortfeasor was not entitled to seek contribution from another joint tortfeasor.³⁹

While the English courts adhered to the doctrine of imposing joint and several liability only in cases that involved parties acting in concert, the American courts began to broaden the doctrine.⁴⁰ The impetus for expansion of the rule occurred in 1848 when New York State adopted the Field Code of Procedure and other states subsequently adopted similar codes.⁴¹ These codes recognized that a plaintiff should be able to hold parties liable when the parties' individual acts produced a single, indivisible harm, even if the parties did not act in concert to further a common venture.⁴² The rationale was that each party had contributed to inflicting harm upon the plaintiff and should bear the consequences for it, because the damages could not properly be apportioned.⁴³ The

by cooperation or request . . . or [provided] aid or encouragement to the wrongdoer . . . or ratif[ie]d and adopt[ed] the wrongdoer's acts done for their benefit").

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 336-37. See generally LANDES & POSNER, *supra* note 32, at 27 (discussing the common law ban on contribution and criticizing the current movement toward permitting contribution). Under the traditional common law rule, if Nicholas Lawrence won a lawsuit awarding him \$100,000 in damages from Beaker Chemicals, Beaker Chemicals cannot seek contribution from the other two companies. For example, Beaker Chemicals, in turn, cannot try to sue Acme Plastics or Lacquer Paint for contribution by claiming that its involvement was not as serious, because its representative only telephoned Lawrence, and did not actually maim him. Beaker Chemicals acted in concert with Acme Plastics and Lacquer Paint to further the conspiracy, and it is as liable as the other companies.

⁴⁰ See PROSSER & KEETON, *supra* note 32, at 325-26.

⁴¹ *Id.* at 325 (stating that the Field Code of Procedure in New York and the similar codes adopted in other states were designed to facilitate joinder of parties so that all questions relating to a lawsuit could be addressed at once). Initially, courts looked at these codes with reluctance and adhered to the old rule that parties could only be joined if they had acted in concert. *Id.* at 326. However, over time, joinder of parties occurred where separate acts of defendants combined to produce an indivisible result in which harm could not be apportioned. *Id.*

⁴² *Id.* at 325. See also *supra* note 41 and accompanying text (explaining why the code drafters felt that parties should be able to be held jointly liable for indivisible harms). To illustrate this idea, Nicholas Lawrence will once again be helpful. If Lawrence was standing somewhere and a representative from Lacquer Paint clubbed him over the head and a representative from Acme Plastics simultaneously clubbed him in the ribs, Lawrence's resultant pain and suffering damages would be indivisible. In this situation, assume that the representatives had not conspired to harm Lawrence and it was his unfortunate luck to be in the wrong place at the wrong time. Lawrence could thus hold both Lacquer Paint and Acme Plastics responsible for damages.

⁴³ See PROSSER & KEETON, *supra* note 32, at 326.

American courts generally did not allow contribution among joint tortfeasors who had produced a single, indivisible harm until the 1970s.⁴⁴

Today, joint and several liability claims generally may be brought in three instances.⁴⁵ Joint and several liability may be imposed when liability ensues pursuant to operation of law, such as in *respondeat superior* cases.⁴⁶ As discussed, joint and several liability may also be imposed when parties acting in concert tortiously cause another party harm.⁴⁷ Finally, joint and several liability can be imposed when two or more parties cause an indivisible harm to the plaintiff.⁴⁸ When considering joint and several liability in terms of the Superfund, the instance which presents the most controversy is the third, because the harm caused when multiple parties dispose of hazardous waste at a common site is often indivisible. Therefore, this instance will be discussed in this Note.

B. *The Restatement's Approach to Joint and Several Liability*

The Restatement (Second) of Torts conforms to the current American trend regarding the imposition of joint and several liability. As Section III of this Note will illustrate, the Restatement approach to joint and several liability is also the approach followed by the majority of federal courts when imposing joint and several liability upon multiple polluters in Superfund suits.⁴⁹ Section 433A of the Restatement states that damages for harm should be apportioned among two or more causes when there are distinct harms or when a reasonable basis exists

⁴⁴ *Id.* at 337. See also LANDES & POSNER, *supra* note 32, at 220-21 (listing each state and whether it follows the current trend toward allowing contribution). If a state has adopted a statute authorizing such movement, the table states whether the statute is typically read broadly or narrowly in that respective state. *Id.*

⁴⁵ See VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 742 (1994) (discussing the types of tort claims where joint and several liability typically applies today).

⁴⁶ *Id.* A respondeat superior case commonly involves an employer-employee relationship. See generally LANDES & POSNER, *supra* note 32, at 208 (discussing the theoretical principles behind the respondeat superior doctrine). To use our hypothetical, if a Beaker Chemicals employee was drinking on his shift while transporting the company's waste to the Glorious Waste Site, and his truck hit Nicholas Lawrence, Lawrence could hold the company liable. The theory of respondeat superior would allow Lawrence to sue the company for its employee's actions while on his shift. The driver would be jointly and severally liable as well.

⁴⁷ See JOHNSON & GUNN, *supra* note 45, at 742. See also *supra* notes 34 and 39 and accompanying text.

⁴⁸ See JOHNSON & GUNN, *supra* note 45, at 742. See also *supra* note 42 and accompanying text.

⁴⁹ See *infra* notes 86-131 and accompanying text.

for determining the contribution of each cause to a certain harm.⁵⁰ Section 433A further states that damages for types of harm other than distinct harms or harms which can be apportioned according to a reasonable basis cannot be apportioned among two or more causes.⁵¹

Section 875 of the Restatement addresses indivisible harms.⁵² When a harm is indivisible, each of the parties who legally caused the harm can be held individually liable for the entire harm.⁵³ Therefore, under the Restatement, joint and several liability should not be applied to a divisible harm, but it should be applied to an indivisible harm.⁵⁴ The Restatement commentary uses examples to illustrate the difference between a harm which is divisible and a harm which is indivisible.⁵⁵ A

⁵⁰ RESTATEMENT (SECOND) OF TORTS § 433A (1963-64). Therefore, using the Nicholas Lawrence example from note 34, *supra*, a representative of Lacquer Paint was responsible for striking Lawrence in the legs, a representative of Acme Plastics for holding him still, and a representative of Beaker Chemicals for getting Lawrence to the scene; the harms are distinct and could be reasonably separated. A court might find Lacquer Paint liable for 75% of the amount of damages, because its representative actually maimed Lawrence. The court might further find that Acme Plastics was liable for 20% of the damages, because its representative held Lawrence in place, but did not maim him. Finally, the court might find Beaker Chemicals liable for only 5% of the total damages, since its representative inflicted no physical harm upon Lawrence, but merely phoned to him to get him to come to the scene.

⁵¹ RESTATEMENT (SECOND) OF TORTS §433A (1963-64). This section of the Restatement (Second) reads as follows:

- (1) Damages for harm are to be apportioned among two or more causes where
 - (a) there are distinct harms, or
 - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
- (2) Damages for any other harm cannot be apportioned among two or more causes.

Id.

⁵² RESTATEMENT (SECOND) OF TORTS § 875 (1977). The Restatement (Second) of Torts states, "Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." *Id.*

⁵³ *Id.* To expand on the hypothetical from note 42, *supra*, where Nicholas Lawrence was clubbed over the head by a representative from Lacquer Paint while simultaneously clubbed in the ribs by a representative from Acme Plastics, we will assume that Lawrence died instantaneously, from cardiac arrest. Once again, assume that the actions of these representatives occurred while acting independently and not as a result of a conspiracy between the two. Because Lawrence died as a result of the blows he sustained and they occurred simultaneously, the harm cannot fairly be apportioned between the representatives from Lacquer Paint and Acme Plastics. Therefore, both companies can be held liable for the full amount of damages in the ensuing lawsuit.

⁵⁴ See *supra* note 52 and accompanying text.

⁵⁵ See RESTATEMENT (SECOND) OF TORTS §433A cmt. b, d, i (1963-64) (providing illustrations of divisible and indivisible harms). Comment b addresses distinct harms through the

divisible harm is one which encompasses distinct acts for which damages may be fairly estimated and apportioned.⁵⁶ In cases involving such distinct acts, joint and several liability does not apply because the harm can be apportioned according to the consequences of each separate act.⁵⁷ However, the Restatement also recognizes that some divisible harm is more difficult to apportion according to distinct acts, but that harm is still capable of being reasonably and rationally apportioned.⁵⁸ In cases involving such reasonable and rational apportionment of harm, joint and several liability does not apply because some rational basis exists for fairly apportioning the harm.⁵⁹ In contrast to divisible harms, indivisible harms are those harms which cannot be fairly apportioned between tortfeasors.⁶⁰ Because no basis exists to apportion the harm, each joint tortfeasor is liable for the entire harm.⁶¹

example of a plaintiff who has been shot by two defendants acting independently, but at the same time. If one defendant wounds the plaintiff's arm while the other wounds his leg, it is possible to separate the harm that each defendant has caused since each inflicted a separate injury. Pain and suffering expenses, along with medical expenses, may be apportioned according to a rough estimate. The harms are distinct because each can be attributed to a tortfeasor, so they are therefore divisible. Comment d addresses divisible harms which are not as easily divided into distinct parts, but which can be reasonably and rationally apportioned. An example of this sort includes when the cattle of multiple owners trespass upon a plaintiff's land and destroy his crop. The resultant harm is the destroyed crop, and responsibility for damages can be apportioned among the cattle owners according to the number of cattle each owned, assuming that the harm caused is proportional to the number of cattle which trespassed upon the land. Thus, the harm is fairly divisible. Comment i addresses indivisible harms. Indivisible harms cannot be separated because the injuries are neither distinct nor capable of being reasonably or rationally apportioned. An example of an indivisible harm includes the instance where two negligently driven vehicles collide and kill a bystander. Because both drivers acted negligently and the result was death to the bystander, no distinct harms exist, and the harm caused is not capable of being apportioned between the drivers. Therefore, this sort of occurrence is one properly termed an indivisible harm, and both parties may be held liable for the entire amount of damages.

⁵⁶ See RESTATEMENT (SECOND) OF TORTS § 433A (1963-64). See also *supra* note 55 and accompanying text (illustrating through an example what a divisible harm is which involves distinct acts).

⁵⁷ See RESTATEMENT (SECOND) OF TORTS § 433A (1963-64).

⁵⁸ RESTATEMENT (SECOND) OF TORTS § 433A (1963-64); see *supra* note 55 and accompanying text (providing an example of a harm which is divisible because it can be reasonably and rationally apportioned among the parties involved).

⁵⁹ See RESTATEMENT (SECOND) OF TORTS § 433A (1963-64).

⁶⁰ RESTATEMENT (SECOND) OF TORTS § 875 (1977); RESTATEMENT (SECOND) OF TORTS § 433A cmt. i (1963-64); see *supra* note 55 and accompanying text (addressing the example that the Restatement provides concerning an indivisible harm); see *supra* note 53 and accompanying text. See also JOHNSON & GUNN, *supra* note 45, at 742 (explaining divisibility and apportionment of harm among tortfeasors).

⁶¹ RESTATEMENT (SECOND) OF TORTS § 875 (1977).

As is the case in traditional common law, the Restatement also adheres to the view that the plaintiff bears the burden of proof in a tort action.⁶² After the plaintiff meets this burden of proof, the burden shifts to the defendants to limit the scope of their liability.⁶³ Thus, if the action involves two or more defendants, one or more of the defendants can attempt to limit his or her liability by showing that the harm is divisible and should be apportioned among the defendants.

C. *Joint and Several Liability and Its Importance with Regard to the Superfund*

1. The Enactment of CERCLA: Why It Was Needed and Who Can Be Held Liable

Responding to growing societal concern, Congress signed CERCLA into law to establish a system to efficiently and effectively clean up hazardous substances released into the environment.⁶⁴ By definition, a "release" is any substance that has been spilled, leaked, pumped, poured, emitted, emptied, discharged, injected, escaped, leached, dumped, or disposed of into the environment.⁶⁵ Under the statute, the term "release" therefore addresses both the intentional and unintentional discharges of hazardous substances into the environment.⁶⁶ CERCLA encompasses four components in dealing with these releases, including: providing a means by which the Environmental Protection Agency (EPA) can acquire and analyze information about potentially dangerous waste sites; allowing the United States government to address and clean up releases of hazardous substances; creating a fund known as the Superfund to underwrite the clean up; and creating a system of Potentially Responsible Parties (PRPs) who are accountable for releasing the hazardous substances into the environment in a specific locale.⁶⁷

⁶² RESTATEMENT (SECOND) OF TORTS § 433B (1963-64).

⁶³ *Id.*

⁶⁴ See STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 302 (1997) (explaining why the Comprehensive Environmental Response, Compensation, and Liability Act was enacted and the purposes enumerated in the statute). See *supra* notes 9-11 and accompanying text (addressing the nation's concern and worry with the hazardous waste problem and how public sentiment spilled over into the political sector and stimulated Congressional action).

⁶⁵ 42 U.S.C.A. § 9601 (West 1998).

⁶⁶ See FERREY, *supra* note 64, at 305 (explaining the scope of the term "release" under the CERCLA statute and stressing that for a polluter to be held liable, the releases do not have to be intentional).

⁶⁷ See U.S.C.A. § 9601 (West 1998). See also FERREY, *supra* note 64, at 302, 323-25 (stating that the statute created certain categories of those who may be held liable (PRPs) and

Once Congress created CERCLA, the EPA had the power to gather information regarding hazardous waste sites and create plans for cleaning them.⁶⁸ The United States government had the authority to mandate cleanup of the substances, and the Superfund was the trust fund designed to pay the government's share of response, removal, and remediation costs.⁶⁹ The Superfund originally had an allotment of \$1.6 billion to pay for such costs.⁷⁰ However, the statute also specified who could be held liable for cleanup costs and harms resulting from the disposal of hazardous substances.⁷¹ These parties were named

addressing who falls into these categories). For further discussion of those falling into the differing categories who are collectively termed Potentially Responsible Parties, see *infra* text accompanying notes 71-73.

⁶⁸ See FERREY, *supra* note 64, at 303. Once the EPA's National Response Center is notified concerning a release of hazardous waste, it contacts the governor of the respective state along with the proper administrative agencies. *Id.* Then the EPA uses the information which it has gathered to form running lists of problem sites nationwide. *Id.* The EPA then examines the potential dangers to the public from the releases of the hazardous waste and creates a response plan to address cleanup procedures. *Id.* See also TRENDS, *supra* note 15, at 1 (stating that the EPA uses Superfund money to implement cleanups). *Id.* The EPA has a choice of compelling PRPs to clean up the site, or it can pay contractors, states, or various federal agencies to do so. *Id.* The 1997 report stated that, over approximately ten years, the amount of Superfund money spent in paying contractors for cleanup has increased. *Id.* In 1996, \$696 million was spent on contractor work, as compared to \$261 million in 1987. *Id.*

⁶⁹ See 42 U.S.C.A. §§ 9601-75 (West 1998); see also FERREY, *supra* note 64, at 310.

⁷⁰ See *supra* note 15 and accompanying text.

⁷¹ U.S.C.A. §9607(a) (West 1998). The relevant portion of the statute states that these parties are:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
 - (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
 - (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

Potentially Responsible Parties, or PRPs.⁷² There are four categories of PRPs: present owners and operators of vessels or facilities; past owners and operators of facilities at the time of hazardous substance disposal; those who under contract, agreement, or other means arranged for the disposal or treatment of hazardous substances; and those who accepted hazardous substances for transport to disposal or treatment facilities.⁷³ Under the statute, PRPs must eventually pay for cleanup costs unless they can utilize one of the three affirmative defenses provided by the statute.⁷⁴

PRPs have only a limited number of defenses to liability.⁷⁵ The statute provides three specific affirmative defenses to a PRP.⁷⁶ It provides a defense from liability for the release of hazardous substances

(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; and

(D) the costs of any health assessment or health effects study carried out.

Id.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See 42 U.S.C.A. §9607(b) (West 1998).

⁷⁶ 42 U.S.C.A. §9607(b) (West 1998) provides the following three specific affirmative defenses to a PRP:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by-

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that

(a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and

(b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

Id.

if the release was caused by an act of God.⁷⁷ It also provides a defense if the release was caused by an act of war.⁷⁸ Finally, the statute provides a defense if the release was caused by an act or omission of a third party who is not related to a PRP by means of any contractual relationship, if the defendant can show by a preponderance of the evidence that he exercised due care with regard to the hazardous substances.⁷⁹ No additional affirmative defenses are available to a PRP.⁸⁰ Contrary to some arguments advanced by defendants that proximate cause must be shown before they are held liable, courts' interpretations of the statute maintain that a PRP may be held liable for depositing even a minute amount of a hazardous substance, for having a hazardous substance on the site even once, or for having no current connection to a site.⁸¹

⁷⁷ *Id.* For example, if lightning struck one of Lacquer Paint's disposal containers and released the company's ketones and organic solvents into the environment, Lacquer Paint could use the act of God defense to avoid liability.

⁷⁸ *Id.* Suppose the nation was at war and a bomb caused Acme Plastics' disposal containers to explode at Glorious Waste Site, thereby releasing styrenes and benzene into the soil. Acme Plastics would want to invoke the act of war defense to avoid being held liable for the release of the chemicals.

⁷⁹ *Id.* For example, picture the CEO of Jones Foods puncturing a disposal container originating from Beaker Chemicals while shooting rabbits at the Glorious Waste Site. If the CEO of Jones Foods was not in a contractual relationship with Beaker Chemicals or the Glorious Waste Site, and both Beaker Chemicals and the Glorious Waste Site could show by a preponderance of the evidence that the container was safely sealed and stored, neither would be held liable for the CEO's actions.

⁸⁰ See 42 U.S.C.A. § 9607(a) (West 1998). The statute only establishes these three affirmative defenses. *Id.*

⁸¹ See, e.g., *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989) (maintaining that liability could be imposed on a Potentially Responsible Party for releasing even the smallest quantity of hazardous waste). The court found that "[t]he plain statutory language fails to impose any quantitative requirement on the term hazardous substance and we decline to imply that any is necessary." *Id.* at 669. See also *United States v. S.C. Recycling & Disposal, Inc.*, 653 F.Supp. 984 (C.D.S.C. 1984) (stating that a Potentially Responsible Party can be liable even when its waste is no longer on the site). The court stated that "[e]ach of the generator defendants made arrangements with SCRDI or its predecessors for disposal or treatment of wastes containing hazardous substances and . . . based on the undisputed facts, each of these generator defendants is subject to liability under Section 107 of CERCLA." *Id.* at 992-93. See also *Kelly v. Thomas Solvent Co.*, 714 F. Supp. 1439 (W.D. Mich. 1989) (addressing how courts have ruled that retroactive applications of CERCLA with regard to joint and several liability is constitutional, based on CERCLA's language and legislative history). The *Kelly* court maintained that although a Potentially Responsible Party may not have a current relationship with a site, it can still be liable under the statute for its past releases at the site, even if they occurred before the statute was enacted. *Id.* at 1444-45.

2. The Lack of a Specific Statutory Provision

Joint and several liability is a major concern with regard to the Superfund, because hazardous waste disposals at any given site commonly involve multiple polluters. Because these disposals involve multiple polluters, the issue of liability becomes complicated when questions arise over which party caused the harm and to what extent each party contributed to that harm. When Congress signed CERCLA into law in 1980, it did not set forth a specific provision relating to joint and several liability.⁸² Therefore, allocation of joint and several liability has been left to the federal courts.⁸³ Because no uniform standard exists for determining allocation of joint and several liability, differing interpretations regarding its imposition have left multiple polluters uncertain about their responsibilities and unclear about how to proceed in cost recovery actions under the Superfund.⁸⁴ Section III of this Note will illustrate the differing approaches that the federal courts have taken with regard to imposing joint and several liability under the Superfund and analyze the rationale behind each position.⁸⁵

⁸² Pub. L. No. 96-510, 94 Stat. 2767 (1980), 42 U.S.C.A. §§ 9601-75 (West 1988). See also Patrick S. Martin, *The Legacy of Chem-Dyne: Searching for Equity in CERCLA Costrecovery Actions*, 25 TEX. TECH. L. REV. 909 (1994) (explaining that CERCLA did not have a provision regarding how multiple polluters should be held responsible for cleanup costs); William D. Evans, Jr., *The "Cape Fear" Features of Superfund Contribution Litigation: The Available Remedies and Extent of Liability*, 75 MICH. B. J. 1170, 1171 (1996) (stating that it is unfortunate that Superfund does not give a specific means for allocating liability).

⁸³ See, e.g., *In re Bell Petroleum Servs., Inc., v. Sequa Corp.*, 3 F.3d 889 (5th Cir. 1993); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992); *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); *United States v. A&F Materials Co.*, 578 F. Supp. 1249 (S.D. Ill.1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). For an analysis of some of these cases and an explanation of the judicial interpretations regarding joint and several liability under them, see *infra* Section III. See also Martin, *supra* note 82 at 909 (stating that the federal courts have had to rely on their own guidance in determining how to apportion liability upon multiple polluters at a specific site); Lynda J. Oswald, *New Directions in Joint and Several Liability Under CERCLA?*, 28 U.C. DAVIS L. REV. 299, 312 (1995) (explaining that as a result of the lack of specific language under CERCLA regarding joint and several liability, Congress "deliberately left the task of articulating such a standard to the courts . . . [therefore the] liability scheme today is as much the result of judicial interpretation as it is of congressional creation").

⁸⁴ See Martin, *supra* note 82, at 909-10.

⁸⁵ See *infra* notes 86-131 and accompanying text.

III. FEDERAL COURT POSITIONS REGARDING SUPERFUND JOINT AND SEVERAL LIABILITY

In the absence of specific language regarding joint and several liability in Superfund suits, the federal courts have generally followed one of two approaches.⁸⁶ The first approach was established in *United States v. Chem-Dyne Corporation*.⁸⁷ This approach is the one which is followed by a majority of courts and is based upon the Restatement (Second) of Torts.⁸⁸ The second approach followed by courts is one based upon equitable factors, and it is followed by a minority of federal courts.⁸⁹ This section will address and analyze both of the two positions that the federal courts have taken.

A. *The Chem-Dyne (Majority) Position*

Chem-Dyne was the first case to address the issue of joint and several liability with regard to the Superfund.⁹⁰ In *Chem-Dyne*, the United States Government sued twenty-four defendants alleged to have generated or transported hazardous substances located at the Chem-Dyne treatment facility.⁹¹ The government wanted to be reimbursed for the Superfund money that it spent to clean the site.⁹² The defendants maintained that joint and several liability could not be imposed upon them for the government's response costs.⁹³ The defendants moved for a favorable determination of partial summary judgment before the federal court.⁹⁴ In denying the defendant's motion, the federal court examined both the

⁸⁶ See generally Cathleen Clark, *Should the Butcher, the Baker and the Candle Stick Maker be Held Responsible for Hazardous Waste?*, 1994 UTAH L. REV. 871 (1994) (addressing the differing judicial approaches and concluding that equitable apportionment is the fairest method for imposing joint and several liability). Clark contrasts the major judicial approaches taken with regard to joint and several liability and terms them the Restatement Method and the Apportionment Method. *Id.* See also Oswald, *supra* note 83 (classifying the judicial approaches as the majority approach and the minority, or moderate approach). *But see* Martin, *supra* note 82, at 917 (arguing that there are three judicial approaches and that they are rightly termed the Chem-Dyne Approach, the Alcan Approach, and the Moderate Approach).

⁸⁷ 572 F. Supp. 802 (S.D. Ohio 1983).

⁸⁸ See *infra* notes 94-97 and accompanying text.

⁸⁹ See *infra* notes 121-31 and accompanying text.

⁹⁰ *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 804 (S.D. Ohio 1983). The federal court stated that the issue of joint and several liability was a matter of first impression to itself as well as to other federal courts, and that there was no case authority which was pertinent to this particular issue. *Id.*

⁹¹ See *id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

statutory language of the statute and Congress' legislative intent.⁹⁵ The court noted that when the statute was originally pending in Congress, the language of the bill in the House of Representatives contained explicit provisions regarding joint and several liability while any such reference was left out of the Senate version.⁹⁶ The House adopted the Senate version, striking all references to joint and several liability from its final version of the bill and substituting instead the silent version of the Senate.⁹⁷ Upon examining the legislative history, the *Chem-Dyne* court concluded that the two houses intended for traditional and evolving principles of common law to be applied to each case in determining joint and several liability.⁹⁸

Because the *Chem-Dyne* court believed that the legislative history provided for courts to look to common law in considering joint and several liability claims in Superfund suits, it turned to the Restatement for guidance on how to address joint and several liability when multiple polluters were involved.⁹⁹ The court stated that if the harm was

⁹⁵ See *Chem-Dyne*, 572 F.Supp. at 805-06 (stating that the court would first examine the pertinent statutory language, but concluding that the language was "ambiguous with regard to the scope of liability . . . [so to] discern the Congressional intent . . . [the court would] review and weigh the legislative history of the Act"). *Id.* at 805. The court noted that CERCLA was established to address the very real dangers posed by the roughly thirty to fifty thousand nationwide hazardous waste sites. *Id.* A major goal of the statute was to provide governmental monetary support to immediately clean up the sites and contain the spread of hazardous waste. *Id.*

⁹⁶ See *id.* at 806. The *Chem-Dyne* court cited to the speech of Senator Randolph regarding the lack of a joint and several liability provision in the final version of the Senate bill. *Id.* The Senator maintained that any reference to joint and several liability was stricken from the final version of the bill because the prevailing view in the Senate was that courts should rely upon "common law principles to determine when parties should be severally liable . . . The changes were made in recognition of the difficulty in prescribing in statutory terms liability standards which will be applicable in individual cases." *Id.* at 806 (citing to 126 Cong. Rec. S14969 (Nov. 24, 1980)).

⁹⁷ See *Chem-Dyne*, 572 F. Supp. at 806. The court looked to speeches made in the House of Representatives to discern its legislative intent with regard to its agreement to adopt the Senate's version of the bill in not mentioning joint and several liability. *Id.* at 807. The court focused on Representative Florio's speech which stated that the standard of liability was one of strict liability, and where "issues of joint and several liability [are] not resolved by this [they] shall be governed by traditional and evolving principles of common law." *Id.* The Representative continued to say that the omission of such language would not be fatal because it would instead "insure the development of a uniform rule of law, and . . . encourage the further development of a Federal common law in this area." *Id.* (citing to 126 Cong. Rec. H11788 (Dec. 3, 1980)).

⁹⁸ See *Chem-Dyne*, 572 F. Supp. at 808; see *supra* notes 94-95 and accompanying text.

⁹⁹ See *Chem-Dyne*, 572 F. Supp. at 810. The *Chem-Dyne* court relied on the Restatement, Second, of Torts as well as the Prosser and Keeton treatise on torts to provide insight into the issue of joint and several liability. *Id.* In its opinion, the *Chem-Dyne* court discussed the

divisible, and if the damages caused could be reasonably and rationally apportioned, each defendant would be liable only for its respective harm.¹⁰⁰ The court found that the *Chem-Dyne's* defendants could not prove that the harm was divisible; thus, there was no reasonable or rational basis for apportioning the damages.¹⁰¹ In reaching this decision, the court stressed that the hazardous waste at the *Chem-Dyne* facility had commingled, and that the identities of the sources of the wastes were not ascertainable.¹⁰² Stating that the harm was not fairly apportionable, the court also noted that controversy existed over which specific wastes had polluted the groundwater, how far each waste had migrated, and how hazardous each waste truly was.¹⁰³ The court therefore held that the defendants' motion for partial summary judgment should be denied.¹⁰⁴

Other federal courts have also followed the position that the *Chem-Dyne* court established with regard to joint and several liability.¹⁰⁵ Two

differences between divisible harms and indivisible harms. *Id.* For an explanation of these differences, see *supra* Section II, Parts A and B and notes 32-63 and accompanying text.

¹⁰⁰ See *Chem-Dyne*, 572 F. Supp. at 811. The court further stated that if the harm was indivisible, each defendant could be held liable for the entire harm. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* The hazardous waste at the *Chem-Dyne* site was truly voluminous, involving disposals from 289 generators or transporters, and approximately 608,000 pounds of waste. *Id.* Because the wastes had commingled, or mixed, harm could not fairly be apportioned. *Id.*

¹⁰³ *Id.* Basing a decision regarding joint and several liability responsibility upon the volume of waste of a certain generator or transporter would not be fair because factors such as toxicity and migratory potential of the waste do not necessarily coincide with amount of the waste that is disposed. *Id.*

¹⁰⁴ *Id.* The town of Anywhere, U.S.A., from the beginning of this note can be used to illustrate how a jurisdiction following the *Chem-Dyne* approach would rule in a Superfund suit involving Lacquer Paint, Acme Plastics, and Beaker Chemicals as generator defendants. Imagine that Lacquer Paint had deposited approximately 100 tons of waste over thirty years, Acme Plastics deposited approximately 200 tons of waste over a period of nineteen years, and Beaker Chemicals deposited approximately 50 tons of waste over ten years, all of which commingled at the Glorious Waste Site. A court following the *Chem-Dyne* doctrine would not consider the amount of waste each company deposited, nor would it consider the period of time over which the waste had been deposited. The court would instead find that the harm caused when the waste leaked from the containers, polluting the drinking water of Anywhere, was not fairly apportionable among the generator defendants. It would hold each defendant liable for all of the damages, claiming that the harm could not be fairly apportioned. Such a result is damaging to the company which deposited the least amount, or the least toxic amount, but the *Chem-Dyne* approach specifically refuses to allow these distinctions.

¹⁰⁵ The *Chem-Dyne* position is the position which the majority of courts follow. See, e.g., *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *New*

of the most significant cases that adhered to the *Chem-Dyne* doctrine were *United States v. Monsanto Company*¹⁰⁶ and *O'Neil v. Picillo*.¹⁰⁷ Appealing from an order of summary judgment issued by the district court, among other issues, the defendants in *Monsanto* contended that they should neither be held liable to the United States nor to the South Carolina government for response costs incurred when these two governments removed hazardous wastes, using Superfund money, from a disposal facility in South Carolina.¹⁰⁸ The court disagreed.¹⁰⁹ In ruling that the defendants were within the scope of joint and several liability as articulated by the *Chem-Dyne* court, the *Monsanto* court stressed that apportionment of damages for harm caused could not fairly be divided according to the volume each specific defendant deposited at the site.¹¹⁰ The *Monsanto* court first addressed the applicable portions of the Restatement (Second) of Torts, as did the *Chem-Dyne* court.¹¹¹ The defendants lacked evidence that the volume of waste was directly related to the harm caused, especially considering that the wastes had commingled.¹¹² In dicta, the court addressed the need to show that the district court could not apportion liability, because it lacked evidence regarding the individual and interactive nature of the hazardous wastes involved.¹¹³

In *O'Neil*, the court also followed the position taken by the *Chem-Dyne* court and the *Monsanto* court.¹¹⁴ The appellants in *O'Neil* generated hazardous wastes that had been disposed of at a pig farm.¹¹⁵ After a fire

York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985). See also notes 86-87, *supra*, and accompanying text.

¹⁰⁶ 858 F.2d 160 (4th Cir. 1988).

¹⁰⁷ 883 F.2d 176 (1st Cir. 1989).

¹⁰⁸ See *Monsanto*, 858 F.2d at 164. The waste was disposed of "haphazardly." Toxin-filled drums were randomly placed wherever available space existed in the warehouse. *Id.* The drums lacked pallets underneath them to protect them from the damp ground. *Id.* No documentation or inventory records were kept at the site. *Id.* Eventually, many drums rusted and rotted, releasing hazardous substances. *Id.* These substances commingled and led to the creation of poisonous fumes and frequent fires and explosions. *Id.*

¹⁰⁹ See *id.* at 172.

¹¹⁰ *Id.*

¹¹¹ *Id.* For a discussion of the pertinent principles of the Restatement (Second) of Torts, see *supra* notes 32-63 and accompanying text.

¹¹² See *Monsanto*, 858 F.2d at 172.

¹¹³ See *id.* The court did note that in some situations, the volume of wastes each defendant contributed may be indicative of contributory harm, but maintained that this proposition was not workable here. *Id.*

¹¹⁴ See *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989).

¹¹⁵ See *id.* at 177. Although the *O'Neil* court did not specifically address the types of waste in this opinion, the lower court opinion did mention the types of waste that were disposed

occurred, hazardous waste was released onto the land, and the defendants maintained that they should not be held jointly and severally liable for past or future remedial actions because their contribution was insubstantial.¹¹⁶ The defendants argued that because the total number of hazardous waste barrels that they were responsible for could be demonstrated in proportion to the number of barrels excavated, they should not have to bear the costs of all of the remedial action.¹¹⁷ In rejecting this argument, the *O'Neil* court relied heavily on the findings of the *Chem-Dyne* and *Monsanto* courts, and, in a footnote, noted that because the wastes had commingled and could not be fairly identified with respect to harm caused, apportionment of the damages would be arbitrary.¹¹⁸

Clearly, as initially evinced by the *Chem-Dyne* court, the federal courts have been willing to adhere to the Restatement in ruling on joint and several liability under the Superfund.¹¹⁹ However, the *Chem-Dyne* position has been criticized by courts for being too harsh, and these courts, unwilling to follow the *Chem-Dyne* doctrine, maintain that equitable factors should determine how joint and several liability should be apportioned under the Superfund.¹²⁰

at the site. See *O'Neil v. Picillo*, 682 F. Supp. 706 (D.R.I. 1988). The types of waste included allyl alcohol, isocyanate resin, and sodium aluminum hydride. *Id.* at 721, 723-24.

¹¹⁶ See *O'Neil*, 883 F.2d at 178. Other generators and transporters had reached prior settlement agreements with the Environmental Protection Agency, so they were not parties to this suit. *Id.*

¹¹⁷ See *Monsanto*, 858 F.2d at 181-82.

¹¹⁸ See *id.* at 178-79, 182-83 & n.11 (discussing that the wastes could not be fairly apportioned; thus, it also adheres to the idea set forth in the Restatement, Second, of Torts that tortfeasors should be held jointly and severally liable for indivisible harms).

¹¹⁹ See *supra* notes 99-118 and accompanying text.

¹²⁰ See *United States v. A&F Materials Co.*, 578 F. Supp. 1249, 1256-57 (S.D. Ill. 1984) (addressing past decisions with regard to joint and several liability under the Superfund and contending that the Restatement approach is unnecessarily harsh). The *A&F* court instead examined several factors which it maintained could more equitably apportion liability. *Id.* This approach is not widely followed and is termed by many commentators as the moderate, or minority approach. *Id.* See *supra* note 86 and accompanying text. For other courts which have considered the *A&F* analysis, see generally *Central Me. Power Co. v. F.J. O'Connor Co.*, 838 F.Supp. 641 (D. Me. 1993); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F.Supp. 1100 (N.D. Ill. 1988); *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78 (D. Me. 1988).

B. The A&F (Moderate) Position

In contrast to the *Chem-Dyne* court, the *A&F* court adopted a more moderate approach to the liability question.¹²¹ In *A&F*, the United States government claimed that the defendants generated and disposed of more than seven million gallons of hazardous waste at a waste disposal site in Greenup, Illinois.¹²² The defendants had disposed of the waste by depositing it into lagoons and tanks on the site.¹²³ The government brought suit after learning that the waste was leaking into the environment and permeating the groundwater supply, the surrounding soil, and the neighboring river.¹²⁴

The *A&F* court, like the *Chem-Dyne* court, examined the legislative history surrounding CERCLA to determine how to apportion liability for the release of hazardous substances.¹²⁵ After noting that the language of CERCLA gave no specific guidelines concerning liability in situations where waste from multiple polluters had commingled, the court concluded that Congress wanted each reviewing court to address such instances on an individual basis.¹²⁶ The *A&F* court relied heavily on

¹²¹ *A&F*, 578 F. Supp. at 1256. The *A&F* court noted that a strict application of the Restatement approach, followed by the *Chem-Dyne* court, was inappropriate and harsh. *Id.* at 1255-56. The *A&F* court remarked that this approach was not equitable because it shifted the onerous burden upon each defendant to demonstrate an individual lack of contribution. *Id.*

¹²² *Id.* at 1252.

¹²³ *Id.*

¹²⁴ *Id.* The government wished to hold the generator defendants liable under CERCLA, and recover Superfund monies spent on cleanup costs for the site. *Id.* at 1252.

¹²⁵ *See id.* at 1253. The *A&F* court, like the *Chem-Dyne* court, was concerned with how to apportion liability among the various defendants involved. *Id.* However, the lack of a uniform approach and clear standard led yet another federal court to reach its own conclusion about how best to apportion liability. The *A&F* court approach is more moderate than the *Chem-Dyne* approach, as will be illustrated. The *A&F* court realized that commingling of wastes in the tanks and lagoons would make it difficult for the government to show which defendant should bear responsibility for the release of the hazardous substances. *Id.* Often, the wastes chemically react with each other, making apportionment virtually impossible. *Id.* The court noted that following the *Chem-Dyne* approach of joint and several liability shifts this burden of apportionment to each defendant to prove an individual lack of responsibility for the release of hazardous substances. *Id.* The court further stated that the imposition of joint and several liability, as used in *Chem-Dyne*, would permit the government to recover all Superfund monies it expended, even at the expense of exempting unknown and insolvent generators. *Id.*

¹²⁶ *Id.* at 1255. The *A&F* court discussed the Senate version and the House version of CERCLA, and concluded that each house wished to provide a sense of fairness to defendants. *Id.* at 1256. The court concluded that the Restatement approach, as followed by the *Chem-Dyne* court, was not fair because joint and several liability could be imposed

the proposed Gore Amendment in analyzing the proper approach to the liability question.¹²⁷ The Gore Amendment provided for factors such as volume and toxicity of a polluter's waste to influence a reviewing court in apportioning liability, so it was deemed a moderate, or equitable solution to liability apportionment.¹²⁸ The *A&F* court maintained that in passing the Gore Amendment, the House indicated a willingness to break from a traditionally strict application of joint and several liability.¹²⁹ After the *A&F* court determined that the legislature intended for courts to use a moderate approach in imposing joint and several liability, it praised this approach for its flexibility in promoting individual fairness.¹³⁰ The *A&F* court then concluded that the moderate approach in imposing joint and several liability was more equitable than a strict approach, such as the one advanced by the *Chem-Dyne* court.¹³¹

on a defendant polluter which only contributed a minimal amount of waste to a certain site. *Id.* at 1256.

¹²⁷ *A&F*, 578 F. Supp. at 1256. In its consideration of CERCLA, the House passed the Gore Amendment, located at 126 Cong. Rec. at H9461 (Sept. 23, 1980). *Id.* As discussed by the *A&F* court, the Gore Amendment was friendly to multiple polluters which only contributed minimal amounts of waste to a certain site. See *A&F*, 578 F. Supp. at 1256. The Gore Amendment had several provisions to assist a court in apportioning liability, and encouraged the reviewing court to consider the following six factors:

- 1) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;
- 2) the amount of the hazardous waste involved;
- 3) the degree of toxicity of the hazardous waste involved;
- 4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- 5) 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
- 6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

Id.

¹²⁸ *Id.* The *A&F* court found the Gore Amendment appealing, despite the fact that the Senate never adopted it into its version of the bill. *Id.* Because the Senate did not adopt the Gore Amendment, it did not appear in the final version of the bill, but the *A&F* court looked further into the legislative intent of the Senate, as reflected in floor debates. *A&F*, 578 F.Supp. at 1256. The *A&F* court concluded that the Senate did not want to design some mandatory standard for courts to follow regarding how to impose joint and several liability. *Id.*

¹²⁹ *Id.* at 1256.

¹³⁰ *Id.* at 1257. The *A&F* court found that a moderate approach would serve to protect the interests of minimal polluters, and would keep them from suffering unfair financial punishment. See *id.*

¹³¹ See *id.* The *A&F* court thus set the stage for advancing the other major approach to the liability question. It clearly stated its finding that the moderate approach was the more

The need for a uniform standard governing the imposition of joint and several liability in Superfund suits is long overdue. Results in these cases should not depend largely upon which federal court hears the case. The next section will consider various proposals to reform the Superfund joint and several liability scheme, but will mainly emphasize the current political climate and how it is affecting reform proposals.

IV. REFORMING THE SUPERFUND AND THE CURRENT POLITICAL CLIMATE

The Superfund has not been neglected since Congress passed the SARA Amendments in 1986.¹³² Many subsequent attempts have been

effective one, calling it "both persuasive and consistent with the intent of Congress." The *A&F*, 578, F. Supp. at 1256. Using the hypothetical from note 104, *supra*, the difference in philosophy between the *Chem-Dyne* and *A&F* courts can be easily understood. Assume that Lacquer Paint had deposited 100 tons of waste at the Glorious Waste site over thirty years, Acme Plastics had deposited 200 tons of waste over nineteen years, and Beaker Chemicals had deposited 50 tons of waste over ten years. If the court hearing the case followed the *A&F* approach, it would examine such factors as volume and toxicity of the wastes in allocating financial responsibility among the three companies. Suppose that although the volume of waste Lacquer Paint deposited was 100 tons, but its toxicity was only .001% per ton while the volume of waste that Beaker Chemicals deposited was 50 tons, but its toxicity was 1% per ton. Using this approach, a court might find that since Lacquer Paint was responsible for .1 percent of the hazardous release in terms of toxicity per ton while Beaker Chemicals was responsible for fifty percent of the hazardous release, Beaker Chemicals should bear a greater burden of the financial responsibility. This example is only one possible finding that a court might make using the moderate (*A&F*) approach. The court might also find that the burden should be borne fairly equally between Lacquer Paint and Beaker Chemicals, because Lacquer Paint contributed a significantly higher proportion of the waste. The moderate approach would allow a court to weigh all factors such as the ones presented here on an individual basis.

¹³² See John H. Cushman, Jr., *Buried in Measure on Toxic Waste: One Special Offer*, N.Y. TIMES, Sept. 5, 1997, at A1 (stating that "as if banished to a legislative limbo, bills to extend the toxic waste law have languished in three successive Congresses"). See also Alfred R. Light, "The First Thing We Do . . .": *The ABA's Resolution on CERCLA Reauthorization*, 9 J. NAT. RESOURCES & ENVTL. L. 371 (1994) (discussing the ABA's resolution to reform the Superfund law, which it has characterized as causing only "massive, wasteful, and unproductive litigation" in its current state). *Id.* at 378; Nancy Kaplan, Esq., *Superfund Headed for Reauthorization—and Repair*, in THE 1995 EXECUTIVE FILE: HOT ENVIRONMENTAL ISSUES 19 (M. Lee Smith, ed., 1995) (supporting the contention that Superfund suits are very involved regarding liability because "litigation is lengthy and protracted"); FRONA M. POWELL, LAW AND THE ENVIRONMENT 360 (1998) (stating that businesses often maintain that Superfund lawsuits are less expensive than potential cleanup costs, and that this factor thus fosters litigation). *But see* Robert W. McGee, *Superfund: It's Time for Repeal After a Decade of Failure*, 12 UCLA J. ENVTL. L. & POL'Y 165 (1993) (discussing the problems with Superfund and why it should be repealed instead of reformed). McGee maintains that litigation over joint and several liability has presented one of the largest problems because it has become so prolific. *Id.* at 173. See generally James A. Rogers & David H. Topol, *Proposals for Reforming Superfund*, C883 ALI-ABA 1 (1994) (presenting the criticisms of Superfund and outlining the various proposals designed to change it, including proposals

made to reform the Superfund, but none have succeeded.¹³³ Industries and major corporations are yet again campaigning to limit their scope of liability.¹³⁴ Businesses want to have restrictions placed upon the liability scheme, so that they do not face huge financial penalties.¹³⁵ However, environmental interest groups want to ensure that the pertinent statutory language is broad, so that the financial burden can be placed upon industry.¹³⁶ A major difficulty that industries face in this battle involves the question of whether joint and several liability should be imposed upon them, because they have the "deepest pockets" to bear the losses.¹³⁷

by the Treasury Department, the NAACP, and the National Environmental Trust Fund).
Id.

¹³³ See *supra* note 132. See also Rena I. Steinzor & David Kolker, *To Pay Or Not to Pay: Local Governments' Stake in Legislation to Reauthorize Superfund*, 25 URB. LAW. 627, 628 (1993) (arguing that public opinion thought the 103rd Congress would make strides at reforming the Superfund and stating that the last reauthorization came in 1986 with the passage of SARA). The SARA reauthorization was a four and a half year process and "involved a bruising battle between environmentalists, industry, and the Reagan Administration." *Id.* Although the 103rd Congress did not succeed in reforming the Superfund, as history has proved, the authors were correct in stating that the reform process was going to be "a drawn out, acrimonious political brawl." *Id.*

¹³⁴ See Andrew C. Revkin, *Babbitt Assails G.E. Over Delay in Ridding Hudson of Chemicals*, N.Y. TIMES, Sept. 26, 1997, at A1 (commenting on the lobbying efforts of corporations while Congress again debates updating the Superfund).

¹³⁵ *Id.* See also Cushman, *supra* note 132, at A1 (stating that industries also fear having to pay the costs of environmental restoration, in addition to penalties for cleanup of the site itself). For example, in Montana, the Atlantic Richfield Company has spent hundreds of millions to clean up a basin in the Clarks Fork River. *Id.* The company had polluted the basin after using the site for copper mining and smelting for more than one hundred years. *Id.* In addition to cleaning the site, the state wants the company to pay to restore the basin. *Id.* The state sued the company for \$765 million, the amount it estimates will be necessary to pay for the environmental damage. *Id.*

¹³⁶ See Revkin, *supra* note 134, at A16. But see Rogers & Topol, *supra* note 132, at 11 (discussing the Treasury proposal to reform the Superfund, which was made public on September 8, 1993). *Id.* The Treasury proposal advocated eliminating joint and several liability, as it was inconsistent with the philosophy that the polluter should pay the resultant expenses of the cleanup. *Id.* The environmental interest groups, however, are focused upon preserving and restoring the environment, and it can be presumed that these groups feel that industry is best suited to bear these costs.

¹³⁷ See McGee, *supra* note 132, at 174 (stating that the EPA has increasingly "used joint and several liability as a club, pursuing big companies with deep pockets, while often ignoring the waste generators who are most responsible for the waste problems"). McGee illustrates his point through the example of a case which occurred in Missouri, in which the EPA sued only four of a possible 300 waste generators. *Id.* The mega-company IBM was one of the four defendants that the EPA sued. *Id.* It had to engage in a lawsuit against more than 175 defendants to regain its expenses, even though it had contributed less than one percent of the waste at the site. *Id.*

Political pressures and party ideologies have significantly impeded reform attempts.¹³⁸ Republicans generally maintain that joint and several liability should be eliminated and replaced with a proportional liability scheme.¹³⁹ In a proportional liability scheme, cleanup costs would be assessed in accordance with the amount of waste that a party deposited at a given site.¹⁴⁰

Conversely, Democrats generally maintain that while the Superfund is in need of reform, its principle of forcing any responsible polluter to pay should be retained.¹⁴¹ The controversy lies in trying to forge a

¹³⁸ See generally 1996 BRIEFING BOOK, *supra* note 9, at 79 (discussing the differences between the Democrat and Republican positions regarding the Superfund). See also *What Do President Bill Clinton, EPA Administrator Carol Browner and the EPA Inspector General Say About Superfund?* (June 27, 1996) <<http://www.house.gov/transportation/press/press450.htm> [hereinafter *What Do They Say?*] (stating that in March and April 1996, the Clinton Administration and the Democrats presented thirty-four different proposals to the House Republicans, seven of which were rejected completely, and twenty of which the Republicans either accepted completely or modified).

¹³⁹ See 1996 BRIEFING BOOK, *supra* note 9, at 79. In the Republican view, imposing strict, joint and several liability fosters litigation instead of site cleanup. *Id.* Also, many Republicans holding Congressional offices have urged an end to retroactive liability. Advocates of this view see retroactive liability as an unfair punishment because it penalizes parties for waste disposals which were legal and done in accordance with law when they were made. *Id.*

¹⁴⁰ See *id.* See also *Chairman Shuster Pleased With Initial Subcommittee Hearing on Superfund* (June 13, 1995) <<http://www.house.gov/transportation/press/1995/press589.htm> (discussing how to reform Superfund). Although the bill did not succeed, his statement about the bill provides an insightful view of the Republican position. He stated that the liability reforms would:

[I]nsert more fairness into the process, reduce transaction costs, and help small businesses who have been caught up in Superfund . . . Small parties, who sent 1% or less of the waste to the site, are completely out of the system. These people do not have to hire lawyers and get dragged through years of litigation. For everyone else, today's litigation is replaced by an equitable allocation system.

Id.

¹⁴¹ See Cushman, *supra* note 132, at A17 (stating that many Democrats are wary of any proposal that would detract from the "original intent and goal of the Superfund legislation"). See also *What Do They Say?*, *supra* note 138 (saying that the Clinton Administration and the Democratic Party has altered their position regarding joint and several liability from one of "you can't pay for it" to "the polluter should pay, not the taxpayer; Superfund liability is fair; people should pay for any harm that they caused"). But see 1996 BRIEFING BOOK, *supra* note 9, at 79. Here, the EPA Administrator, Carol Browner, conceded that the Superfund liability provisions were broad and far-reaching. *Id.* The Administrator, contrary to the Republican position, felt that the retroactive liability scheme should be retained, forcing companies to assume responsibility for their past actions. *Id.* However, the EPA Administrator favored a statutory exemption for some smaller entities, including municipal landfills, homeowners, and smaller companies. *Id.*

compromise between the Republicans and the Democrats. Except for the past three terms, Congress has been unable to reach such compromise.¹⁴² In the 104th Congress, two major reform bills were proposed.¹⁴³ Senator Smith, who introduced a bill in the 104th Congress without success, also introduced a bill in the 105th Congress.¹⁴⁴

While the political controversy rages over what liability provisions should be included in the Superfund, towns such as Anywhere, U.S.A., face immediate, dangerous consequences when hazardous substances are released into the environment.¹⁴⁵ A very real example of a site currently in desperate need of cleanup is the Hudson River.¹⁴⁶ However,

¹⁴² See Cushman, *supra* note 132. See also note 132 and accompanying text.

¹⁴³ The bill that presumably received the most attention was proposed by Congressman Michael Oxley, a Republican from Ohio. His bill was designated H.R. 2500, 104th Cong. (1995), and its provisions are discussed in some detail in the 1996 BRIEFING BOOK, *supra* note 9, at 79. A convenient summary of this bill's major provisions can also be found online, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR02500:@@D>. Consistent with the Republican position, this bill sought to lessen liability for certain municipal landfills and small businesses. *Id.* H.R. 2500 also sought to limit the retroactive nature of Superfund liability by giving reimbursements from Superfund money to PRPs for fifty percent of their cleanup costs occurring after H.R. 2500 was introduced, but this exemption was only to apply if a PRP was liable before 1987. *Id.* Senator Bob Smith, a Republican from New Hampshire, introduced the other major bill, designated S. 1285, 104th Cong. (1995), but his bill was quickly stalled. See 1996 BRIEFING BOOK, *supra* note 9, at 79. This bill faced opposition from the Majority Leader, also a Republican, concerning tax credit provisions. *Id.*

¹⁴⁴ S. 8, 105th Cong. (1997). As of yet, this bill has not been passed. Representative Bud Shuster, a Republican from Pennsylvania, also lent his support to the bill. See generally *Chairman Shuster Applauds Introduction of the Smith-Chafee-Lott Superfund Reform Bill* (Jan. 22, 1997) <<http://www.house.gov/transportation/press/press09.htm>> (stating his belief that the 105th Congress would be successful in finally reforming the Superfund).

¹⁴⁵ See *supra* note 6 and accompanying text. In the hypothetical posed at the beginning of this note, government officials had just discovered that the groundwater supply reaching the town of Anywhere was polluted. To extend the hypothetical, it is now necessary to consider the ramifications of such pollution. The residents of Anywhere cannot drink water from their faucets for fear of ingesting possible toxic agents. Vegetation in gardens will be adversely affected if it is supplied with this water. Residents cannot eat fruits and vegetables raised with this water without possibly being exposed to toxins. The water also exposes various land and water animals to the toxins.

¹⁴⁶ See Revkin, *supra* note 134 at A1, A16. Two General Electric factories located along the upper banks are responsible for the release of polychlorinated biphenyls (PCBs) into the Hudson. *Id.* at A16. The PCBs have spread across approximately two hundred miles of the Hudson. *Id.* The chemicals have already adversely affected fish and wildlife, and scientists have recently discovered that the toxins are present in alarming levels in bald eagles and other birds. *Id.* PCBs are also thought to be linked to cancer and various learning disabilities as well, therefore presenting a very real threat to humans. *Id.* The release of hazardous substances into a water body is not uncommon. See also Cushman, *supra* note 132, at A17. In California, controversy looms over the release of chemicals such as DDT into the seacoast near Palos Verdes. *Id.*

the company responsible for paying the costs is currently struggling to influence the legislature to limit its liability.¹⁴⁷ Industries and interest groups are not the only ones lobbying for their interests.¹⁴⁸ Congressmembers are also trying to curry favor with one another by creating proposals favorable to key committee members.¹⁴⁹ The legislature must reach a compromise with regard to Superfund liability provisions if it wishes to expedite cleanup of polluted sites.¹⁵⁰ As the political sparring continues, towns such as Anywhere, U.S.A., suffer the consequences from the release of hazardous waste. The next section of this Note proposes a solution to how joint and several liability should be apportioned in Superfund suits.

V. A UNIFORM APPROACH TO JOINT AND SEVERAL LIABILITY IN SUPERFUND SUITS

Achieving a uniform approach to joint and several liability in Superfund suits will require compromise between opposing political interests and ideologies, as well as between environmental interest groups and industry. The Superfund should continue to pay for the cleanup of hazardous wastes, but reimbursement to the Superfund should be justly apportioned. Such just apportionment would involve combining principles from both ends of the political spectrum to create a solution that would be as equitable as possible for all affected parties.

¹⁴⁷ See Revkin, *supra* note 134, at A1, A16. The responsible company, General Electric, discovered that it was responsible for the release of the toxins in the 1980s. *Id.* at A16. The company stated that it has located and stopped "almost all new releases of the chemicals . . ." *Id.* Arguing that liability laws should be limited in their scope, the company pointed out that it has already spent in excess of \$130 million to prevent further contamination from occurring in the waters of the Hudson. *Id.* at A1.

¹⁴⁸ See *supra* notes 133, 135-36 and accompanying text.

¹⁴⁹ See Cushman, *supra* note 132, at A1. To gain support for their proposal, Republicans included a special provision for the home state of the ranking Democrat on the Senate Environment Committee because this committee is now considering the bill. *Id.* The state is Montana, which is currently suing the Atlantic Richfield Company for over half a million dollars to pay for environmental restoration at along the upper basin of the Clarks Fork River. *Id.* See also *supra* note 134 and accompanying text. In the current bill, Republicans are hoping to limit claims to pay for environmental restoration. See Cushman, *supra* note 132, at A1. Limiting such claims would force taxpayers in states without such special provisions to bear the costs of environmental restoration. *Id.* at A17. Such political bargaining is quite usual among parties, and this instance is "typical of the kind of horse-trading that is commonplace on Capitol Hill, especially in complicated cases like Superfund that involve many opposing interests." *Id.* at A1.

¹⁵⁰ See *supra* note 132 and accompanying text.

A. *The Proposal*

This proposal will include enforcement provisions as well as prospective measures to encourage future compliance in meeting disposal guidelines mandated by the EPA or the applicable state law.¹⁵¹ The proposal reads as follows:

- 1) *Liability shall be apportioned among multiple polluters at a given site in accordance with the volume and toxicity of the waste for which each polluter is responsible.*
- 2) *Retroactive liability shall be retained.*
- 3) *Manufacturers of hazardous substances shall pay a user fee when producing such substances. The user fee shall be proportional to the volume and toxicity of the materials in question.*
- 4) *Proceeds from the user fees shall go directly into the Superfund.*
- 5) *When effecting a disposal, a company shall obtain government certification that the substances have been disposed of in accordance with guidelines mandated by the EPA or the applicable state law.*
- 6) *Upon receiving proper government certification that the disposal has been made in accordance with guidelines mandated by the EPA or the applicable state law, the end user of a hazardous substance shall be entitled to partial reimbursement of the user fee.*

Thus, this proposal suggests a just apportionment of joint and several liability in Superfund suits and is more in accordance with the philosophy of the *A&F* court¹⁵² than that of the *Chem-Dyne* court.¹⁵³ Further, and perhaps more importantly, the proposal blends elements

¹⁵¹ This proposal is designed to specifically address joint and several liability in Superfund suits. Congress did not create a specific provision concerning joint and several liability in Superfund suits when it enacted CERCLA. See *supra* note 19, notes 82-85 and accompanying text. The absence of a joint and several liability provision in CERCLA has generally led federal courts to follow one of two approaches when determining joint and several liability in Superfund suits. See *supra* notes 86-131 and accompanying text. The lack of a uniform approach with regard to how federal courts should impose joint and several liability in Superfund suits has led to inconsistent results. *Id.* Thus, this proposal serves as an addition to the existing CERCLA statute because it is designed to specifically address the issue of joint and several liability in Superfund suits.

¹⁵² *United States v. A&F Materials Co.*, 578 F. Supp. 1249 (S.D. Ill. 1984).

¹⁵³ *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). For a comparison of the *Chem-Dyne* and *A&F* approaches, see *supra* notes 86-131 and accompanying text.

from a wide band of the ideological spectrum.¹⁵⁴ The institution of a proportional liability scheme reflects Republican philosophy while the retention of retroactive liability reflects traditional Democratic thought.¹⁵⁵ Yet, both principles are capable of working together harmoniously and effectively to realize a uniform approach in imposing joint and several liability in Superfund suits.

B. *The Principles Behind the Proposal*

1. A Proportional Liability Scheme

The use of proportional liability in Superfund suits would allow courts to have a concrete basis for apportioning liability. Even if wastes have commingled at a disposal site, courts can examine the volume and toxicity of the amount of waste that each polluter has contributed and, based upon these considerations, can apportion liability for cleanup costs among the various parties. Republicans have often advocated a proportional liability scheme, but use of such a scheme, if based on the volume and toxicity of a polluter's waste, is consistent with the "polluter pays" doctrine advanced by Democrats.¹⁵⁶ Under a proportional liability scheme, each polluter would be responsible for the costs of the cleanup, but this liability would be assessed according to each polluter's share of disposed waste at the site. Many Democrats also maintain that in considering Superfund reform proposals, the legislature must be careful to adhere to the statute's original intent and goal.¹⁵⁷ A proportional liability scheme based on volume and toxicity of the disposed waste does not appear to conflict with the statute's original intent.¹⁵⁸ Furthermore, the adoption of a proportional liability scheme in which courts allocate liability based on the volume and toxicity of disposed waste would also provide defendants in Superfund suits with a degree of certainty and predictability.¹⁵⁹ The next principle set forth in this Note favors retaining retroactivity in Superfund suits. This principle is arguably more

¹⁵⁴ For a discussion of the differing political ideologies regarding liability in Superfund suits, see *supra* notes 132-50 and accompanying text.

¹⁵⁵ See *supra* notes 139 and 141 and accompanying text.

¹⁵⁶ See *supra* note 141 and accompanying text.

¹⁵⁷ *Id.*

¹⁵⁸ See *supra* notes 127-28 and accompanying text.

¹⁵⁹ Using this type of proportional liability scheme would presumably avoid the "frantic and expensive search for other parties to whom to disperse costs . . . [along with the] costly and protracted litigations that have left the cleanup process hamstrung." KRAMER & BRIFFAULT, *supra* note 33, at 64.

controversial than the proportional liability scheme, but the retroactivity principle is clearly within the spirit of the original CERCLA legislation.¹⁶⁰

2. Retaining Retroactivity

In a Superfund suit, PRPs are often held responsible for actions which have occurred many years ago. This principle, known as retroactivity, has been widely criticized as unfair and inconsistent with the principles of tort law.¹⁶¹ However, the Superfund must continue to apply retroactive liability to PRPs if it is to be effective in achieving cleanup.¹⁶² Retroactive liability in Superfund suits directly assists the environment because it forces PRPs to account for their past actions, even if a PRP acted in accordance with the law at the time of the disposal. Republicans have argued that retroactive liability should be eliminated while Democrats have argued that it should be retained.¹⁶³

Although the imposition of retroactive liability may seem unfair to PRPs who abided by existing laws at the time they made a disposal, retaining such liability seems to be environmentally practical.¹⁶⁴ Retaining retroactive liability in Superfund suits would ensure to the fullest extent practicable that a PRP would reimburse the Superfund for past actions which have caused environmental problems. The Superfund would thereby be replenished by PRPs instead of burdening

¹⁶⁰ See *infra* notes 161-63 and accompanying text. See *supra* note 139 for a discussion of Republican philosophy regarding retroactivity in Superfund suits. See *supra* note 141 for an analysis of Democratic thought concerning retroactivity in Superfund suits.

¹⁶¹ See *supra* note 139 and accompanying text. See also KRAMER & BRIFFAULT, *supra* note 33, at 57 (stating that the presence of strict and retroactive liability in the Superfund makes PRPs liable for even the most "indirect and improbable consequences of actions taken decades ago with respect to waste disposal," even if the PRP followed the existing law with regard to disposal).

¹⁶² If retroactive liability could not be imposed in Superfund suits, what would happen to towns such as Anywhere, U.S.A.? Provided the Superfund has enough money, a contractor could be hired to clean up the release of hazardous substances, but how would the Superfund be reimbursed? PRPs must reimburse the Superfund, for if it ceases to exist, the taxpayers would become directly responsible for bearing all of the cleanup costs. Such a result would defeat a proportional liability scheme, as the Republicans advocate, as well as the "polluter pays" doctrine, as the Democrats advocate.

¹⁶³ See *supra* notes 139 and 141 and accompanying text.

¹⁶⁴ See *supra* note 162 and accompanying text. Putting political ideologies aside, imposing retroactive liability will force PRPs to be active in taking responsibility for cleanups. Complex suits such as the Superfund involve varied "political, sociological, economic, and technological implications . . . [however] we must consider not only the individual litigant and lawyer, but entire communities." JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 46 (1995).

taxpayers with additional expenses. It may be necessary, however, to make retention of retroactivity more politically palatable by inserting an ameliorative clause designed to provide relief to companies, particularly small businesses, that are facing financial ruin and dissolution because previously accepted disposal practices that they followed in good faith are now environmental threats. Finally, the consideration of retroactive liability can exert a salutary effect upon some hazardous substance disposers by forcing them to exercise greater care in disposal techniques than, absent the specter of possible future liability, would otherwise be their inclination. The next principle that this proposal establishes is the creation of the user fee. The user fee is necessary to increase immediate Superfund monies, as well as to encourage compliance with proper disposal methods.¹⁶⁵

3. The User Fee

This proposal suggests placing a user fee upon manufacturers of hazardous substances. This user fee should be proportionate to the volume and toxicity of the particular substance and would, naturally, be passed on in the price of the product to each successive user. End users would be able to receive partial reimbursement of this user fee if they produced government documentation showing that the substance had been disposed of in accordance with procedures mandated by the EPA or the applicable state law.¹⁶⁶ Placing a user fee on hazardous substances has a twofold purpose. First, proceeds from the user fee can go directly into the Superfund, thereby increasing the amount of money immediately available for cleanups. Second, providing partial reimbursement of the fee for suitable disposal will ultimately encourage compliance with proper disposal methods.¹⁶⁷ Although such compliance

¹⁶⁵ See *infra* notes 166-68 and accompanying text.

¹⁶⁶ To protect against fraud, EPA officials or state environmental authorities would have to verify that the hazardous substances were disposed of properly. This verification could take place through an EPA or state environmental on-site examination, for instance. An on-site examination is only one possibility to ensure verification, and this note does not suggest that an on-site examination should be the only means of meeting the verification requirement.

¹⁶⁷ For instance, if Beaker Chemicals manufactured one ton of benzene, and paid a user fee of 50¢ per pound, the assessed user fee would be \$1000. The user fee that Beaker Chemicals paid would be reflected in the cost the company would charge for benzene. Under the proposal in this note, that money would go into the Superfund to pay for various cleanups. If Acme Plastics purchased the benzene to use in making plastics, and properly disposed of its waste, it would receive documentation allowing for partial reimbursement of the user fee. Even if the legislature decided to allow a company to be reimbursed for only 25% of the fee, Acme Plastics could still receive \$250. This

would not allow a PRP to escape liability under the proposal in this Note, it will encourage PRPs to make disposals as environmentally safe as possible.¹⁶⁸ Imposing user fees and providing for their partial reimbursement will offer financial incentives for complete and careful tracking of hazardous substances, from the time of manufacture to the time of disposal.

Furthermore, such user fees would not be fundamentally unfair to the purchasers of hazardous substances. The fee would not unduly burden the manufacturers because they could pass on the additional costs in the price of their products in a fashion similar to a value added tax. The scheme will, of course, cost the final consumer a bit more, but, by offering some financial incentive for proper disposal, it will encourage voluntary compliance with disposal regulations. The consequent provision of additional environmental protection should generate widespread public acceptance of the levy.

VI. CONCLUSION

Since its creation in 1980, the Superfund has caused a great deal of angst, uncertainty, and resistance, particularly with regard to liability. In creating the Superfund, Congress failed to define how joint and several liability should be imposed upon PRPs. This lack of legislative guidance has led courts to apply different approaches to the imposition of joint and several liability in Superfund suits. This lack of uniformity has perpetuated remedial inconsistency, which can be best remedied by a uniform approach to joint and several liability. Delay and excessive litigative expense cannot continue to consume PRPs, as they desperately try to avoid being drawn into the Kafkaesque landscape of uncertainty perpetuated by inequitable apportionment of liability. A just and uniform approach to joint and several liability will dispel uncertainty by providing PRPs with firmer guidelines as to how liability will be apportioned. For a uniform approach to be adopted, however, politicians of all stripes must be willing to engage in ideological compromise. Competing political philosophies can no longer continue to postpone solutions at the expense of the environment.

This Note has provided one proposal for establishing a uniform approach to joint and several liability in Superfund suits. As our country approaches the third millennium, it is imperative that its leaders

reimbursement would, in this author's view, provide great incentive for a company to dispose of its waste properly.

¹⁶⁸ See *supra* notes 151-66 and accompanying text.

seriously address the grave consequences engendered by decades of releasing hazardous substances into the environment. PRPs must be held accountable for the costs of cleaning up the environment when their actions result in the release of hazardous substances. However, the PRP with the "deepest pockets" should not be the one that is held accountable for the bulk of the cost. Liability should be justly apportioned, in accordance with the volume and toxicity of the hazardous substances for which the PRP is responsible. Steps should be taken to encourage proper disposal of hazardous substances. Imposing user fees upon hazardous substances and allowing for their partial reimbursement after proper disposal could provide a great incentive to carefully comply with mandated disposal standards. Such incentives cannot displace the need to retain retroactivity in Superfund suits, however. Each polluter should pay for tainting the environment, but a polluter's liability should be apportioned in the most equitable fashion possible. To protect the future of towns such as Anywhere, U.S.A., elected representatives must provide the guidance that has been conspicuously lacking in the past. Through legislative remediation, this country must provide the framework and the leadership that will allow its courts to apply a uniform approach to joint and several liability in Superfund suits.

-Jennifer L. Stringer