Contribution Under CERCLA: Judicial Treatment After SARA

INTRODUCTION

As part of the Superfund Amendments and Reauthorization Act of 1986 (SARA),[1] Congress expressly provided for a right of contribution in liability actions under Section 107 of the Comprehensive Environmental Response and Liability Act (CERCLA).[2] Even before the enactment of this section most federal courts had implied a right of contribution from either the objectives and overall scheme of CERCLA itself or from the federal common law.[3]

Nevertheless, the amended Section 113 of CERCLA does not give courts much guidance on how liability should be apportioned in contribution actions between potentially responsible parties. Moreover, Section 113(f) is unclear as to whether equitable defenses can be used as a bar to a contribution action or whether these defenses could merely be used to mitigate contribution liability. Part I of this Note will provide an overview of the objectives behind CERCLA and the mechanics of the liability section of the Act. Part II will discuss the different theories of apportionment a court could employ in a contribution action under CERCLA. Part III will explore the cases that discuss contribution under CERCLA, the mechanics of apportionment and the use of equitable defenses. The Note will then point out any trends in the federal courts' development of a rule of apportionment and suggest some reforms in the treatment of contribution under CERCLA.

1. Pub. L. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 and other provisions of the U.S.C. (Supp. IV 1986)).

2. SARA § 113(b), CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (Supp. IV 1986).

3. *See, e.g.*, United States v. New Castle County, 642 F. Supp. 1258, 1269 (D. Del. 1986); United States v. Conservation Chemical Co., 619 F. Supp. 162, 228 (W.D. Mo. 1985); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985); Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1492 (D. Colo. 1985).

I. OVERVIEW OF THE ACT

A. *Objectives of the 1980 Act*

CERCLA was adopted in 1980, in a rush during the closing days of the Democratic-controlled 96th Congress.[4] The crux of the legislative scheme centers on the taxation provision, which created a "Superfund" to finance the cleanup of orphan toxic waste sites,[5] and on the liability provision, which imposes liability on certain enumerated parties for costs relating to the release of a hazardous substance.[6]

Because the final Act was a compromise bill put together hurriedly, the legislative history is unclear and not very helpful in gaining a perspective on the overall objectives of the Act. In interpreting the Act, however, federal courts have used this history extensively in attempting to discern the scope and meaning of the Act.[7] Courts have found the main objective of CERCLA to be to provide a rapid cleanup response to improperly managed waste sites that threaten public health and to induce voluntary cleanups at those sites.[8]

Congress was more explicit about its objectives when it passed SARA. The House Report on the Superfund Amendments stated

4. *See* Grad, *A Legislative History of the Comprehensive Environmental Response and Liability Act*, 8 COLUM. J. ENVTL. L. 1 (1982); Envtl. L. Inst., 1 *Superfund: A Legislative History*, xiii - xxii (1982).

5. CERCLA § 201, Amendments to Internal Revenue Code of 1954, 26 U.S.C. §§ 4611, 4612, 4661 (1982); SARA § 204(a), CERCLA § 221(a), 42 U.S.C. 9631(a) (1982); Superfund Revenue Act of 1986, SARA §§ 511-517 (these sections deal with the financing of the Superfund, providing a total of 8.5 billion dollars over five years); for an explanation of these provisions *see* Atkeson, Goldberg, Ellrod & Connors, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986*, 16 ENVTL. L. REP. (ENVTL. L. INST.) 10363, 10413 (1986); *see also* CERCLA § 111, 42 U.S.C. § 9611 (1982 & Supp. IV 1986) (provision for use of the Hazardous Substance Superfund).

6. CERCLA § 107, 42 U.S.C. § 9607 (1982 & Supp. IV 1986).

7. *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802, (S.D. Okla. 1983). In Chem-Dyne, the court reviewed the legislative history of the Act in order to discern legislative intent as to the imposition of joint and several liability under CERCLA. The court found joint and several liability allowable under the Act after an extended exploration into the Congressional Record and the comments of the bill's sponsors. *Id.* at 805-808.

8. *Id.* at 805; *see also* City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135, 1142-1143 (E.D. Pa. 1982) (the objective of CERCLA is "to facilitate the prompt clean up of hazardous dump sites by providing a means of financing both governmental and private responses and by placing the ultimate financial burden upon those responsible for the danger"); United States v. Conservation Chemical Co., 628 F. Supp. 391, 404 (W.D. Mo. 1985) ("[t]he fundamental purpose of CERCLA is to provide for the expeditious and efficacious cleanup of hazardous waste sites"); Colorado v. ASARCO, Inc., 608 F. Supp. at 1491.

that the bill "has been written with the underlying belief that Congress should focus on ways to ensure rapid and thorough cleanup of abandoned hazardous waste sites . . . ."[9] The legislative history reflected that in replenishing the Superfund, Congress was aware that the EPA would not have adequate monetary and personnel resources to cleanup all the hazardous waste sites that needed attention.[10] The House Report, in stating that an underlying principle of SARA is to "[f]acilitate cleanups of hazardous substances *by the responsible parties* while assuring a strong EPA oversight role with a set of tough legal enforcement standards", illustrates that Congress intended SARA to respond to the problem of inadequate EPA resources.[11]

B. *Liability Under the Act*

Section 107(a) of CERCLA provides that parties will be liable for government and/or private party cleanup costs of toxic waste sites if that party is:

> (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 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 . . . of a hazardous substance . . . .[12]

These parties, commonly referred to as potentially responsible parties (PRPs) by commentators, are subject to strict liability and given only limited statutory defenses.[13] The Act itself does not explicitly state that the strict liability standard applies, but states

9. H.R. REP. No. 253(I), 99th Cong., 1st Sess. 3, 55 (1985) *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2837 [*hereinafter* HOUSE REPORT].

10. *Id.*

11. *Id.* (emphasis added).

12. 42 U.S.C. § 9607(a) (1982 & Supp. IV 1986).

13. CERCLA § 107(b), 42 U.S.C. § 9607(b) (1982).

that the term "liable" shall be interpreted in the same way as the standard of liability of Section 311 of the Clean Water Act.[14] This section has been interpreted as imposing a strict liability standard and has been applied as the liability standard of CERCLA Section 107.[15]

In a CERCLA action where multiple parties are potentially liable under Section 107, courts usually impose joint and several liability. Questions of equitable apportionment of this liability often are considered subsequently in an action for contribution. When CERCLA was enacted, the section that had contained an express provision providing for joint and several liability was deleted and no mention of the term was included in the Act.[16] Despite this deletion, however, no court has interpreted this as a rejection of joint and several liability under CERCLA.[17] In *United States v. Chem-Dyne*, the Oklahoma District Court examined the legislative scheme and history of CERCLA and determined that "the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case-by-case evaluation of the complex factual scenarios associated with multiple generator waste sites will assess the propriety of applying joint and several liability on an individual basis."[18]

In applying joint and several liability in cases under CERCLA, courts take two different approaches to the problem. The majority of courts apply the common law tests set forth in the *Restatement (Second) of Torts*, Section 886A,[19] while a minority of courts

14. 42 U.S.C. § 1321(b)(3) (1982).

15. *See, e.g.*, City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. at 1140; United States v. Chem-Dyne, 572 F. Supp. 802, 805 (S.D. Okla. 1983).

16. 126 CONG. REC. S14969 (daily ed. Nov. 24, 1980)(remarks of Sen. Stafford); 126 CONG. REC. S14964 (Senator Randolph, sponsor of the bill, explained that "[w]e have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable . . . .The changes do not reflect a rejection of the standard in the earlier bill."); *see also* 126 CONG. REC. H11787 (daily ed. Dec. 3, 1980)(remarks of Rep. Florio); H11787 (remarks of Rep. Waxman); for a discussion of the legislative history in regard to joint and several liability, *see* United States v. Chem-Dyne, 572 F. Supp. at 805-07.

17. *See, e.g.*, United States v. Chem-Dyne, 572 F. Supp. at 808; United States v. Wade, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983); United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 994 (D. S.C. 1986), *aff'd sub nom.* United States v. Monsanto Co., 858 F.2d 1607 (4th Cir. 1988).

18. United States v. Chem-Dyne, 572 F. Supp. at 808 (*citing* 126 CONG. REC. at S14964, H11787, H11799 (Nov. 23, 1980).

19. RESTATEMENT (SECOND) TORTS, § 886A (1979) [*hereinafter* RESTATEMENT].

apply a "moderate" approach, taking into account issues of fairness and equitable apportionment at the liability stage.

While a court may impose joint and several liability under CERCLA, the Act does not require it to do so.[20] A court generally applies joint and several liability when there is a single, indivisible harm among joint tortfeasors causing such harm.[21] If two or more causes have combined to bring about a harm to a plaintiff, courts apply the common law rule of apportionment if there are distinct harms or if there is a reasonable basis for determining how much each cause contributed to a single harm.[22]

In CERCLA liability cases, however, it is extremely difficult to show that an injury is divisible or otherwise subject to apportionment. Theories of divisibility based on the volume of waste contributed by a party to a toxic dump site have been rejected by most courts. Courts have rejected this theory of divisibility because volume of waste is not necessarily an accurate predictor of the risk associated with that waste due to the different toxicity levels and migratory potential of different substances.[23] Therefore, volume of waste as a basis for finding a divisible harm would only be appropriate when all the waste disposed at the site was the same.[24] Basing divisibility on different stages of a cleanup has also been rejected as a sound basis for apportionment because it was unrelated to the various parties' contribution to the harm.[25] Another factor that makes a finding that the harm is divisible un-

20. *See, e.g.*, United States v. Chem-Dyne, 572 F. Supp. at 810-11; New York v. Shore Realty Co., 759 F.2d 1032, 1042 n.13 (2d Cir. 1985); United States v. Stringfellow, 661 F. Supp. 1053, 1059-60 (C.D. Cal. 1987); United States v. Monsanto Co., 858 F.2d 160.

21. United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. at 994, *aff'd sub nom.* United States v. Monsanto, 858 F.2d 160; United States v. Chem-Dyne, 572 F. Supp. at 810; United States v. Wade, 577 F. Supp. 1326, 1337-38 (E.D. Pa. 1983); the approach of these courts follows the common law test as stated in the RESTATEMENT, § 875.

22. RESTATEMENT, § 433A; *see e.g.* United States v. Chem-Dyne, 572 F. Supp. at 810; New York v. Shore Realty Co., 759 F.2d at 1044 (the proper mechanism to determine whether to impose joint and several liability is under common law principles on a case-by-case basis).

23. O'Neil v. Picillo, 682 F. Supp. 706, 725 (D. R.I. 1988); United States v. Chem-Dyne Corp., 572 F. Supp. at 811; *see also* United States v. Stringfellow, 661 F. Supp. at 1060; United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. at 994, *aff'd sub nom.* United States v. Monsanto, 858 F.2d 160.

24. O'Neil v. Picillo, 682 F. Supp. at 725.

25. *Id.*

likely is that the burden is on the defendant who seeks to limit its liability to show that the harm is capable of apportionment.[26]

A minority of courts confronting the joint and several liability issue have taken a slightly different view of the doctrine's application in CERCLA cases. In *United States v. A & F Materials, Co.*,[27] the District Court for the Southern District of Illinois agreed with the majority approach that the language of CERCLA did not preclude the application of joint and several liability. However, the court found that "a rigid application of the *Restatement* approach to joint and several liability is inappropriate."[28] The court reasoned that this would be contrary to the Congressional intent behind CERCLA to promote fairness in apportionment and could lead to harsh results for a defendant who contributed a small amount to a large indivisible hazardous site. The court instead followed a "moderate" approach to joint and several liability which took into account various factors in apportioning the harm.[29] The court took the factors it considered from the language of the unenacted Gore Amendment to CERCLA. This Amendment had been passed by the House of Representatives, but was later dropped in the final bill passed in 1980.[30] The Amendment had provided for a multiple factor test for courts to employ in deciding whether to employ joint and several liability or to apportion liability based on other equitable factors. Under the Gore Amendment, the court could consider, among other factors, the defendant's level of contribution to the hazard, the defendant's culpability, and the degree of cooperation of the defendant with government officials.[31]

26. RESTATEMENT, § 433B; United States v. South Carolina Recycling, 653 F. Supp. at 994; United States v. Dickerson, 640 F. Supp. 448, 450 (D. Md. 1986); United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985); United States v. Chem-Dyne, 572 F. Supp. at 810.

27. 578 F. Supp. 1249 (S.D. Ill. 1984).

28. *Id.* at 1256.

29. *Id*; *see also* United States v. Hardage, 116 F.R.D. 460, 465-66 (W.D. Okla. 1987) (a court may apportion damages according to "the degree of involvement by the parties in the generation, transportation, treatment stage, or disposal of hazardous waste and the degree of care exercised").

30. 126 CONG. REC. at H9461, 26,781. The Gore Amendment was passed by the House of Representatives on September 23, 1980, as part of H.R. 7020, but was later dropped in the compromise bill enacted by Congress in December, 1980.

31. Under the amendment, courts had the power to impose joint and several liability whenever a party could not show a reasonable way to apportion the damage; however, in

The approach of the court in *A & F Materials* was criticized by a South Carolina District Court in *United States v. South Carolina Recycling Co.*[32] In that case, the court found that consideration of the Gore factors at the liability stage was premature. Rather, the court found that these factors were better considered in an action for contribution by PRPs because in this way the cleanup of the site would not be delayed.[33] In *United States v. Monsanto Co.*, the Fourth Circuit affirmed the district court in *South Carolina Recycling* and stated that factors such as degree of fault in contributing to the toxic waste site would be relevant in an action for contribution, but not at the liability stage.[34]

It should be noted that in private cleanup actions where all the parties are PRPs, the issue of whether equitable factors are considered at the liability or contribution stage is not that critical. This is because a private action between PRPs, although deciding issues of liability, is actually the equivalent of a contribution action between PRPs seeking indemnification for liability to the government for cleanup. Nevertheless, the majority approach of

imposing joint and several liability, a court could apportion damages according to the following factors as set forth in the amendment:

(i) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;

(ii) the amount of the hazardous waste involved;

(iii) the degree of toxicity of the hazardous waste involved;

(iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;

(v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and

(vi) the degree of cooperation by the parties with Federal, State or local officials to prevent any harm to the public health or the environment. 126 CONG. REC. 26,781 (1980).

32. 653 F. Supp. at 994, n.7.

33. *Id.* at 995; O'Neil v. Picillo, 682 F. Supp. 706, 725 (D.R.I. 1988) ("[i]ssues of fairness and equitable apportionment may be more properly addressed in a subsequent contribution action . . ."(citing RESTATEMENT § 881(1) & (2)); United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal 1987). *See generally* Garber, *Federal Common Law of Contribution under the 1986 CERCLA Amendments*, 14 ECOLOGY. L.Q. 365, 370 (1987). Ms. Garber argues that apportionment of liability very well might reduce the ability of a party to recover costs from defendants, while contribution merely redistributes liability among PRPs after relief has been awarded. Dubuc & Evans, *Recent Developments Under CERCLA: Towards a More Equitable Distribution of Liability*, 17 ENVTL. L. REP. (ENVTL. L. INST.) 10197 (June 1987) (the application of the Gore Amendment approach can further complicate liability trials and lead to greater delay in the cleanup of sites). *But see Developments - Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1527-35 (1986). *Developments* argues for the application of the Gore Amendment factors instead of the traditional approach to joint and several liability in order to avoid unfair treatment to deep pocket parties that did not substantially contribute to the harm.

34. 858 F.2d 160.

putting off the questions of equitable apportionment until the contribution stage is the more efficient approach because it still promotes fairness but does not invite complication and delay in deciding liability.

C. *Joint and Several Liability in Actions for Contribution*

The *Restatement* provides that in actions for contribution joint tortfeasors cannot be liable for more than their equitable share of the liability.[35] Therefore, liability for a defendant in a contribution action is several, but not joint. In CERCLA liability actions this will mean that any PRPs sued first would be jointly and severally liable, while in a subsequent action for contribution these PRPs would only be able to recover an amount from any unnamed PRPs that is equal to the unnamed PRPs' equitable contribution to the damage.

The *Restatement* approach was taken by the court in *United States v. Conservation Chemical*.[36] In that case, the Western District of Missouri recognized that third-party plaintiffs could maintain a contribution action against third-party defendants, but the court stated that the liability of the third-party defendants would be limited to their equitable share.[37] This approach does not promote a Congressional policy of fairness to multiple defendants. By making contribution liability joint and several, all solvent PRPs—whether named parties in the original cleanup or not—would be responsible for the entire cost of the cleanup. In this way, PRPs would not end up paying an unfair portion of the liability merely because they were unfortunate enough to be sued first as named parties in the original suit.

II. CONTRIBUTION UNDER CERCLA

A. *Generally*

CERCLA Section 113(f),[38] added to CERCLA by the 1986 Superfund Amendments (SARA), governs actions for contribution under the Act. That section provides:

> (1) Any person may seek contribution from any other person who is liable or potentially liable under Section 107(a), during

35. RESTATEMENT, § 886A(2).
36. 619 F. Supp. 162, 229 (W.D. Mo. 1985) (*citing* the RESTATEMENT).
37. *Id.*
38. 42 U.S.C. § 9613(f) (Supp. IV 1986), added to CERCLA by SARA § 113(b).

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

The legislative history illustrates that the Congressional purpose of adding this provision to CERCLA was to "[e]ncourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups."[39] Although contribution actions may encourage settlement and private cleanup of hazardous waste sites by promoting a policy of fairness in apportionment of liability, it is difficult to see how this provision has decreased CERCLA litigation.

Even before the enactment of Section 113(f), many federal district courts had implied a right of contribution from the language of CERCLA itself or the federal common law.[40] Courts had noted even before the enactment of Section 113(f), that federal courts should adopt a uniform federal common law rule of contribution.[41] In the United States, however, there is not a single, uniform approach to contribution; hence there is no uniform "American Rule" from which federal courts could borrow to apply in CERCLA cases.[42]

Nevertheless, there are several different methods of allocating liability which could be borrowed for contribution cases under CERCLA. The *Restatement* recognizes two methods for apportioning equitable shares of the liability—pro rata contribution and comparative contribution.[43] Moreover, the *Restatement* provides no right of contribution for intentional torts and states that no tortfeasor can be required to make contribution beyond that

39. HOUSE REPORT at 59, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2841.

40. *See, e.g.*, United States v. New Castle County, 642 F. Supp. 1258, 1269 (D. Del. 1986); United States v. Conservation Chemical Co., 619 F. Supp. at 228; Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (W.D. Mo. 1985); Colorado v. ASARCO Inc., 608 F. Supp. 1484, 1492 (D. Colo. 1985); *see generally* Note, *A Right to Contribution Under CERCLA: The Case for Federal Common Law*, 71 CORNELL L. REV. 668 (1986); Note, *The Right of Contribution for Response Costs Under CERCLA*, 60 NOTRE DAME L. REV. 345 (1985).

41. *See* United States v. Chem-Dyne, 572 F. Supp. 802, 808 (S.D. Okla. 1983).

42. Note, 60 NOTRE DAME L. REV. 345, *supra* note 40, at 357; W. PROSSER & W. KEETON, THE LAW OF TORTS, §§ 46-52 (5th ed. 1984).

43. RESTATEMENT, § 886A, comment h.

tortfeasor's equitable share of the liability.[44] Courts could also apply other methods of contribution such as comparative causation or consideration of numerous factors as in the Gore Amendment.[45]

B. *Different Methods of Apportionment*

Questions regarding liability apportionment arise in three situations. First, when the government sues less than all PRPs and a subsequent action for contribution is brought by the named parties against other PRPs.[46] Second, in a private action to recover response costs pursuant to Section 107(a)(4)(B) when the party incurring cleanup costs does not name all PRPs in the action and a subsequent action for contribution is brought by the named PRPs against other PRPs. Third, when one PRP brings a private action to recover response costs against another PRP.[47] This third situation, although not technically an action for contribution, has the same effect as an action for contribution because a court must decide issues of liability apportionment between PRPs.

Under a pro rata scheme of apportionment, costs are divided equally among all joint tortfeasors.[48] This method has been criticized as inappropriate for contribution suits under CERCLA.[49] This method would not promote CERCLA's policies of fairness or the encouragement of voluntary cleanup when all PRPs, no matter how small their contribution to the environmental hazard, would be equally liable for the cleanup. Numerous federal courts have noted that Congress was concerned with fairness when it enacted the liability section of CERCLA[50] and the legislative history of SARA points out that Congress was concerned with imposing

44. RESTATEMENT, § 886A(2) & (3).

45. Garber, *supra* note 33, at 382.

46. *See, e.g.*, United States v. Northernaire Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987).

47. *See, e.g.*, FMC Corp. v. Northern Pump., 668 F. Supp. 1285 (D. Minn. 1987).

48. RESTATEMENT, § 886A comment h; The pro rata method of apportionment is also recommended in the Uniform Contribution Among Joint Tortfeasors Act (UCATA) §§ 1(b), 2, 12 U.L.A. 63, 87 (1975).

49. Garber, *supra* note 33, at 382; Note, 60 NOTRE DAME L. REV. 345, *supra* note 40, at 364-66.

50. *See* Idaho v. Bunker Hill Co., 635 F. Supp. 665, 677 (D. Idaho 1986); United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984); United States v. Conservation Chemical Co., 628 F. Supp. 391, 401-02 (W.D. Mo. 1985) ("CERCLA imposes on the judiciary a duty to apportion responsibility in a fair and equitable manner.").

unfair liability on innocent landowners and PRPs that were small contributors to a toxic waste site.[51]

A second method of apportionment recognized by the *Restatement* divides liability based on comparative fault.[52] Under this method as set out in the Uniform Comparative Fault Act (UCFA), each party is assigned a portion of the total fault based on that party's conduct and its causal connection to the harm.[53] This scheme is more in line with CERCLA's policy of fairness because it takes each party's contribution to the harm into account in dividing liability. Under this scheme, knowledge, amount of risk created by the conduct, degree of negligence and overall circumstances of the conduct are taken into account in apportioning liability.[54]

The comparative causation method of apportionment would divide liability based on the percentage of harm created by each PRP. Some courts have attempted to do this by dividing the liability based on volumetric shares of toxic substances dumped.[55] As stated earlier, this is a poor basis to apportion liability because the volume of waste does not necessarily relate to the amount of risk created by that PRP. Differing toxicity and migratory potential of hazardous substances make volume only one factor in determining how much harm or risk of harm was caused by a PRP.[56] Moreover, comparative causation alone is not helpful in apportioning liability between different classes of PRPs. It is impossible to determine what part of the harm was caused by an owner/operator of a landfill compared to a transporter or generator.

A modification of the comparative fault approach would take into account the factors outlined in the Gore Amendment at the contribution stage.[57] Under the Gore Amendment, liability would be apportioned based on a number of factors that are

51. *See, e.g.*, 131 CONG. REC. H11,093-94, H11,158, S12,008; 132 CONG. REC. S14,922; *supra* notes 9-11 and accompanying text.

52. RESTATEMENT, § 886A comment h.

53. UNIF. COMPARATIVE FAULT ACT (UCFA) § 2, 12 U.L.A. 41-42 (Supp. 1987).

54. *See* UCFA § 2 comment, 12 U.L.A. 42 (Supp. 1987).

55. This approach often comes up in deciding whether the harm is divisible for joint and several liability purposes. *See* O'Neil v. Picillo, 682 F. Supp. 706, 725 (D.R.I. 1988) (court rejects argument that harm is divisible based on volumetric contribution of substances to the site because different wastes have different toxicity).

56. *See supra* notes 23-25 and accompanying text; *see also* Garber, *supra* note 33, at 384.

57. *See supra* note 31 and accompanying text; Garber, *supra* note 33, at 385.

designed to further the goals of CERCLA. This apportionment method takes into account the relative fault of liable parties by examining different factors such as volume, toxicity and other factors which relate to culpability, as well as the role of the party in the disposal of the waste.[58] In the legislative history of SARA, factors very similar to those contained in the Gore Amendment were discussed as relevant criteria for courts to employ when deciding contribution actions.[59] This approach would be similar to the one taken by the court in *A & F Materials*, but the apportionment would take place at the contribution rather than liability stage.

III. JUDICIAL APPLICATION OF CONTRIBUTION PRINCIPLES IN CERCLA CASES

A. *Allocation of Liability*

The cases applying Section 113(f) do not give much guidance in answering the question of what "equitable factors" a court should emphasize in apportioning costs.[60] Recent cases suggest that federal courts are creating a federal common law of contribution that follows the *Restatement*, section 886A, and apportions liability according to a modified comparative fault approach that incorporates equitable defenses as to mitigation of damages, and the multi-factor approach suggested by the Gore Amendment.[61] The legislative history of Section 113(f) cites *Chem-Dyne* and *A & F Materials*, voicing approval of the standards of liability adopted by those courts.[62] This is ironic and makes this legislative history unclear, given that the *Chem-Dyne* court followed the *Restatement* rule to find joint and several liability if the harm was indivisible, while the *A & F Materials* court approached the joint and several

58. United States v. Conservation Chemical, Co., 628 F. Supp. at 401.

59. HOUSE REPORT at 19, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3042.

60. 42 U.S.C. § 9613(f) (Supp. IV 1986) ([I]n resolving contribution claims, the court may allocate response costs among liable parties using such *equitable factors* as the court determines are appropriate. . . .)(emphasis added).

61. *See, e.g.*, Chemical Waste Management v. Armstrong World Ind., 669 F. Supp. 1285 (E.D. Pa. 1987); Amoco Oil v. Dingell, 690 F. Supp. 78 (D. Me. 1988); United States v. Conservation Chemical Co., 628 F. Supp. at 401-04.; *Cf.* FMC Corp. v. Northern Pump, 668 F. Supp. 1285; United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988) (equitable factors may be considered at the contribution stage).

62. HOUSE REPORT at 19 *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 3042; 131 CONG. REC. H11069-70 (Dec. 5, 1985); *Id.* at H11073; 132 CONG. REC. H9563 (daily ed. Oct. 8, 1986).

liability question somewhat differently by apportioning harm at the liability stage.[63] The approval of both of these somewhat conflicting approaches to joint and several liability can be reconciled if viewed as legislative approval of the application of joint and several liability with subsequent consideration of the factors of the Gore Amendment in actions for contribution against other PRPs. *FMC Corp. v. Northern Pump*[64] is a case where one PRP brought a private action to recover response costs under Section 107(a)(4)(B) against another PRP. In that case, the district court of Minnesota found that in a private action to recover response costs, a party must show "1) CERCLA liability and 2) accountability for the disposal of hazardous wastes."[65] The court noted that in a case where PRPs are suing each other, CERCLA gives no guidance as to liability apportionment, but merely states who is potentially liable. Therefore, for a party to be liable for response costs, that party must not only be potentially liable under CERCLA, but also be accountable for disposal of wastes at the site.[66] The court in *FMC v. Northern Pump* did not discuss how liability would be apportioned once accountability for disposal was shown or what factors would be considered.[67]

A similar approach to apportioning liability between PRPs in a private enforcement action was taken in *Chemical Waste Management, Inc. v. Armstrong World Industries, Inc.*[68] In *Chemical Waste Management*, the Pennsylvania District Court, although finding that equitable defenses were not a bar to a private liability action under CERCLA, stated that the extent of a PRP's recovery from another PRP would depend upon "the owner/operator's [a PRP under CERCLA] relative fault, the volume of waste deposited, and the relative toxicity of such waste."[69] The court cited in support for this approach Section 113(f) and the language in this sec-

63. *See supra* notes 19-33 and accompanying text.

64. 668 F. Supp. at 1285.

65. *Id.* at 1290.

66. *Id.*

67. The court did note, however, that the conclusion that accountability had to be shown for a recovery of response costs between PRPs followed from the cases that found that liability could be joint and several and that had implied a right to contribution. The court cited *A & F Materials*, 578 F. Supp. at 1255, with approval for the concept that principles of common law should be used to determine the scope of liability. This suggests that the *FMC* court would apply the Gore factors as the equitable factors used to determine the scope of liability between accountable parties. *Id.* at 1290.

68. 669 F. Supp. at 1285.

69. *Id.* at 1292 n.10.

tion stating that the court may allocate response costs among liable parties using equitable factors. This multi-factor approach is similar to the modified comparative fault/Gore factor consideration undertaken by the court in *A & F Materials*.[70] The only difference is that the analysis is to be made at the stage where liability is allocated.

United States v. Northernaire Plating Co.[71] is a case where one PRP sued another PRP in a third party contribution action to recover for liability imposed through a federal enforcement action. The court found that all the parties were joint and severally liable because the harm to the site was not divisible even though the basis for the liability was different. Nevertheless, the court found that the issue of equitable apportionment of an indivisible injury was appropriately resolved in a subsequent action for contribution.[72] Unfortunately, the court did not go on to outline how it would go about making such an equitable apportionment.

Amoco Oil Company v. Dingwell,[73] is a 1988 case where the Federal District Court of Maine did outline the factors to be considered in a contribution action. That case concerned a consent agreement entered into by Dingwell, a landfill operator, and a group of fifteen companies who had disposed of wastes at the site operated by Dingwell ("Dingwell Site"). In an enforcement and liability action brought by the Maine Department of Environmental Protection ("DEP") and the EPA, some of the group of waste generators settled with the DEP and the EPA and financed the cleanup of the Dingwell site. Dingwell, after negotiations with the group of waste generators, agreed to join the consent decree and pay sixty-five percent of the cleanup costs in return for an agreement by the group of waste generators to seek recovery against him solely out of the proceeds of his insurance policies. The court reviewed this contribution settlement to ensure that the agreement was "fair, adequate and reasonable."[74]

In its review of this contribution settlement, the court determined that the agreement was reasonable by applying its appor-

70. In *United States v. Conservation Chemical Co.*, 628 F. Supp. 391, 401 (W.D. Mo. 1985) the court also stated that damages should be apportioned according to the Gore Amendment factors, which the court saw as a variation of the comparative fault doctrine that takes into account varying factors of culpability.

71. 670 F. Supp. 742.

72. *Id.* at 749.

73. 690 F.Supp. 78 (D. Me. 1988).

74. *Id.* at 85.

tionment of damages test to Dingwell. In applying that test and deciding what was a fair range for Dingwell's potential liability, the court considered the factors contained in the Gore Amendment, citing to both the Congressional Record and *A & F Materials*.[75] After applying the Gore factors to this situation, the court decided that the agreement was fair because Dingwell could have been one hundred percent liable in a contribution action brought by the waste generators.

B. *Equitable Defenses*

Other problems of apportioning liability relate to the use of equitable defenses in limiting contribution. Will equitable defenses such as unclean hands be an absolute bar to a private liability action or action for contribution under CERCLA? Courts must decide what the role of equitable defenses will be in these actions. Although some courts have decided that equitable doctrines such as clean hands or *caveat emptor* can bar a private liability action under Section 107(a)(4)(b) of CERCLA,[76] a more reasonable approach would be to take equitable factors into account in apportioning the liability between PRPs, but not treat these equitable factors as a complete bar to bringing a liability action.[77]

The equitable defense issue is often addressed by courts in regard to whether to allow a PRP to seek reimbursement against another PRP under the private liability section of CERCLA. The court allowed this type of action in *City of Philadelphia v. Stepan Chemical Co.*,[78] where a city sued for recovery of response costs for wastes illegally dumped at a municipal landfill. The municipal owner of the site was a PRP, yet it was not responsible for the damage because it was caused by illegal dumping. In that case,

75. *Id.* at 86.

76. *See, e.g.*, Mardan Corp. v. C.G.C. Music Ltd., 600 F. Supp. 1049, 1057 (D. Ariz.), *aff'd*, 804 F.2d 1454, 1457 (9th Cir. 1984) (The court applied the clean hands defense as a bar for a private action between PRPs; however, the Ninth Circuit did not decide whether this was proper because it affirmed the case on other grounds); *see also* D'Imperio v. United States, 575 F. Supp. 248, 253 (D. N.J. 1983) (to recover under § 107(a)(4)(b), a party must prove it is not liable for cleanup costs).

77. *See, e.g.*, United States v. Conservation Chemical, 628 F. Supp. at 404-05. ("application of the unclean hands defense in this instance would turn Congressional intent on its head"); Chemical Waste Management v. Armstrong World Ind., 669 F. Supp. 1285, 1291 (E.D. Pa. 1987) (issues of innocence and clean hands were only relevant "as to the amount of response costs that the plaintiff may recover"); Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913 (N.D. Okla. 1987).

78. 544 F. Supp. 1135 (E.D. Pa. 1982).

the court emphasized that the city had voluntarily undertaken the cleanup and had not been responsible for the damage.[79] One commentator has noted that "[t]o the extent that the court suggests that only responsible parties with very clean hands may bring a Section 107(a)(4)(B) action, its holding may be rather narrow."[80] The *City of Philadelphia* case has been cited for the broad proposition that Section 107(a)(4)(B) allows PRPs to bring recovery suits,[81] however, another court has used the unclean hands argument to suggest that a party which is liable for cleanup costs cannot bring a private recovery action under Section 107(a)(4)(B).[82]

In *Mardan Corp. v. C.G.C. Music, Ltd.*, the District Court in Arizona read the *City of Philadelphia* case narrowly and used it as support for its argument that CERCLA does not allow a plaintiff who is partly responsible for the hazardous condition to bring a private suit under Section 107(a)(4)(B).[83] The court reasoned that a Section 107 action is actually an equitable action in restitution and therefore the equitable defense of unclean hands was applicable in a private response recovery action.[84] However, in *United States v. Conservation Chemical, Co.*,[85] the Federal District Court for the Western District of Missouri found that the "[a]pplication of

79. *Id.* at 1143.

80. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L. Q. 181, 217 (1986).

81. Pinole Point Properties Inc. v. Bethlehem Steel Corporation, 596 F. Supp. 283, 291 (N.D. Cal. 1984); *cf.* Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563 (E.D. Pa. 1988) (The court, citing *City of Philadelphia*, allowed a PRP to maintain an action for contribution under § 107(a)(4)(B) and rejected defendant's attempt to invoke the clean hands defense. The reasoning of the case makes it unclear whether the court felt the application of the unclean hands defense was ever appropriate in a private liability action under CERCLA.).

82. Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. at 1057; *see also* D'Imperio v. United States, 575 F. Supp. at 253.

83. Mardan Corp. v. C.G.C. Music Ltd., 600 F. Supp. at 1057.

84. *See* Violet v. Picillo, 648 F. Supp. 1283, 1295 (D. R.I. 1986) (In a private liability action under CERCLA § 107(a)(4)(B), because the plaintiff seeks equitable relief of restitution, the defendants are not barred from asserting equitable defenses) *sub nom.* O'Neil v. Picillo, 682 F. Supp. 706, 726-727 (D.R.I. 1988) (court considered, but dismissed, unclean hands claim against the state); United States v. Northern Pharm. and Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1983), *aff'd in part, on other grounds*, 842 F.2d 977 (8th Cir. 1988) (actions based on § 107 are equitable actions in the nature of restitution); *But cf.* United States v. Stringfellow, 661 F. Supp. 1053, 1162 (C.D. Cal. 1987) (affirmative defenses raised by defendants are not defenses to liability, but may be relevant factors in regard to damages).

85. 628 F. Supp. at 404-05.

the unclean hands defense in this context [CERCLA liability] would turn Congressional intent on its head." The court reasoned that the fundamental purpose of CERCLA is to provide for the expeditious cleanup of hazardous waste sites and that this purpose would be furthered by having PRPs accept and assume responsibility for cleanups.[86]

In *O'Neil v. Picillo*,[87] the defendants argued that the cleanup of the site had been mishandled by the state—not a PRP in this case—and that the doctrine of unclean hands barred the state from recovering cleanup costs. The Rhode Island District Court had held previously that, because what the plaintiffs in a CERCLA liability action under Section 107(a)(4)(B) seek is the equitable remedy of restitution, the defendants could raise equitable defenses.[88]

Although the court in *O'Neil* concluded that the state's conduct did not so soil its hands so as to bar a recovery action under Section 107(a)(4)(B), the court should not have considered the unclean hands defense in the first place. Application of the doctrine was unnecessary because any wrongful conduct by the state in conducting its cleanup could have been contested by the defendants as not in accordance with the National Contingency Plan.[89] Moreover, unclean hands could have been considered as a factor—but not as a total bar—in apportioning liability.

The Federal District Court for the Eastern District of Pennsylvania in *Chemical Waste Management v. Armstrong World Industries*,[90] did not look favorably upon the use of the unclean hands doctrine to bar CERCLA liability actions. The court held that a party liable for response costs may sue other PRPs under Section 107(A)(4)(B) and that the doctrine of unclean hands as espoused in *Mardan* has no place in CERCLA actions.[91] The court found that SARA Section 113(f) indicated a Congressional intent to allow a PRP to bring an action against another PRP. Section 113(f) provides that "any person may seek contribution from *any other person who is liable* . . . under Section 9607(a) [CERCLA section 107(a)] . . ." (emphasis added by the court). This language, the

86. *Id.*
87. 682 F. Supp. at 726-27.
88. Violet v. Picillo, 648 F. Supp. at 1294-95.
89. This defense was in fact raised in the case. O'Neil v. Picillo, 682 F. Supp. at 728-29.
90. 669 F. Supp. 1285, 1291 (E.D. Pa. 1988).
91. *Id.* at 1291 n.7.

court argued, is significant because the word "other" in Section 113(f) means that a PRP may maintain a suit for contribution against another person who is or may be liable for response costs.[92] The court found that issues of innocence and clean hands were only relevant "as to the *amount* of response costs that (the plaintiff) may recover."[93]

One commentator has noted that "preventing potential responsible parties, even those with unclean hands, from seeking compensation under Section 107(a)(4)(B) would unnecessarily limit private cleanups of hazardous wastes."[94] Moreover, the approach of the *Mardan* court would not be in line with the language and Congressional intent of the contribution section of CERCLA added by SARA Section 113(f). A private response action taken by one PRP against another is in essence a contribution action and should be treated as such. Therefore, due consideration of equitable factors in regard to issues of liability apportionment should be allowed, but equitable doctrines such as unclean hands should not bar one PRP from bringing a private action under CERCLA as it should not bar one PRP from bringing a contribution action under Section 113(f).

The Third Circuit in *Smith Land & Improvement Corp. v. Celotex*[95] took this exact approach in deciding that the equitable defense of *caveat emptor* did not bar a contribution action under CERCLA. In that case, a purchaser of land was forced to clean up an asbestos hazard when the EPA brought a CERCLA enforcement action. The purchaser settled with the EPA and sought contribution from Celotex. The district court entered summary judgment for Celotex, finding that *caveat emptor* applied to contribution actions under CERCLA and that the "price the purchaser had paid for the land reflected the possibility of environmental risks."[96]

The Third Circuit reversed, finding that the application of the doctrine of *caveat emptor* to a private party action under CERCLA was not in accord with the policies underlying CERCLA.[97] The court found that because the doctrine totally barred recovery by a

92. *Id.* at 1291; *see also* Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913, 915-16 (N.D. Okla. 1987); United States v. Stringfellow, 661 F. Supp. at 1062.

93. Chemical Waste Management v. Armstrong World Industries, 669 F. Supp. at 1292 (emphasis in original).

94. Garber, *supra* note 33, at 218.

95. 851 F.2d 86 (3d Cir. 1988).

96. *Id.* at 88 (quoting the district court).

97. *Id.* at 89.

purchaser, regardless of the other equities concerning the parties, the doctrine would frustrate the Congressional intent to encourage cleanup by responsible parties.[98] The court did conclude, however, that the doctrine of *caveat emptor* could be considered in regard to the question of mitigation of damages.[99]

A release or an agreement not to sue a joint tortfeasor can also be a factor in deciding how to apportion liability. This factor was taken into account in *Lyncott Corporation v. Chemical Waste Management*,[100] a continuation of the litigation in *Chemical Waste Management v. Armstrong*.[101] In apportioning liability, the District Court of the Eastern District of Pennsylvania decided that the principles of the Uniform Comparative Fault Act[102] were the most consistent with the legislative scheme of CERCLA.[103] Therefore, the court granted one tortfeasor contribution protection and attributed the equitable shares of that party's response costs to the party which entered into the agreement with that joint tortfeasor. In this way, the court apportioned CERCLA liability according to the equities of the situation and the expectations of the parties when they entered into a settlement agreement.

Although some earlier cases have found that equitable defenses bar private liability and contribution actions between PRPs, the recent approach of the courts in *Chemical Waste Management* and *Smith Land & Improvement Corp.* is a sounder approach which is more in line with the Congressional intent of the liability and contribution sections of CERCLA as amended by SARA. If equitable defenses are considered as factors affecting liability apportionment,[104] the approach will comport with a modified comparative fault model of liability apportionment that takes into account numerous factors in deciding contribution liability for joint tortfeasors.

98. *Id.* at 90.
99. *Id.*
100. 690 F.Supp. 1409 (E.D. Pa. 1988).
101. 669 F. Supp. 1285 (E.D. Pa. 1988).
102. *Supra*, note 43-44, and accompanying text.
103. Lyncott Corporation v. Chemical Waste Management, 690 F.Supp. at 1417-18.
104. *Cf.* United States v. Stringfellow, 661 F. Supp. at 1062 (affirmative defenses raised by defendants are not defenses to liability, but may be relevant factors in regard to damages).

IV. CONCLUSION

Since SARA added an explicit section providing for contribution, most district courts are beginning to develop a federal law of contribution that follows the approach of the *Restatement*, Section 886A. This approach is workable within the context of CERCLA litigation; however, the *Restatement* rule that liability for contribution is not joint, but merely several, should be abrogated because it is not in line with the CERCLA goals of fairness and prompt cleanup of hazardous sites.[105] If contribution liability in CERCLA cases were made joint and several, rather than merely making a defendant in a contribution action liable for only its equitable share, then all solvent PRPs—whether named parties in the original cleanup action or not—would be responsible for the entire cost of the cleanup. No PRP should have to end up paying an unfair share of the liability merely because it was sued first.

Courts are also following CERCLA Section 113(f) and taking "equitable factors" into account in apportioning liability for response costs. The equitable factors which courts are examining in order to decide what kind of apportionment to make depend on the actual facts of each case. Nevertheless, many federal courts do consider common law equitable defenses such as unclean hands and *caveat emptor* as mitigating factors in deciding liability for response costs. This approach is in line with Congressional intent as long as courts do not consider these equitable defenses to be a total bar to a liability action, but merely mitigating factors in awarding damages. Courts are also using a modified comparative fault analysis that takes numerous factors such as culpability and cooperation into account in apportioning damages.

Although a multi-factor approach cannot be applied with mathematical precision, it is the fairest and most workable approach for apportioning CERCLA liability. CERCLA merely states who is liable, but it will be up to the courts to decide how that liability will be shared by joint tortfeasors. In making the apportionment based on considerations of contribution to the harm and cooperation in cleanup of the site, courts will be promoting settlement and prompt cleanup of sites because parties that have contributed relatively little to the hazardous site will be able to bring private

105. This approach was suggested in *Developments - Toxic Waste Litigation, supra* note 33, at 1538.

liability and contribution actions. Less culpable PRPs can then be assured that courts will attempt to apportion the liability based on actual contribution to the hazardous site. By considering cooperation with the cleanup as a mitigating factor, PRPs will also have an incentive to work towards prompt cleanup.

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