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Federal Common Law of Contribution
Under the 1986 CERCLA Amendments

Ellen J. Garber*

INTRODUCTION

Since the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)1 in 1980, the statute's imposition of strict liability for the cleanup of hazardous substances has engendered considerable judicial and subsequent congressional concern over who should bear the ultimate costs of cleanup. Although the statute did not elaborate further on the standard of liability, the courts decided that joint and several liability was permitted, but not mandated,2 and that response costs should be apportioned when there is a reasonable basis for division.3 Most courts that considered the question also found an implicit right to third-party suits for contribution.4

With the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA),5 Congress expressly created a right to contribution and delegated to the courts the job of creating a federal common law of contribution. The amendments provide that a court "may allocate response costs among liable parties" according to "such equitable factors as the court determines are appropriate,"6 but they supply no explicit standards for determining what are appropriate equitable considerations.

This Comment argues that the policies underlying CERCLA and its recent amendments should be used to define the equitable considerations relevant to contribution under CERCLA. First, the major policies of the statute are identified by examining its legislative history and judicial construction. Second, additional CERCLA policies regarding contribution

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2. See infra notes 28-30 and accompanying text.
3. See infra notes 31-34 and accompanying text.
4. See infra notes 45-48 and accompanying text.
are derived from specific statutory provisions in the 1986 amendments. Third, the relative importance of these policies in the CERCLA framework is discussed, and a basic list of equitable factors is set forth for judicial consideration in contribution proceedings. Finally, both conventional and more novel theories of contribution are examined to see whether they promote CERCLA policies. This Comment concludes that courts should use a modified comparative fault analysis in deciding contribution claims under CERCLA.

I

STATUTORY POLICIES OF CERCLA

A. The 1980 Act

1. Objectives

Congress enacted CERCLA in 1980 to respond both to the public perception that abandoned hazardous waste dumpsites had become a nationwide problem and to the inability of the Resource Conservation and Recovery Act of 1976 (RCRA)\(^7\) (which regulates only operating disposal sites) to solve that problem.\(^8\) Several bills were considered in both houses between 1978 and 1980, but the final version, adopted "in the closing days of the lame duck session of an outgoing Congress,"\(^9\) was hurriedly put together and even more hurriedly passed, both in response to the publicity over Love Canal and to make sure that some measure was enacted before the change in administrations.\(^10\) Because the final bill emerged from floor fights in the Senate where major amendments were made and adopted, the legislative history of the 1980 Act is vague and sketchy.\(^11\)

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Despite the lack of a comprehensive legislative history, the courts have been able to piece together the principal elements of congressional intent. The most cited formulation of the “one key objective” of CERCLA is “to facilitate the prompt clean up of hazardous dumpsites by providing a means of financing both governmental and private responses, and by placing the ultimate financial burden upon those responsible for the danger.” Another court found a congressional intent to “induce voluntary responses to those sites.” Implicit in these objectives is the additional purpose of conserving the Superfund for achievement of statutory goals.

2. The Liability Standard

The liability provisions of CERCLA constitute a legislative scheme that substantially departs from common law in the area of hazardous wastes. Liability under CERCLA does not depend on the principles of nuisance, negligence, and trespass traditionally used in pollution tort cases. Instead, parties are liable for the costs of cleaning up hazardous substances simply on the basis of their relationship either to the site contaminated with hazardous substances or to the hazardous substances themselves regardless of fault. Under the statute, all current owners of a facility and all persons who owned the facility at the time of dumping, plus all operators, transporters, generators, and persons who “otherwise arranged for disposal or treatment” are liable for the costs of cleanup. Liability is retroactive with regard to wastes dumped and sites abandoned.


First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.


14. Formally, the Hazardous Substance Response Trust Fund [hereinafter Superfund].


16. CERCLA does preserve common law rights and remedies that otherwise exist. See CERCLA § 114(a), 42 U.S.C. § 9614(a).

17. A facility is defined as any site or area, including man-made structures or improvements, where a hazardous substance has come to be located. Id. § 101(9), 42 U.S.C. § 9601(9).

18. Id. § 107(a), 42 U.S.C. § 9607(a) (amended 1986).
doned prior to the passage of the Act. 19

Another important feature of the liability scheme was Congress' intentional omission of a standard of liability, 20 except for a reference to the standard under the Federal Water Pollution Control Act (FWPCA) 21 in the definitions section of CERCLA. 22 The legislators preferred to leave the precise formulation of a liability standard to the federal courts rather than to adopt a mandatory standard that would prove inflexible. 23

The courts concluded that a federal common law standard was required and that the comparable FWPCA standard was strict liability. 24 The courts selected a liability rule that took no account of state law. A uniform rule, they reasoned, would discourage illegal waste dumping in states having "lax liability laws" 25 and protect from the vagaries of state law the government's ability to obtain reimbursement for Superfund expenditures. 26 Uniform federal law also was viewed as consistent with CERCLA's exclusive federal court jurisdiction and the special federal interest in hazardous wastes. 27

In addition, the district courts, led by the seminal decision in United States v. Chem-Dyne Corp., 28 adopted joint and several liability as formulated by the Restatement (Second) of Torts. 29 Although CERCLA does

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22. "'[L]iable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33." CERCLA § 101(32), 42 U.S.C. § 9601(32).
23. It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tort feasors will be determined under common law or previous statutory law.
29. See, e.g., A & F Materials Co., 578 F. Supp. at 1255-56; Stringfellow, 14 Envtl. L.
not expressly impose joint and several liability, joint and several liability effectuates the intent of Congress by enabling the government to recover the entire cost of cleanup from any liable party without having to identify all responsible parties.

Generally under joint and several liability rules, when there is a single, indivisible harm, each party is subject to liability for the entire harm. However, some courts have held that apportionment of response costs among potentially responsible parties is appropriate when there is a reasonable basis for division of the harm, each party then being subject to liability only for its portion of the harm caused. If apportionment were the rule instead of the exception, in practice the government would be hindered in its efforts to recover its response costs, for apportionment issues can add time and expense to litigation. For that reason, the government is relieved of the obligation to join all potentially responsible parties and prove their individual contributions to the dumpsite. Moreover, the burden of proving divisibility of harm is on the defendant seeking to limit his liability.

There is some indication that Congress also was concerned with fairness under CERCLA, thereby justifying apportionment of response costs in some special cases that do not fit the general rule. Most courts have found that apportionment is necessary to mitigate the harshness of


31. See, e.g., Chem-Dyne Corp., 572 F. Supp. at 810 (citing Restatement (Second) of Torts § 875 (1979)).

32. See, e.g., id. (citing Restatement (Second) of Torts §§ 433A, 881); A & F Materials Co., 578 F. Supp. at 1255. Bases for apportionment include: Distinct harms, successive injuries severable in point of time, harm capable of division on a "reasonable and rational" basis, innocent or noninnocent causes, and contributory negligence. Restatement (Second) of Torts § 433A comment on subsection (1) (1965). See also Prosser and Keeton on the Law of Torts § 52 (W. Keeton 5th ed. 1984).

33. See, e.g., Chem-Dyne Corp., 572 F. Supp. at 810 (citing Restatement (Second) of Torts § 433B(2) (1965)).

34. At least one court, distinguishing between apportionment of the harm and division of costs, suggested that division of costs in a third-party suit for contribution might be appropriate when apportionment is not. United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 995 (D.S.C. 1984) (order of Feb. 23, 1984). Although the district court did not explain its reasoning, this approach takes into account the government's interest in a speedy trial by postponing thorny causation and fault issues until after the government's involvement has ended. Thus, this government interest arguably supports limiting apportionment issues without similarly restricting suits for contribution.


36. "[B]oth Houses of Congress were concerned about the issue of fairness, and joint and several liability is extremely harsh and unfair if it is imposed on a defendant who contributed only a small amount of waste to a site." United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). Another court found that apportionment corresponds with con-
joint and several liability in cases involving very small contributors, even when the harm is not easily divisible. The district court in *A & F Materials* pointed with approval to the Gore Amendment, adopted by the House but left out of the final bill, to support this approach. The Gore Amendment would have allowed courts to consider a variety of factors tied to specific statutory policies in apportioning costs, including equitable considerations such as the size of the party's contribution to the site and the degree of cooperativeness with the government.

3. **Contribution**

In an action for contribution, one joint tortfeasor who has discharged more than his fair share of the common liability proceeds against another tortfeasor to recover his excess costs. Though based on similar principles of equitable redistribution of losses, apportionment and contribution may operate very differently under CERCLA. Apportionment may reduce the ability of the plaintiff (usually the government) to recover costs, whereas contribution redistributes liability among potentially responsible parties.

37. *Eg.* Idaho v. Bunker Hill Co., 635 F. Supp. 665, 677 (D. Idaho 1986) ("care must be taken by the courts in imposing joint and several liability upon what may be a relatively small contributor to the waste site because of the inherent unfairness"); *A & F Materials Co.*, 578 F. Supp. at 1256-57; United States v. Stringfellow, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,385, 20,387 (C.D. Cal 1984) (joint and several liability should be applied flexibly to allow the court to consider "the plight of the small contributor that is unable to prove the extent of its contribution").

38. *A & F Materials Co.*, 578 F. Supp. at 1256 (citing the full text of the Gore Amendment); 126 CONG. REC. 26,781 (1980). One commentator found judicial revival of the Gore Amendment, after both houses failed to adopt it, to be "questionable." Comment, *supra* note 34, at 10,231.


41. The Gore Amendment factors include:

(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).


43. When damages are apportioned, the plaintiff bears the risk that one or more of the defendants is insolvent or judgment-proof. When the defendants are jointly and severally liable, and only contribution is allowed, each defendant bears that risk. Rodburg, *Apportionment of Damages in Hazardous Waste Litigation*, 1982 HAZARDOUS WASTE LITIG. 183, 200.
sponsible parties after the plaintiff has been awarded relief. 44

Prior to the 1986 amendments, a handful of courts recognized an implicit right to contribution under CERCLA. 45 Whereas a preference for apportionment under CERCLA was deduced from fragmentary legislative history, general notions of fairness, and the prevailing law of joint and several liability, contribution either was inferred from the language of the statute or was found necessary to protect a different set of federal interests underlying the statute. 46

Some of these courts based their analysis in part on section 107(e)(2) of CERCLA: "Nothing in this subchapter . . . shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, had or would have, by reason of subrogation or otherwise against any person." 47 Others reasoned that section 107(e)(2) did not create any rights, but at most preserved claims for contribution. 48

Only a few courts to date have taken a thorough look at how contribution would advance CERCLA’s policy goals. In Colorado v. ASARCO, Inc., 49 for example, the court based an implicit right to contribution both on the presence of an express contribution provision in the Senate bill (later deleted) and on the Gore Amendment. 50 The court also

46. See, e.g., New Castle County, 642 F. Supp. at 1269 (contribution encourages cooperation with the government, improves chances of settlement, increases the defendant pool, reduces government litigation costs, and protects the Superfund from depletion); Conservation Chem. Co., 619 F. Supp. at 228 (“A right of contribution, then, is encompassed by CERCLA itself, not by independent considerations of fundamental fairness and not by the federal common law as such.”); Colorado v. ASARCO, Inc., 608 F. Supp. at 1491 (right of contribution is consistent with the quick cleanup goals of CERCLA).
50. Id. at 1486-89.
found that contribution would provide an incentive for parties to seek out all other potentially responsible parties, thus properly placing the burden of apportioning response costs on those responsible rather than on the government.  

The court further concluded that contribution would not hinder CERCLA goals: "Once cleanup is assured, however, no goal of CERCLA would be promoted by requiring one of the responsible parties to continue to bear the full cost of injuries caused in part by others." Unlike apportionment, suits for contribution presuppose a completed cleanup, settlement, or a prior adjudication of liability. When the government is the plaintiff, contribution creates no danger that the Superfund will go unreimbursed.

In United States v. New Castle County, the district court found that contribution promotes other federal interests: It increases the chances of settlement, decreases litigation by encouraging potentially responsible parties to seek out others for contribution, and protects Superfund resources by encouraging voluntary cleanups (parties are more willing to clean up sites when they can recover costs from other responsible parties). Interestingly, the New Castle court took notice of the fact that Congress was then working on the bills that eventually were adopted as amendments in 1986.

Despite their analysis of the benefits of contribution under CERCLA, and their conclusion that a uniform, federal rule is indicated, neither the Colorado v. ASARCO nor the New Castle court, nor any other court prescribed standards for dividing response costs in suits for contribution.

### B. The 1986 CERCLA Amendments

In 1985, both houses of Congress prepared bills to amend CERCLA. Because authorization for the Superfund was due to expire on September 30, 1985, Congress focused much of its concern on the appropriate taxing mechanism to feed the fund. Nevertheless, Congress

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51. *Id.* at 1488 (citing 126 CONG. REC. 26,784 (1980) (comments of Rep. Gore)).
52. *Id.* at 1491.
54. *Id.* at 1268-69.
55. *Id.* at 1267-68.
59. The legal and legislative news services chronicled the heated debate over who would be taxed to support the Superfund. See, e.g., 16 Env't Rep. (BNA) 892 (Sept. 20, 1985) (White House threatened to veto broad-based tax on industry).
also took a comprehensive look at CERCLA’s substantive provisions in an attempt to remedy the numerous oversights in the 1980 compromise.

Although the original purposes of CERCLA—to clean up promptly hazardous waste dumpsites and to impose the costs on the responsible parties—remained unchanged, six years’ experience in implementing the statute alerted Congress to additional concerns. In its attempt to create a scheme that would deal effectively with the Love Canals across the nation, it appeared to many legislators that Congress had ridden roughshod over small contributors and “innocent” landowners. To others, CERCLA was a source of endless litigation and not much else.

Congress, in enacting SARA, added a set of goals to CERCLA that related to the workability of the statutory scheme: Expediting cleanups, eliminating excessive litigation, encouraging voluntary cleanups, using Superfund dollars more efficiently, and treating potentially responsible parties more fairly. Several provisions of SARA address these goals. For instance, Congress enacted provisions for covenants not to sue that allow the government to release settling parties from further liability, thus providing incentives for potentially responsible parties to settle. Settlements save the government time and litigation expenses, which conserves Superfund dollars for actual cleanup expenditures and ensures quicker initiation of cleanup efforts.

Other SARA provisions encourage voluntary cleanups. Like settlements, voluntary cleanups save time and litigation expenses, and probably conserve Superfund resources even more effectively by minimizing government involvement. If potentially responsible parties believe they will be jointly and severally liable for cleanup costs without an opportunity to seek reimbursement from other potentially liable parties, voluntary cleanups will not be undertaken. A perception of unfairness in the statutory scheme also deters voluntary cleanups. The deterrent effect is exacerbated when the would-be cooperative party is “innocent” or contributed only a small amount to the entire problem. SARA addresses


63. SARA § 122(a), 42 U.S.C.A. § 9622(c), (f).
these problems through its contribution provisions and other provisions
for de minimis settlements and innocent landowners.

1. Contribution

Congress amended section 113 of CERCLA to provide explicitly for
a right to contribution.64

Any person may seek contribution from any other person who is liable or
potentially liable under section 107(a), during or following any civil ac-
tion under section 106 or under 107(a). Such claims . . . 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 dimin-
ish the right of any person to bring an action for contribution in the
absence of a civil action under section 106 or section 107.65

A suit for contribution under CERCLA may arise in one of three
ways. First, the government may sue multiple parties to force cleanup
under section 10666 or to recover cleanup costs under section 107.67 Be-
cause liability is joint and several, the courts have held that the govern-
ment need not join all potentially responsible parties.68 Parties already
joined generally want to adjust liability among themselves or to bring in
other potentially liable third-party defendants. Second, a potentially re-
sponsible party may counterclaim for contribution in a cost-recovery suit
brought by a party who intends to or who already has cleaned up a site
(usually her own property). Third, a party who has settled with the gov-
ernment for more than his fair share of cleanup costs may seek contribu-
tion from other potentially responsible parties.

In enacting the contribution provision, Congress expressly required
the law of contribution to be federal law.69 Although the words of the
amendment do not go so far as to specify a uniform federal law,70 the
House Committee on the Judiciary and various members of Congress
voiced approval of the standards of liability adopted by the courts, citing

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64. In providing for contribution, the legislators made clear that they were merely con-
firming a right that already existed under the statute, thereby eliminating any problems of
CODE CONG. & ADMIN. NEWS at 3041; S. REP. No. 11, 99th Cong., 1st Sess. 44 (1985); see
65. SARA § 113(b), 42 U.S.C.A. § 9613(f).
67. Id. § 9607.
68. See, e.g., United States v. Dickerson, 640 F. Supp. 448, 450 (D. Md. 1986); United
69. See supra text accompanying note 65.
CODE CONG. & ADMIN. NEWS at 3041-42; id. pt. 5, at 24, reprinted in 1986 U.S. CODE CONG.
& ADMIN. NEWS at 3147.
Chem-Dyne and A & F Materials by name. In addition, most commentators who considered the issue prior to the amendments concluded either that the law of contribution under CERCLA should be uniform or that the courts undoubtedly would settle on a uniform rule.

The "equitable factors" standard for contribution among parties under SARA is undefined, and thus is left to the courts to interpret. In deciding what factors are appropriate, courts should examine the words of the statute and the amendments, the legislative history, the structure of the statute, the previously developed federal common law of liability under CERCLA, and relevant authority on contribution law to develop a body of contribution rules. In other words, because "uniquely federal interests" are at stake in the framework of a novel statutory scheme, the federal law of contribution under CERCLA should be fashioned to promote the policies of the statute; the courts should not simply survey the available law to find a majority rule or a model statute.

The preceding sections of this Comment identified many of the policies embodied in CERCLA and the recent amendments. The next sections look in detail at specific amendments, adopted at the same time as the contribution provision, that further illustrate important statutory policies. These provisions also support the statutory policies previously


72. See, e.g., Guariglia, Apportionment and Contribution Under the "Superfund" Act, 53 UMKC L. REV. 594, 614-15 (1985). This author acknowledges that "not all states recognize a right to contribution," but concludes:

Although it is debatable whether there is a strong federal interest in the creation of a uniform federal rule of contribution under CERCLA [especially because the suits will arise between two private parties], the courts will probably adopt a uniform federal rule in an attempt to avoid dealing with diverse state laws and potential conflict of laws issues. Id.; see also Developments, supra note 13, at 1526-27, 1538 n.118; Note, supra note 20, at 357, 361 n.119 (noting that the states have not adopted a uniform approach to contribution, and therefore that there is no "American rule" of contribution).

73. See SARA § 113(b), 42 U.S.C.A. § 9613(f).

74. See Developments, supra note 13, at 1536-57 (resources available to the courts include analogous statutes, the Restatement (Second) of Torts, uniform statutes, treatises, scholarly commentary, and state law); see also Landis, Statutes and the Sources of Law, in HARVARD LEGAL ESSAYS 213 (1934).

75. See discussion supra note 46.


77. See supra notes 12-15 & 62 and accompanying text.
identified and provide examples of the equitable considerations that should guide the courts in shaping CERCLA's contribution law.

2. Other Statutory Provisions

The provisions in SARA for covenants not to sue, de minimis settlements, and innocent landowners are helpful in framing contribution rules. Settlement reduces agency expenditures on litigation, thereby reserving Superfund resources for cleanup. By protecting settling parties from further liability through covenants not to sue, the amendments create a strong incentive for parties to settle and to undertake or finance cleanups. De minimis settlements also are an attractive alternative to litigation for parties who caused a small share of the harm. Thus, by providing the government with tools to encourage settlements, Congress recognized the valuable role that positive incentives can play in CERCLA's statutory scheme. Contribution rules under CERCLA, therefore, should be designed to increase the likelihood that potentially responsible parties will choose to settle or clean up voluntarily.

The de minimis settlements and innocent landowner provisions also evince an overall congressional policy favoring fairness to nonculpable parties and small contributors. This policy should guide the division of costs in suits for contribution.

a. Covenants Not to Sue

Interspersed throughout section 122 on settlements are provisions for covenants not to sue. The statute thus provides positive incentives to settle by permitting the government to grant discretionary releases from liability to parties who have cooperated with the government. Parties who have fully complied with a section 106 consent decree, who have entered into a settlement with the government, who have been granted a de minimis settlement, or who have agreed to restore or protect natural resources may be released from further liability both to the government and to third parties.

Once eligibility for a covenant not to sue has been determined by

78. See 42 U.S.C.A. § 9622(f) (parties in full compliance with § 106 orders may be released from further liability to the government); id. § 9622(g)(2) (de minimis settlors may be released from further liability to the government); id. § 9622(j)(2) (parties who agree to restore natural resources may be released from liability to the federal trustee).

79. See supra note 78. Section 122 also creates mandatory releases from liability. SARA § 122(h)(4), 42 U.S.C.A. § 9622(h)(4) (parties who settle with the government are absolved from claims for contribution regarding matters addressed in the settlement). In addition, a mandatory covenant not to sue releases responsible parties from liability when the government has decided to require off-site disposal where on-site disposal would be adequate. Id. § 122(f)(2), 42 U.S.C.A. § 9622(f)(2) ("Special Covenants Not To Sue").
several threshold criteria, the government's discretion is guided by the public interest as defined by seven specific "factors." These factors take into account the effectiveness of the party's efforts, the availability of Superfund monies for future response actions at the site, and the degree of the party's involvement in the actual cleanup. Thus, although the government has great latitude in granting positive incentives to settle, that discretion is limited by the interest in avoiding duplication of efforts and needless expenditures of government money.

b. De Minimis Settlements

Prior to SARA, CERCLA's joint and several liability scheme potentially imposed complete liability for cleanup costs on a relatively minor contributor to a dumpsite who could not prove the divisibility of the harm caused. Section 122(g) of SARA allows the government to settle "as promptly as possible" with parties whose contribution to a hazardous waste site is minimal compared to that of other parties. The government also has discretionary authority to grant a settling de minimis contributor a covenant not to sue for future liability at the same facility. The de minimis settlement provision provides a way to avoid the costly litigation that can ensue when small contributors are forced to litigate to escape joint and several liability. De minimis settlements also allow government recognition of the "legitimate interests of those who have to pay for these cleanups" by minimizing the likelihood that a small contributor will be forced to pay the entire cost of cleanup.

When the costs in question constitute only a minor portion of the

80. E.g., covenants may be granted to de minimis settlors, restorers of natural resources, or parties who settle with the government. See supra note 78.

81. The factors to use in determining whether a covenant not to sue is in the public interest are:

(A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.

(B) The nature of the risks remaining at the facility.

(C) The extent to which performance standards are included in the order or decree.

(D) The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.

(E) The extent to which the technology used in the response action is demonstrated to be effective.

(F) Whether the [Superfund] or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.

(G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.


82. 42 U.S.C.A. § 9622(g).

83. SARA § 122(g)(2), 42 U.S.C.A. § 9622(g)(2).

total costs of cleanup, de minimis status will be granted (1) if the amount of the hazardous substances contributed by the party and the toxicity or hazard caused by the substances are minimal in comparison to other hazardous substances at the facility, or (2) if the party is merely an owner who did not conduct any activities in any way involved with the hazardous substance and who did not contribute to the release, and the owner purchased without actual or constructive knowledge that the site was a hazardous waste facility.\(^8\)

De minimis settlements promote fairness by enabling small contributors to "cash out" of joint and several liability, and they save government resources by avoiding litigation. However, "actual or constructive knowledge" precludes settlement in many instances. Though denying settlements conflicts with the goal of avoiding litigation, it reflects congressional concern with fairness in the ultimate allocation of response costs.

c. Innocent Landowner Defense

Imposing liability on innocent landowners for the sole reason that their land contained hazardous wastes was emblematic of the unfairness in the 1980 statute.\(^8\) Still, concern for the efficacy of the liability provisions in forcing cleanups was so strong that Congress declined to create a separate defense under section 107(b) of CERCLA for innocent landowners.\(^8\) Instead, Congress amended the definition of "contractual relationship" for the purposes of section 107(b)(3)\(^8\) to make clear that innocent purchasers of land may rely on the "third-party" defense\(^8\) despite the fact that they engaged in a land transaction with the previous owner who caused a release.\(^9\)

The innocent landowner (third-party) defense is not easy to prove. In essence, the landowner must show that she did not know or have reason to know of the presence of the hazardous substance at the time of

85. SARA § 122, 42 U.S.C.A. § 9622.
86. See 131 Cong. Rec. H11,158-62 (daily ed. Dec. 5, 1985) (debate surrounding adoption by the House of the Frank Amendment, which would have created a separate statutory defense under section 107(b) for innocent landowners); see also id. at H11,160 (comments of Rep. Kindness) ("the de minimis clause does not take care of the situation where it is a large problem, but you still have an innocent landowner").
89. The third-party defense excuses a potentially responsible party from liability for the acts or omissions of third parties, other than those employed by or under a contractual relationship with the party claiming the defense, when that party has exercised due care and taken reasonable precautions. Id.
90. SARA § 101(f), 42 U.S.C.A. § 9601(35).
To establish that there was no "reason to know," the party must have undertaken appropriate inquiry consistent with good commercial practice or custom. The court will take into account the party's specialized knowledge or experience, the relationship of the purchase price to the fair market value of the property, the fact of common knowledge about the condition of the property, and the ability to discover the contamination upon appropriate inspection.

Congress concluded that fairness concerns outweigh the benefits of cleanup when the party is truly innocent. Parties who buy property with the knowledge that it is contaminated probably bargain for a lower price to reflect the cost of cleanup. As a result, it is fair to hold them responsible for the costs of cleanup. Completely innocent parties, on the other hand, can be presumed not to have paid a bargain price, and thus they are not in an economically advantageous position to clean up the hazardous substance.

C. Hierarchy of Statutory Policies and Equitable Factors

Not all of CERCLA's statutory policies are of equal weight. CERCLA's major policy goals are (1) prompt cleanup of hazardous waste sites and (2) fixing the costs of cleanup on the parties who were responsible for the harm. The main tools to accomplish the first goal are the Superfund and a joint and several liability scheme that ensures that the government can recover costs from any party or parties who created the hazardous condition. The second goal involves not only fairness but also deterrence and internalization of the costs of hazardous wastes. While this goal can be considered inconsistent with quick cleanup in certain circumstances, and may be considered secondary in importance, it is the primary concern of contribution.

Subsidiary to these goals is an objective that is essential to the smooth functioning of the statutory scheme: keeping the Superfund from running out before its goals are accomplished. This objective is served by giving the government the power to expedite cleanups and cost recovery, to eliminate excessive litigation and concentrate government funds on cleanup, and to encourage voluntary cleanups, settlements, and cooperation with the government. It has been argued that contribution helps to conserve Superfund resources in two ways. First, contribution provides incentives to clean up voluntarily and to settle. Second, contribution places the burden on responsible parties to create a larger defendant.
SARA reinforces policies regarding fairness and culpability. Admittedly, CERCLA liability "is predicated on nonculpable conduct. The purpose of the statute is not to punish defendants but to ensure that waste sites are cleaned up." After SARA, however, culpability may be considered in assigning liability in order to alleviate the instances of greatest unfairness (such as imposing response costs on innocent landowners). Otherwise, culpability should be considered only in dividing costs when it will not inhibit government cost recovery and achievement of voluntary cleanup (e.g., during the settlement phase). Thus, CERCLA's policies can be distinguished in part by whether they concern liability prior to cleanup and government reimbursement, or afterwards.

The use of a culpability standard in determining liability at the onset of CERCLA negotiations or actions (i.e., apportionment) would delay cleanup by burdening the government with difficult and time-consuming litigation issues. Contribution, however, occurs in the very last stages of CERCLA enforcement, and use of a culpability criterion for dividing costs would have no adverse impact on the government. In fact, contribution may provide an incentive for voluntary action and cooperation by parties who might have been hesitant to risk cleaning up for fear they would never recover the amount spent above and beyond their fair share.

The major CERCLA policies that are relevant to the law of contribution, and the statutory provisions implementing them, suggest a list of equitable factors that the courts should consider in dividing response costs in CERCLA contribution suits:

96. For instance, it was unclear prior to the amendments whether a culpable party, such as a noninnocent purchaser, could maintain a suit against other potentially responsible parties to recover costs, and the courts were divided on the subject. See Belthoff, supra note 8, at 156-57; Note, supra note 94, at 275-77. This issue has been resolved in the amendments by extending the right to contribution without qualification. See SARA § 113(b), 42 U.S.C.A. § 9613(f).
97. Developments, supra note 13, at 1537.
98. Since the adoption of a contribution provision, the continued need for apportionment in government cost-recovery actions is questionable in light of the strong government interest in expeditious litigation. See Rodburg, supra note 43, at 190; cf. United States v. Miami Drum Services, Inc., 25 Env't Rep. Cas. (BNA) 1469, 1475 n.8 (S.D. Fla. 1986) (where contribution is available, arguments against imposing joint and several liability are weakened).
99. But see New Castle County, 642 F. Supp. at 1265 ("A right to contribution cannot encourage voluntary cleanup since it does not come into play until after a lawsuit has already been instituted against a responsible party.").
with the government; volume (or some other measure of causal relationship) of the hazardous substances contributed to the dumpsite; degree of active participation in production, transport, or disposal; negligence; intentional wrongdoing; actual or constructive knowledge of the problem; benefit received from the hazardous substance; risk bargained for; expeditiousness, effectiveness and degree of completion of the remedy; and future liability of the Superfund for the same dumpsite. This list is not exhaustive. For instance, in some cases, courts may want to consider the ability of a party to spread costs, the public or quasi-public character of a party, and whether a party is insolvent or judgment-proof.

Generally speaking, the equities of a case involve the parties’ relative delay, fault, and ethical position. Delay is commonly understood to refer to a party’s diligence in solving a problem or mitigating a harm, and it is relevant to CERCLA’s quick cleanup goal. Fault is not a consideration in initially assigning liability under CERCLA, unless the party had no role whatsoever in creating the harm, but it is relevant to the distribution of burdens among liable parties. The ethical content of equity involves moral position, but that should not be given undue emphasis over matters of public policy, practicality, and convenience of administration. Thus, when equitable factors relating to delay and fault are roughly equal or difficult to compare, it is appropriate to make policy considerations the deciding factors.

The equities of each case will vary, but it is important for courts to weigh and balance equitable considerations within the framework of CERCLA’s policies. The hierarchy of policies in the statute provides guidelines for selecting and weighing equitable factors. This approach is consistent with traditional rules of equity.

Env’tl. L. Rep. (Envt’l. L. Inst.) 10101, 10110 (Apr. 1987). These factors are a codification of the Environmental Protection Agency’s (EPA) interim settlement policy, and most of them are more applicable to government settlement strategies than to private suits for contribution. See Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5037-38 (1985).


103. D. Dobbs, supra note 101, at 55-56. By way of illustrating the point that a preoccupation with the moral component of ethics leads courts to ignore public policy, Professor Dobbs states that in nuisance cases, “courts have long balanced equities and hardships, but they have seldom if ever considered environmental questions in deciding whether to enjoin or not.” Id. at 56. Professor Coons discusses at length a justification of the legal presumption of equality between parties, based on the inability to measure “individual moral worth.” Coons, Compromise as Precise Justice, 68 Calif. L. Rev. 250, 256 (1980). This presumption brings into play policies unrelated to the particular parties. Id. at 261.
II
THE LAW OF CONTRIBUTION

Having identified the basic policy and equitable considerations and their relative importance under CERCLA, several existing contribution schemes will now be examined to determine how well these schemes accommodate CERCLA concerns.104 The Restatement recognizes only two methods of cost-division in contribution—pro rata and comparative fault105—and provides no right of contribution for an intentional wrongdoer.106 Other methods of contribution include comparative causation and the multifactor comparison of the Gore Amendment. These schemes will be evaluated to determine which approach best promotes the policies reflected in CERCLA and its amendments.

A. Pro Rata Contribution

A pro rata division of costs creates as many equal shares as there are joint tortfeasors. In a CERCLA contribution suit using a pro rata standard, each responsible party would pay an equal share of the response costs. The pro rata method of apportioning losses is recommended in the Uniform Contribution Among Tortfeasors Act (UCATA)107 as well as the Restatement.108 The pro rata formulation, though seemingly fair if the maxim “equality is equity”109 is an accurate description, is probably the least acceptable alternative for contribution suits under CERCLA. Both the Restatement and the UCATA exclude intentional wrongdoers,110 thus limiting the parties eligible for contribution to those who are somewhat comparable in their degree of culpability. Yet the Restatement and the UCATA hardly can be said to advance the purposes of

104. Although a right of contribution has been recognized by courts under the Federal Water Pollution Control Act (FWPCA), the standards for dividing costs have not been discussed. See, e.g., In re Berkeley Curtis Bay Co., 577 F. Supp. 335, 339 (S.D.N.Y. 1983). In Berkeley Curtis, the underlying joint and several liability was based on comparative fault. Id. at 336. The court in United States v. Chem-Dyne Corp. adopted the strict liability standard of the FWPCA, but declined without explanation to adopt the joint and several liability standards of the FWPCA despite finding the liability provisions of CERCLA and FWPCA “strikingly similar.” 572 F. Supp. 802, 810 (S.D. Ohio 1983). The FWPCA cases, however, arose in the context of maritime law. See, e.g., United States v. Bear Marine Serv., 509 F. Supp. 710, 716-17 (E.D. La. 1980), vacated on other grounds, 696 F.2d 1117 (5th Cir. 1983).
105. Restatement (Second) of Torts § 886A comment h (1979).
108. Restatement (Second) of Torts § 886A comment h (1979).
109. Id.
110. See UCATA § 1(c), 12 U.L.A. 63 (1975) (“There is no right of contribution in favor of any tortfeasor who has intentionally [wilfully or wantonly] caused or contributed to injury or wrongful death.”); Restatement (Second) of Torts § 886A(3) (1979).
CERCLA by dividing the remaining losses without regard to each party's participation in creating the harm or history of voluntary cleanup activities—in other words, without regard for "fairness" in the sense Congress intended.

There are, however, advantages to dividing costs equally among liable parties. The pro rata approach would simplify litigation. And it can be argued that pro rata shares may increase the incentives to clean up because plaintiffs will have less costly trials and will be almost certain of recovering some portion of their expenditures. Combined with the possibility that external factors, such as market pressures to develop land, actually are more compelling than statutory incentives or sanctions in inducing cleanup, it does not follow that pro rata contribution should be rejected out of hand.

Yet the concept of pro rata contribution does a disservice to two important goals of CERCLA, namely fairness and fixing the ultimate costs of cleanup on responsible parties. The courts surmised that Congress was concerned with fairness in 1980,111 and it can no longer be doubted that this is the case as of 1986.112 The de minimis settlement and innocent landowner provisions also are inconsistent with a pro rata approach.

B. Comparative Fault

The Restatement recognizes comparative fault based on negligence as an alternative to pro rata contribution.113 Under the Uniform Comparative Fault Act (UCFA), a percentage of the total fault is assigned to each party based on that party's conduct and its causal connection to the harm.114 When determining the percentages of fault, the following factors are considered:

(1) [W]hether the conduct was mere inadvertence or engaged in with an awareness of the danger involved, (2) the magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury, (3) the significance of what the actor was seeking to attain by his conduct, (4) the actor's superior or inferior capacities, and (5) the particular circumstances, such as the existence of an emergency requiring a hasty decision.115

Comparative fault probably corresponds most closely with modern notions of fairness in dividing tort losses. The relative liability of the parties is figured according to their direct participation in creating the

112. See supra notes 60-62 and accompanying text.
113. RESTATEMENT (SECOND) OF TORTS § 886A comment h (1979).
harm and whether their behavior is excusable under the circumstances or for reasons of public policy. The relevant criteria include knowledge, negligence, and actual risk created.

Comparative fault under the UCFA, however, fails to account for later voluntary and cooperative behavior that advances CERCLA’s policies of encouraging quick, voluntary cleanups and minimizing government involvement.\textsuperscript{116} Recognizing the voluntariness and cooperativeness of a party’s efforts in suits for contribution would provide an incentive to engage in voluntary cleanup.\textsuperscript{117}

\textbf{C. Comparative Causation}

Under comparative causation, costs would be divided in proportion to the amounts of hazardous substances contributed by the parties to a dumpsite. As a practical matter, liability based on “volumetric shares, particularly for a small share participant, strike[s] a responsive chord of the intuitive sense of justice of the situation.”\textsuperscript{118} Volume of hazardous wastes dumped may be the only information accessible to all parties, and using volume as a surrogate for causation and/or fault has the advantage of simplifying litigation by cutting off debate about other issues.\textsuperscript{119}

The primary disagreement in dividing costs on the basis of causation is whether or not release of hazardous substances causes a divisible harm.\textsuperscript{120} Believing the harm to be indivisible, the court in \textit{United States v. South Carolina Recycling and Disposal}\textsuperscript{121} declined to apportion costs based on the volume of hazardous substances contributed by each party:

[T]he volume of waste of a particular generator is not an accurate predictor of the risk associated with the waste because the toxicity or migratory potential of a particular hazardous substance generally varies independently of the volume. Such arbitrary or theoretical means of cost apportionment do not diminish the indivisibility of the underlying harm, and

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\item[\textsuperscript{116}] Despite this failure, at least one commentator believed that the legislative history and policies of CERCLA supported adoption of comparative fault in contribution suits. Note, supra note 20, at 364. \textit{Cf.} United States v. Conservation Chem. Co., 628 F. Supp. 391, 402 (W.D. Mo. 1985) (in dictum, court approved use of UCFA to apportion liability among settling and nonsettling parties).
\item[\textsuperscript{117}] As noted in the previous section on pro rata contribution, whether private landowners need greater incentives to clean up than those provided by market forces is uncertain. Favoring volunteers may provide a subsidy for inefficient cleanups; however, a certain amount of inefficiency may be a cost worth bearing to achieve voluntary compliance with CERCLA. \textit{See 131 CONG. REC. S12,008} (daily ed. Sept. 24, 1985) (comments of Sen. Domenici) (“we must provide incentives for the Government and private parties to join together rather than litigate”).
\item[\textsuperscript{118}] Rodburg, \textit{Contribution in the Post Chem-Dyne Era.} 1984 \textit{HAZARDOUS WASTE LITIG.} 365, 387-88. It has been noted that in most settlements parties have agreed to divide costs on the basis of volume. \textit{Id.} at 387.
\item[\textsuperscript{119}] \textit{Id.}
\item[\textsuperscript{120}] Note, supra note 94, at 263.
\item[\textsuperscript{121}] 653 F. Supp. 984 (D.S.C. 1984).
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are matters more appropriately considered in an action for contribution between responsible parties after plaintiff has been made whole.\textsuperscript{122}

One commentator suggested that liability can be apportioned strictly on the basis of the percentage of harm created by the chemicals for which the parties are responsible by using a multiple-variable model.\textsuperscript{123} The model demonstrates the impact of each party’s hazardous substances on the total cost of cleanup based on factors such as volume, toxicity, persistence, migratory potential, ignitibility, and reactivity.\textsuperscript{124} But there are difficulties in obtaining the information necessary to complete such a technically complex model, and there is some danger that courts will misunderstand its application.

Comparative causation does not work well within CERCLA’s liability scheme because it cannot be applied in situations in which some of the parties are liable simply as landowners,\textsuperscript{125} or when the two parties handled the very same wastes but at different points in time and with differing degrees of knowledge, care, and cooperation in the cleanup effort.

\textbf{D. The Gore Amendment}

One observer, in discussing the tension in the common law between formal theory and individual justice, has noted that “apportionment of losses is now achieved in some restitution situations by arming the court with a sufficient number of inconsistent rules to guarantee at least one path to justice.”\textsuperscript{126} Each of the above-described apportionment schemes addresses some of the goals of CERCLA, but none of them advances statutory purposes in every situation. The problem in part is one of apportioning liability among different “classes” of potentially responsible parties as defined in CERCLA section 107.\textsuperscript{127}

Using a single criterion for apportioning losses among any given group of potentially responsible parties may produce some odd results. For example, comparative causation will not produce a useful division of losses between a nondisposing owner and a generator (perhaps a lessee). Only the generator was directly involved in producing chemicals. Similarly, if a negligence standard is chosen and all parties acted reasonably and innocently at the time of the dumping—in conformance with an industry practice and without knowledge that the substances involved were

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\item \textsuperscript{122} \textit{Id.} at 995 (citations omitted). Decisions like \textit{South Carolina Recycling} may have confused indivisibility of harm as a matter of law with indivisibility due to the defendants’ inability to sustain their burden to prove a reasonable basis for apportionment. \textit{See} Rodburg, \textit{supra} note 43, at 197-98.
\item \textsuperscript{123} Guariglia, \textit{supra} note 72, at 620.
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} CERCLA § 107(a)(1), § 42 U.S.C. 9607(a)(1) (amended 1986).
\item \textsuperscript{126} Coons, \textit{Approaches to Court Imposed Compromise—The Uses of Doubt and Reason}, 58 \textit{Nw. U.L. Rev.} 750, 753 (1964).
\item \textsuperscript{127} 42 U.S.C. § 9607(a) (amended 1986); \textit{see} Guariglia, \textit{supra} note 72, at 605.
\end{itemize}
“hazardous”—the court will have no criteria to determine contribution shares. Furthermore, use of a pro rata contribution method would conflict with one of CERCLA’s major policies regarding the ultimate placement of costs.

The Gore Amendment used a different method to apportion losses; it compared the behavior of the parties on the basis of a number of factors tied to the important objectives of CERCLA. Like the joint and several liability standard, the Gore Amendment was resurrected by some courts because it furthered the statutory scheme. Significantly, during the 1986 amendment process the House Committee on the Judiciary paraphrased the Gore Amendment factors and offered them as “relevant criteria” for the courts to use in apportioning losses under the new contribution provision:

[T]he amount of hazardous substances involved; the degree of toxicity or hazard of the materials involved; the degree of involvement by parties in the generation, transportation, treatment, storage or disposal of the substances; the degree of care exercised by the parties with respect to the substances involved; and the degree of cooperation of the parties with government officials to prevent harm to public health or the environment.

These factors generally coincide with the comparative fault standards regarding negligence and harm or risk created, but there are important differences. The emphasis in the Gore Amendment is on the relationship of the parties to the harm, and “fault” is measured by how actively involved each party was in creating the harmful situation. Comparative fault under the UCFA, on the other hand, merely accounts for fault on the basis of actual knowledge and capacity to be held knowledgeable. The Gore Amendment also incorporates a comparative causation standard measured by the amount of hazardous substances and degree of toxicity or hazard created. Furthermore, the Gore Amendment recog-

128. 126 CONG. REC. 26,781 (1980).
129. See supra notes 36-41 and accompanying text; see also Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1487-89 (D. Colo. 1985) (citing Gore Amendment as evidence of Congressional approval of contribution under CERCLA). One commentator suggested that the court in A & F Materials, in adopting the Gore Amendment approach to apportionment, would permit apportionment even when a defendant cannot prove his proportionate contribution to the total harm. Note, supra note 94, at 264 n.87. This view posits a very narrow definition of the word “harm” compared to the breadth of concerns reflected in CERCLA. If the harm includes not only the dumping of the hazardous substance but also the lack of cleanup, non-cooperation with the government, and waste of Superfund resources, divisibility of harm can be proved using the Gore Amendment criteria. The Restatement, for example, recognizes divisibility of harms based on relative innocence of the parties. RESTATEMENT (SECOND) OF TORTS § 433A (1965).
nizes the cooperativeness of the party with the government, thus encouraging voluntary cleanups.

The Gore Amendment factors may be difficult to apply because they are nebulous. For instance, there is not always a direct relationship between the cost of cleanup and the amount or toxicity of any given hazardous substance when it may have interacted with other hazardous substances deposited at the same site. Equally difficult to apply is a measurement of the degree of active involvement with the hazardous substance. Active involvement could be measured by “hands-on” participation or by the advantage gained from involvement with the substance (somewhat like products liability). Nevertheless, an approach like the Gore Amendment fits the CERCLA framework because it is susceptible to interpretation in each instance by the courts to further the specific CERCLA policies supporting a right to contribution.

CONCLUSION

The substantive law of contribution under CERCLA has been left to the federal courts to define; however, the courts are not without guidance. As amended by SARA, CERCLA’s liability provisions are less ambiguous, and the statutory policies have been clarified. CERCLA’s policies are grounded in the unique federal interest in nationwide cleanup of hazardous wastes, and these policies provide a starting point for the allocation of cleanup costs.

Quick cleanup of hazardous substances is CERCLA’s primary goal. Any action by a potentially responsible party that advances this goal should carry great weight in the equitable division of cleanup costs. In addition, positive incentives to clean up should be an integral part of the statutory scheme.

Fairness to parties who are liable under the statute is another important goal of CERCLA that should guide the rules of contribution to the extent that it does not make cleanup unduly expensive, difficult, or time-consuming. Thus, although fairness must take a back seat to expediency before a dumpsite is cleaned up and potentially responsible parties are found, afterwards there is no reason to deny the parties an equitable division of response costs based on overall contribution to the problem.

A review of contribution law and commentary on the subject reveals that in many cases comparative fault will be an adequate proxy for the “equitable factors” the court must consider under CERCLA’s new contribution provision. However, in hazardous waste litigation there are often problems in determining causation, and it may be difficult to determine the relative fault of the parties on the basis of negligence, deliberate wrongdoing, or intransigence. In such difficult cases, public policy may prove to be the deciding equitable factor. The overriding policy favoring
quick cleanups argues for incentives to cooperate voluntarily. Thus, all other factors being equal or noncomparable, the degree of cooperation with the government should be decisive. At the contribution stage, the courts should therefore make a comparative fault or Gore Amendment-type analysis, but put a thumb on the scale in favor of parties who engage in voluntary cleanup.

A modified form of comparative fault such as the Gore Amendment not only compares culpable behavior but also gives credit for cooperation with the government in cleaning up hazardous substances. Courts also may want to consider additional equitable factors on a case-by-case basis, but only to the extent that they are relevant to CERCLA's policies. An approach like the Gore Amendment comes closest to implementing the policies of CERCLA.

131. When settling parties are sued for contribution, it is EPA's policy to "argue to the court that in adjusting equities among responsible parties, positive consideration should be given to those who came forward voluntarily and were a part of a group of settling PRPs [potentially responsible parties]." Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5039 (1985).