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Divisibility of Harm Under CERCLA: Does an Indivisible Potential or Averted Harm Warrant the Imposition of Joint and Several Liability?

INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[1] an aggressive attempt to deal with the growing number of hazardous waste sites throughout the United States.[2] The Act imposes potentially harsh liability on anyone contributing to a site "from which there is a release or threatened release" of a hazardous substance.[3] The mere presence of an

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[1] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-57 (1988)), amended by Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-75 (1988)).

[2] SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS., I A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, 3 (Comm. Print. 1983); *see also* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983) ("CERCLA was enacted both to provide rapid responses to the nationwide threats posed by the 30-50,000 improperly managed hazardous waste sites in this country . . . ." (citing 5 U.S.C.C.A.N. 6119, 6119-20 (1980)); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) (stating that CERCLA provides the federal government with the "tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal," and evinces congressional intent "that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created").

[3] Section 107(a) of CERCLA provides in part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section–
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the

individual's waste at a site is sufficient to expose that party to liability under CERCLA irrespective of whether that individual's waste actually leaked or escaped into the environment. In other words, liability under CERCLA is strict for anyone whose waste is found at a site.[4]

Additionally, it has become a well-settled principle under CERCLA that where the harm at a particular site is indivisible, the liability among responsible parties[5] is joint and several.[6] However, it has been debated whether the harm that must be indivisible in order to impose joint and several liability should be limited to the actual harm present at the site and the resulting cleanup costs incurred by the Environmental Protection Agency ("EPA") or should include the potential or threatened harm posed by the site as well. Because the Act includes the phrase "a release or a threatened release"[7] in imposing liability, an answer is not readily apparent within the confines of the statutory language alone. While clearly a party's contribution to a threatened release is enough to establish liability under the Act, it does not necessarily follow that where the

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> incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removable or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607; *see also* Anne D. Weber, Note, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1475 (1989) ("Any person linked by even a tenuous thread to a site where hazardous wastes have been released should assess its liability promptly.").

[4] *See* 126 CONG. REC. S30,932 (1980) (remarks of Sen. Randolph); 126 CONG. REC. H31,965 (1980) (remarks of Rep. Florio); *see also* United States v. Monsanto Co., 858 F.2d 160, 167 and n.11 (4th Cir. 1988) ("We agree with the overwhelming body of precedent that has interpreted section 107(a) as establishing a strict liability scheme."), *cert. denied*, 490 U.S. 1106 (1989); United States v. Hardage, 761 F. Supp. 1501, 1509 (W.D. Okla. 1990) ("Liability under CERCLA is strict, without regard to the liable party's fault or state of mind.").

[5] *See supra* note 3 and accompanying text.

[6] *See* United States v. Bliss, 667 F. Supp. 1298, 1312-13 (E.D. Mo. 1987); United States v. Wade, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983); *Chem-Dyne*, 572 F. Supp. at 810; *see also* United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989) (stating that while CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm), *cert. denied*, 494 U.S. 1057 (1990); *Monsanto*, 858 F.2d at 171-72 (noting that CERCLA has been interpreted to impose joint and several liability); Kelly v. Thomas Solvent Co., 714 F. Supp. 1439, 1448 (W.D. Mich. 1989) (holding that where two or more defendants are responsible for an indivisible harm, each is subject to liability for the whole harm); *see generally infra* notes 63-69 and accompanying text.

[7] 42 U.S.C. § 9607(a)(4).

threatened harm is indivisible the imposition of joint and several liability is proper on that basis alone. It remains to be established whether the EPA can impose joint and several liability among multiple defendants on a theory that the potential harm at the site was indivisible, or that the harm avoided by the EPA's response action would have been indivisible had it occurred.

The EPA argued that an indivisible threatened, potential or averted harm is sufficient to impose joint and several liability for cleanup costs in *O'Neil v. Picillo*.[8] This assertion prompted the *O'Neil* court to focus on the issue of whether divisibility should be determined based on an actual versus a potential harm.[9] While the court did not find it necessary to conclusively decide the validity of the EPA's argument in the case at bar,[10] it pointed to the legislative history of CERCLA and judicial decisions under the Act in mounting a rather harsh criticism of the EPA's reasoning.[11]

However, the issue was not laid to rest by the *O'Neil* court and, therefore, the EPA may reassert its argument in the future in an effort to access a wider range of deep pockets. The EPA may attempt to refute arguments of divisible and apportionable harm set forth by defendants[12] by contending that the presence of an indivisible potential or averted harm requires the imposition of such liability.

This Note examines whether an assertion by the EPA that the presence of an indivisible potential or averted harm should give rise to joint and several liability would be sustainable under CERCLA and existing case law. Part I of this Note discusses in detail the context in which this issue arose in *O'Neil v. Picillo* and the First Circuit's treatment of the theory suggested by the EPA.[13] Part II examines the legislative history of CERCLA and existing common law tort principles that lend support to the court's criticism of the EPA's theory.[14] Part III evaluates the relevant case law under CERCLA, which illustrates that the appropriate inquiry for determining the divisibility

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[8] 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

[9] *Id.* at 180-81.

[10] *Id.* at 181 ("[W]e choose not to resolve the issue in this case. Had appellants met their burden of showing that the costs *actually incurred* by the state were capable of apportionment, we would have had no choice but to address the EPA's theory. But because we do not believe appellants have done so, we can, and do, choose to leave the question for another day.").

[11] *Id.* at 178-81. The court stated that it was "troubled by the practical implications of the Agency's argument" because such arguments were not supported by common law principles, and there was no indication Congress intended to change the common law in this situation. *Id.* at 181.

[12] The defendant carries the burden of demonstrating that the injury is divisible or otherwise subject to apportionment. *See* RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965); *e.g.*, *O'Neil*, 682 F. Supp. 706, 724 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 811 (S.D. Ohio 1983).

[13] *See infra* notes 19-41 and accompanying text.

[14] *See infra* notes 42-74 and accompanying text.

of harm for joint and several liability purposes is the actual, rather than potential harm,[15] and offers an illustrative example of the potential effects of accepting the EPA's argument.[16] Part IV discusses how the logic used to reject the EPA's theory concerning the imposition of joint and several liability for actual removal costs should affect the allocation of pre-cleanup and fixed administrative costs among multiple defendants present at a waste site.[17] Finally, this Note concludes that the harsh criticism leveled against the EPA's theory by the *O'Neil* court was clearly justified and that any future attempt by the EPA to assert joint and several liability on the basis of an indivisible potential or averted harm should be thwarted as contrary to both the congressional intent that drove the enactment of CERCLA and the established case law under the Act.[18]

I. *O'NEIL V. PICILLO*

The case of *O'Neil v. Picillo*[19] arose from Warren Picillo's disastrous decision to allow a portion of his Rhode Island pig farm to be used as a disposal site for drummed and bulk waste. Thousands of barrels of hazardous waste were dumped on the farm during the year 1977, culminating in a huge fire that ravaged the site late in the year.[20] In 1979, the EPA and the State of Rhode Island undertook the cleanup of the area, finding "massive trenches and pits 'filled with free-flowing, multi-colored, pungent liquid wastes' and thousands of 'dented and corroded drums containing a veritable potpourri of toxic fluids.'"[21] After undertaking the cleanup project, the State of Rhode Island initiated a lawsuit in an attempt to recover the cleanup costs incurred between 1979 and 1982. At the conclusion of a month-long bench trial, the district court found three of the five companies to be jointly and severally liable under CERCLA for all of the past cleanup costs not covered by settlement agreements.[22] The other two defendants escaped liability entirely.[23] Two of the three defendants found

[15] *See infra* notes 75-111 and accompanying text.

[16] *See infra* notes 112-21 and accompanying text.

[17] *See infra* notes 122-35 and accompanying text.

[18] *See infra* notes 136-43 and accompanying text.

[19] 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

[20] *Id.* at 177.

[21] *Id.* (quoting O'Neil v. Picillo, 682 F. Supp. 706, 709, 725 (D.R.I. 1988)).

[22] *Id.* at 178. "The State's complaint originally named thirty-five defendants, all but five of whom eventually entered into settlements totalling $5.8 million, the money to be shared by the state and EPA." *Id.*

[23] Two of the five defendants were found not liable by the district court because the State failed

jointly and severally liable appealed to the First Circuit, claiming that the harm at the Picillo site was divisible and, therefore, liability should be apportioned among the defendants and not imposed jointly and severally.[24]

The defendants began by stressing that the state's cleanup costs involved only surface cleanup.[25] They then argued that it was possible to determine the number of barrels of waste each of them had contributed to the site and, in turn, to determine what proportion of the state's removal expenses was attributable to each of them simply by estimating the cost of excavating a single barrel.[26] The EPA asserted that the defendants' recommended approach of apportionment should be rejected[27] because "even if it were possible to determine what proportion of the state's removal costs are attributable to appellants, joint and several liability still would have been proper because the 'harm to be apportioned is not the cost but the environmental contamination that prompts the response action.'"[28]

The Agency thus "adhere[d] to the position that it is irrelevant whether or not the costs of *removal* can be apportioned."[29] As explained by the court, "[t]he reason the Agency takes this position is not, then, because the environmental harm that *actually occurred* was indivisible, but because the additional environmental harm that the government *averted* would have been indivisible had it occurred."[30] Thus, the Agency set forth the proposition that an indivisible potential harm or risk of harm should be sufficient to establish joint and several liability, even where defendants have met their burden of showing a divisible *actual* harm and a reasonable basis upon which to apportion that divisible harm. The *O'Neil* court stated at the outset: "This argument gives us pause because it appears to contravene the basic tort law principle that one pays only for the harm that was, and not for the harm that might have been."[31]

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to prove that the waste attributed to those companies was "hazardous," as the term is defined under CERCLA. *Id.*

[24] *Id.* at 178.

[25] *Id.* at 180.

[26] *Id.*

[27] The EPA first claimed "that it was not possible to determine how many barrels were traceable to the appellants, nor was it possible to determine how much of the contaminated soil removed by the state was attributable to each appellant, and therefore, that it is impossible to apportion the state's removal costs." *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 180-81. The court also set forth an example to illustrate its point:

The court noted that if it were to accept the EPA's "averted harm" argument, there would be only three situations in which apportionment would be appropriate:

> (1) all of the barrels were empty and no further environmental harm was possible;
> (2) the individual barrels were sufficiently far apart that even if further spillage occurred, there would be no commingling of wastes and thus no difficulty determining whose waste caused what damage; or
> (3) every barrel contained precisely the same type of waste so that even if there was further spillage and commingling, the environmental harm could be apportioned according to the volumetric contribution of each defendant.[32]

Under these three highly unlikely scenarios, even the potential or averted harm would be divisible and thus capable of apportionment. However, because the likelihood of any one of these three conditions ever actually being present is so slim, joint and several liability would be imposed in virtually every case.[33]

This fact drew substantial criticism from the court. First, the court was "troubled by the practical implications of the Agency's argument"[34] and criticized the EPA's theory because it would run afoul of the intent of Congress: "[W]e believe Congress did not intend for joint and several liability to be imposed without exception,"[35] which would be the practical result of accepting the EPA's contention. Second, the court was equally troubled by the fact that the EPA's theory finds no support in common law tort principles, which were to be a guide in developing a

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> Assume that it costs the government $1 million to remove all of the barrels from a site, but of this million, only $300,000 were spent removing the defendant's barrels. Also assume that had the barrels not been removed, the additional damage to the environment would have been $5 million and that this five million would not have been divisible. The government certainly would not take the position that it could recover $5 million in such a situation. Instead, it would ask only for the $1 million that it actually spent. Yet when it comes to apportioning that million, the Agency argues that we should look to whether the *$5* million of averted harm would be divisible.

Id.; *see also* United States v. Marisol, Inc., 725 F. Supp. 833, 843 (M.D. Pa. 1989) ("Under common law rules, when two or more persons act independently to cause a single harm for which there is a reasonable basis of apportionment according to the contribution of each, each is held liable only for the portion of the harm he causes.") (citing Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 260-61 n.8 (1979)).

[32] *O'Neil*, 883 F.2d at 181.

[33] *Id.*

[34] *Id.*

[35] *Id.*

uniform approach toward the imposition of joint and several liability under CERCLA.[36] The court concluded:

> We had thought that on the issue of joint and several liability we were to take our lead from evolving principles of common law. It would seem incumbent upon the Agency, then, to demonstrate that on this *particular* question of joint and several liability, Congress intended for us to abandon the common law.[37]

Although the First Circuit in *O'Neil* did not render a dispositive decision as to the validity and appropriateness of the EPA's argument,[38] a close analysis of the legislative history,[39] common law tort principles,[40] and existing case law under CERCLA[41] illustrates that the court's criticism of the EPA's argument was clearly warranted, and that any future attempt by the EPA to assert a similar argument should be soundly defeated.

II. SUPPORT FOR THE *O'NEIL* COURT'S CRITICISM

A. Legislative History

An examination of the legislative history of CERCLA and the 1986 amendments to the Act[42] indicates that the inquiry for determining the divisibility of harm and the appropriateness of imposing joint and several liability must focus on the actual harm that has occurred, rather than the potential or averted harm. An acceptance of the argument set forth by the EPA in the *O'Neil* decision would result in the imposition of joint and several liability in virtually all CERCLA cases,[43] a result clearly in contravention of congressional intent and goals under the Act.[44]

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[36] *Id.* ("[I]t seems to find no support in common law tort principles, which were to be one of our benchmarks in developing a uniform approach to govern the imposition of joint and several liability."); *see also infra* notes 41-62 and accompanying text.

[37] *O'Neil*, 883 F.2d at 181.

[38] *See supra* note 10 and accompanying text.

[39] *See infra* notes 42-64 and accompanying text.

[40] *See infra* notes 65-74 and accompanying text.

[41] *See infra* notes 75-111 and accompanying text.

[42] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-75 (1988)).

[43] *See supra* note 33 and accompanying text.

[44] One of Congress' main concerns was the fair imposition of liability. *See infra* text

In its final form, CERCLA was a compromise evolving primarily from two bills, H.R. 7020[45] and S. 1480,[46] both of which explicitly provided for the imposition of strict, joint and several liability.[47] Noticeably absent from the Act's enacted form, however, is any language imposing joint and several liability. This deletion of any reference to joint and several liability has been interpreted as an effort to avoid the mandatory imposition of such liability under the Act.[48]

The floor debates constitute the only legislative history addressing the compromise bill as a whole,[49] and generally indicate that Congress wished to allow issues of liability to be decided under traditional and evolving common law principles of tort law on a case-by-case basis, and thus did not impose a mandatory liability standard.

For example, Senator Randolph, a sponsor of the Senate bill, explained the significance of the deletion of the reference to joint and several liability as follows:

> [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 were made in recognition of the difficulty in prescribing in statutory terms liability standards which will be applicable in individual cases. . . .
>
> . . . .
>
> 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 or previous statutory law.[50]

Representative Florio, a sponsor of the House version, agreed:

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accompanying notes 52-60.

[45] H.R. 7020, 96th Cong., 2d Sess. (1980).

[46] S. 1480, 96th Cong., 1st Sess. (1979).

[47] *Id.* at § 4(f); H.R. 7020, *supra* note 45, at § 307(a).

[48] *See infra* notes 75-109 and accompanying text.

[49] *See* Barbara J. Gulino, *A Right of Contribution Under CERCLA: The Case for Federal Common Law*, 71 CORNELL L. REV. 668, 672 (1986).

[50] 126 CONG. REC. S30,932 (1980) (remarks of Sen. Randolph). Senator Randolph's reference to "previous statutory law" has been interpreted to refer to § 311 of the Federal Water Pollution Control Act, which in turn has been interpreted as imposing strict liability and as allowing the imposition of joint and several liability in situations involving multiple defendants. *See* Gulino, *supra* note 49, at 673 n.23.

> Issues of joint and several liability not resolved by this shall be governed by traditional and evolving principles of common law. . . . To insure the development of a uniform rule of law, and to discourage businesses dealing in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area.[51]

Thus, the omission of language addressing joint and several liability in the Act represents a conscious decision by Congress to encourage a flexible approach to imposing liability by relying on an ever-developing body of federal common law rather than a strict mandatory imposition to be enforced in every case.

Courts have viewed the deletion of the language as evidence of Congress' concern for achieving fairness.[52] The Senate expressed this sensitivity to fairness by rejecting a mandatory legislative standard and opting instead to allow courts to impose joint and several liability on a case-by-case basis.[53] The House evidenced its concern by passing a bill that contained a very moderate approach to joint and several liability.[54] As part of its bill, the House passed the Gore Amendment,[55] a provision which softened the modern common law approach to joint and several liability when applied to a defendant who contributed a relatively small percentage to the waste site.[56] This proposal addressed the concern of members of the House that in many cases a small contributor would not be able to prove his contribution and would face joint and several liability as a result.[57] Under the Gore Amendment, a court would have retained the power to impose joint and several liability whenever a defendant could not prove his contribution to an injury, but could also apportion damages in such a situation according to a number of equitable factors.[58]

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[51] 126 CONG. REC. H31,965 (1980) (remarks of Rep. Florio).

[52] *See, e.g.*, United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) ("[B]oth Houses of Congress were concerned about the issue of fairness . . . .").

[53] *See id.*; *see also supra* note 50 and accompanying text.

[54] See *A & F Materials*, 578 F. Supp. at 1256 for a discussion of the concern for fairness in Congress.

[55] 126 CONG. REC. 26,783-85 (1980).

[56] *See A & F Materials*, 578 F. Supp. at 1256 (discussing the Gore Amendment).

[57] *See id.* (evaluating the legislative history of the Act).

[58] *See id.* Among the factors a court could consider were:

> (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;

Although the Gore Amendment was not ultimately incorporated into the Act, the concern of Congress to be fair is still evident in the legislative history. In fact, a number of representatives believed the final compromise bill implicitly incorporated the essence of the House's moderate approach to liability.[59] Additionally, committee reports indicate that the general congressional intent driving the passage of CERCLA was to place liability for toxic waste as nearly as possible on those responsible for creating the hazard.[60]

The contention that joint and several liability was not intended to be mandatory under CERCLA is also supported by the legislative history of its subsequent amendments, known as the Superfund Amendment and Reauthorization Act ("SARA").[61] The amendments made no change in the standard of liability under CERCLA.[62] The congressional committee report on SARA noted that "explicit mention of joint and several liability was deleted from CERCLA in 1980 to allow courts to establish liability through a case-by-case application of 'traditional and evolving principles of common law' and pre-existing statutory law."[63] In light of this recognition, the 1986 amendments endorsed a flexible approach to determining the scope of liability rather than mandating the imposition of joint and several liability.[64]

While the statutory language of CERCLA itself is silent on the issue of joint and several liability, the legislative history and Congress' refusal to enact mandatory joint and several liability while amending the Act in 1986 demonstrate that acceptance of the EPA's argument set forth in *O'Neil* would be contrary to the intent of Congress. The virtually

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(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 environment.

Id. at 1256 (discussing provisions of the Gore Amendment). Thus, the Gore Amendment was even less stringent than the Restatement (Second) of Torts, allowing a court to apportion liability where the harm is divisible even if the defendant could not prove his exact contribution. See *infra* notes 65-74 and accompanying text for discussion of the Restatement's treatment of joint and several liability.

[59] *See* 126 CONG. REC. H31,976, H31,980-81 (1980) (remarks by Representatives Mikulski, Gore, and Brown).

[60] *See* H.R. REP. No. 1016, 96th Cong., 2d Sess. 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136-37 ("The Committee intends that for liability to attach under this section, the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action . . . ."); *see also* United States v. Wade, 577 F. Supp. 1326, 1339 (E.D. Pa. 1983) (discussing congressional intent).

[61] Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-75 (1988)).

[62] H.R. REP. No. 253(I), 99th Cong., 1st Sess. pt. 1, at 74 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856.

[63] *Id.* (quoting 126 CONG. REC. H11,787).

[64] *Id.*

mandatory imposition of joint and several liability under CERCLA cannot be reconciled with the statutory intent of the Act.

B. Common Law Principles of Joint and Several Liability: The Restatement Approach

The Restatement (Second) of Torts[65] supports the contention that joint and several liability should not apply to an indivisible potential or averted harm. Section 875 of the Restatement provides: "Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."[66]

The Restatement defines "harm" as "the existence of loss or detriment in fact of any kind to a person resulting from any cause."[67] The language "in fact" indicates that it is the actual harm rather than the potential harm that must be indivisible before joint and several liability is proper under section 875. A potential harm is a threat of harm, not a harm that has in fact been caused.

The only "loss or detriment in fact" that can be said to flow from a potential harm is the associated cost incurred by the EPA in removing that specific threat of future harm to the environment. Reading section 433A of the Restatement in conjunction with section 881 illustrates that damages should be apportioned among the defendants causing an actual harm to the environment and those merely contributing to the potential for additional environmental damage at the site. Section 433A provides:

> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

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[65] RESTATEMENT (SECOND) OF TORTS §§ 433A, 433B (apportionment of harm to causes), 875 (contributing tortfeasors), 881 (distinct or divisible harm) (1965).

[66] *Id.* § 875. An example of an indivisible harm would be:

> Company A and Company B both negligently discharge oil into a stream. The oil, floating on the surface of the stream, is ignited by a spark. A large fire results and burns down C's barn. C may recover a judgment for the full amount of his damages (costs of replacing the barn) from Company A, or Company B, or both of them.

Id. § 433A cmt. i, illus. 14.

[67] *Id.* § 7.

(2) Damages for any other harm cannot be apportioned among two or more causes.[68]

Under section 881, if two or more parties, "acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused."[69] Consequently, in an action by the EPA to recover hazardous waste site cleanup costs, each defendant should pay only for the costs that it has specifically caused the EPA to incur.[70] If the damages to the EPA include expenses incurred in both the removal of a threat and the cleanup of an actual release, the damages should be apportioned accordingly.

For example, any response action initiated by the EPA will be prompted by the actual environmental contamination from a leaking source, the presence of a risk that such a release will occur in the future, or both. According to the Restatement argument, in any case, the "loss or detriment in fact"[71] includes the actual release of waste into the environment and/or any cost incurred by the EPA in responding to the hazards presented at the site. The apportionment sections are directed toward actual harm because that is when the ability to apportion is most at issue. When an actual release has occurred, the harm may be more difficult to apportion because the chemicals may mix, making it impossible to distinguish the damages. That is, it becomes impossible to determine the specific environmental contamination and harm caused by

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[68] *Id.* § 433A.

[69] *Id.* § 881. An example of a divisible harm would be:

> Through the negligence of A, B, and C, water escapes from irrigation ditches on their land, and floods a part of D's farm. There is evidence that 50 percent of the water came from A's ditch, 30 percent from B's and 20 percent from C's. On the basis of this evidence, A may be held liable for 50 percent of the damages to [D]'s farm, B liable for 30 percent, and C liable for 20 percent.

Id. § 433A cmt. d, illus. 4.

[70] It is interesting to note that the drafters of the Restatement actually treat the joint pollution of the environment as subject to the divisibility rule. The drafters write:

> There are other kinds of harm which while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible . . . . Such apportionment is commonly made in cases of private nuisance, where the pollution of a stream . . . has interfered with the plaintiff's use or enjoyment of his land.

Id. § 433A cmt. d. This provision indicates that the Restatement envisions harm at a waste site as divisible, and thus considers liability in such cases apportionable among the various defendants.

[71] *See supra* text accompanying note 67 (quoting RESTATEMENT (SECOND) OF TORTS § 7 (1965)).

each defendant, and the extent to which his particular waste contributed to the incurrence of cleanup costs. In such a case, the actual harm to the environment and costs incurred by the EPA are truly indivisible. However, when a potential threat associated with a particular site is removed, it is quite simple to apportion the damages according to the cost of removing each threatening barrel or container.

Where the harm in fact includes costs incurred by the EPA to prevent a potential harm, in addition to the cleanup cost of the actual spill, the costs should be apportioned. In the event of an actual release, the EPA will incur costs in cleaning up the spilled waste. If the EPA is responding to a mere threat or risk of release, its expenses will be those incurred in the removal of the threat. A threatened release is notably distinct from an actual release, both in terms of associated cleanup costs and in terms of damage to the environment. The cost of removing a nonleaking, potentially threatening barrel is significantly less than containing a spilled substance and ridding the environment of its harmful effects. Furthermore, where a defendant has created only a threatened harm, his contribution to the actual harm is identifiably separate from those polluters whose waste has actually leaked into the environment. There is no opportunity for that defendant's waste to commingle with or to interact synergistically with the spilled waste.[72] Simply put, the defendant's waste has caused no actual environmental damage at all. While the defendant whose waste has leaked causes actual harm in the form of apparent environmental contamination and the associated cleanup costs, the defendant whose waste merely poses a threat of future spills contributes to the actual harm only by way of increasing the EPA's response costs. The actual harm is therefore readily divisible among the various defendants. Under section 433A of the Restatement, if the defendant can illustrate a reasonable basis for calculating his particular contribution to the response cost, he should be liable only for that portion.

If the argument set forth by the EPA in *O'Neil* were accepted, the policy endorsed by the Restatement that a party pays only for the harm he has caused would be thwarted. For example, suppose that the waste of a particular defendant has been found at a site at which the EPA has responded to an actual release. Further, suppose that the same defendant's waste has in no way contributed to the actual release of hazardous substances into the environment, but is simply present at the site in sealed

[72] Courts often cite the commingling and synergistic effects of wastes in ruling that the harm at a particular site is indivisible. *See infra* note 111 and accompanying text.

and intact barrels. Clearly, the mere presence is sufficient to create liability under the Act,[73] but should that defendant be jointly and severally liable for the entire cost associated with cleaning up the site? Under the Restatement, the actual harm that has occurred at this site is divisible, and there is a rational basis to apportion liability. The defendant's contribution to the actual harm at the site is limited to the costs associated with removing the risk of further release; the defendant has not contributed to the actual release of hazardous substances into the environment. Therefore, under the Restatement, the defendant should be liable only for the response cost of removing that particular risk–assuming of course that the defendant can illustrate a rational basis to calculate such cost.[74] The defendant should not be liable in any way for the cost associated with the cleanup of the spilled waste. However, an acceptance of the EPA's argument would allow the Agency to hold the defendant jointly and severally liable by asserting that the harm avoided by the EPA's response action would have been indivisible had it occurred, or that the potential harm at the site was indivisible. Clearly, this would expose the defendant to liability for cost to which he did not contribute, and would be contrary to the Restatement's provision for apportioning liability when a rational basis exists to do so. In order to comply with the Restatement approach, the inquiry for the purpose of determining divisibility must be limited to the actual harm that has occurred and not what might have been. In the case of an EPA claim, "actual harm" should be defined as including any *actual* release of chemicals into the environment and any costs incurred by the EPA in cleaning up the site, but should not be so broad as to include the creation of a mere risk of environmental damage.

III. CASE LAW UNDER CERCLA

Further support for the *O'Neil* court's decision to reject the EPA's argument can be found within the existing case law under CERCLA. "The courts have examined CERCLA's legislative history and concluded that by deleting the joint and several language, Congress intended the courts to apply flexible common law principles of liability allocation to CERCLA rather than a rigid, legislative mandate that joint and several liability apply in every case."[75] Furthermore, "courts have consistently

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[73] *See supra* notes 3-4 and accompanying text.

[74] For example, the defendant might show that there is a rational basis for computing the cost of removal per barrel.

[75] Gulino, *supra* note 49, at 674.

concluded that joint and several liability is permissible but not mandatory under [section 107 of CERCLA], and that liability [is to] be apportioned on a case-by-case basis."[76] Thus, any attempt by the EPA to establish mandatory joint and several liability is improper.

In addition, the courts have indicated that the appropriate inquiry for determining divisibility of harm and reasonableness of apportionment should focus on the actual harm that has occurred–the actual environmental pollution and/or the costs incurred by the EPA in cleaning up the site–rather than the potential or averted harm. Courts deciding the issue of divisibility for a particular site have repeatedly focused on the costs incurred by the EPA or the actual environmental conditions present at the site when deciding how to apportion liability.[77] Noticeably absent from the case law is any decision allowing joint and several liability on the basis of an indivisible potential or averted harm.

A. United States v. Chem-Dyne Corp.

The seminal case discussing joint and several liability under CERCLA is *United States v. Chem-Dyne Corp.*[78] In this decision, the federal district court critically analyzed the legislative history of CERCLA[79] and concluded that the scope of liability is to be "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."[80] In rendering its decision, the court endorsed the Restatement approach[81] to deciding whether joint and several liability is proper under CERCLA.[82] The court stated:

> This case, as do most pollution cases, turns on the issue of whether the harm caused at Chem-Dyne is "divisible" or "indivisible." If the harm is divisible and if there is a reasonable basis for apportionment of damages, each defendant is liable only for the portion of the harm he himself caused. . . . On the other hand, if the defendants

[76] 2 SUSAN M. COOKE, THE LAW OF HAZARDOUS WASTE § 14.01[6][C][i] (1990).
[77] *See infra* notes 78-111 and accompanying text.
[78] 572 F. Supp. 802 (S.D. Ohio 1983).
[79] See *supra* notes 42-64 and accompanying text for a discussion of legislative history.
[80] *Chem-Dyne*, 572 F. Supp. at 806-10.
[81] *Id.* at 810. *See also supra* notes 65-74 and accompanying text (discussing joint and several liability principles under the Restatement (Second) of Torts).
[82] *Chem-Dyne*, 572 F. Supp. at 810-11.

caused an indivisible harm, each is subject to liability for the entire harm.[83]

The court concluded that these general principles of tort law clearly provide the appropriate analysis to be undertaken when applying CERCLA and are most likely to advance the legislative policies and objectives of the Act.[84] The court favored the Restatement approach because it allows defendants to avoid an unjust imposition of joint and several liability by showing that the harm that has occurred is divisible. Where a defendant has contributed to the creation of only a threatened release at a site, that party should be able to avoid joint and several liability by demonstrating the cost incurred by the EPA in removing that specific threat. Under *Chem-Dyne*, joint and several liability is *not* mandatory, but rather hinges upon the divisibility of harm.[85] In order to avoid the wholesale imposition of joint and several liability urged by the EPA, the harm evaluated in determining divisibility should be limited to the actual harm. To rule otherwise would be tantamount to imposing strict, joint and several liability in every case, a result clearly rejected by the *Chem-Dyne* court.

In light of the legislative history of CERCLA, the *Chem-Dyne* decision sets forth the appropriate approach to imposing joint and several liability—one that rests upon the specific conditions of each and every waste site rather than a broad, sweeping approach. As a result, a number of courts have followed the *Chem-Dyne* court's lead and now apply the Restatement approach in imposing joint and several liability in CERCLA cases.[86]

B. United States v. Monsanto Co.

The rationale behind *Chem-Dyne* was echoed in the Fourth Circuit's decision in *United States v. Monsanto Co.*[87] In *Monsanto*, a number of government and private entities contracted with South Carolina Recycling

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[83] *Id.* at 811 (citing RESTATEMENT (SECOND) OF TORTS §§ 433A, 881, 875 (1965)).

[84] *Id.* at 810.

[85] *Id.* ("[A] blanket adoption of the joint and several liability standard . . . would be inconsistent with the legislative history of CERCLA.").

[86] *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 171-73 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 n.13 (2d Cir. 1985); United States v. Bliss, 667 F. Supp. 1298, 1312-13 (E.D. Mo. 1987); United States v. Dickerson, 640 F. Supp. 448, 450 (D. Md. 1986); Colorado v. Asarco, Inc., 608 F. Supp. 1484, 1489-90 (D. Colo. 1985).

[87] 858 F.2d 160 (4th Cir. 1988).

and Disposal, Inc. ("SCRDI") to transport and dispose of chemical and other waste.[88] Over a four-year period SCRDI placed more than 7000 drums of various chemical wastes on a four-acre site.[89] The careless handling of these wastes resulted in fires, fumes, and explosions that eventually prompted a massive EPA response action.[90] The EPA identified waste bearing the labels of three generator defendants.[91] The district court found the defendants jointly and severally liable for the cleanup costs.[92]

The generator defendants challenged this ruling on appeal, claiming that each of them had supplied a potentially identifiable volume of waste to SCRDI and that liability should be apportioned according to volume.[93] The court of appeals initially recognized that CERCLA allows, but does not require, joint and several liability.[94] Recognizing its duty to consider traditional and evolving principles of common law in determining whether joint and several liability is appropriate,[95] the court considered Section 433A of the Restatement (Second) of Torts.[96] Although the *Monsanto* court refused to apportion the liability based on volume,[97] the ruling can be viewed as an endorsement of flexible rather than mandatory imposition of joint and several liability.[98] The court viewed the fact that the waste at the site had commingled as a reason to rule out the possibility of divisible harm,[99] but stated that under other circumstances proportionate volumes of hazardous substances may very well be probative of contributory harm.[100] The *Monsanto* court was concerned that where the waste of different defendants mixes and forms a toxic soup, volume alone is not a rational basis of apportioning harm; other factors may impact on the divisibility.[101] The court, however, did not

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[88] *Id.*

[89] *Id.* at 164.

[90] *Id.* at 164-65.

[91] *Id.* at 164.

[92] *Id.* at 166.

[93] *Id.*

[94] *Id.* at 171.

[95] *Id.*

[96] *Id.* at 172; see also *supra* notes 65-70 and accompanying text for a discussion of section 433A of the Restatement.

[97] *Monsanto*, 858 F.2d at 172-73.

[98] *Id.* at 172 ("[The defendants] presented no evidence, however, showing a relationship between waste volume, the release of hazardous substances, and the harm at the site."); *see also id.* at n.25.

[99] *Id.* at 172.

[100] *Id.*

[101] *Id.* at n.26 ("We agree with the district court that evidence disclosing the relative toxicity, migratory potential, and synergistic capacity of the hazardous substances at the site would be relevant to establishing divisibility of harm.").

reject apportioning harm on the basis of volume when it can be "reasonably assumed, or has been demonstrated, that independent factors had no substantial effect on the harm to the environment."[102] The *Monsanto* court thus clearly rejected the mandatory imposition of joint and several liability in favor of a more flexible approach.

C. Additional Support

Courts generally favor the Restatement approach[103] relied on by the *Chem-Dyne* and *Monsanto* courts because it facilitates fairness, one of the main concerns of Congress in adopting the legislation without specific reference to joint and several liability.[104] For example, the court in *United States v. Wade*[105] stated that the Restatement approach helps to "ameliorate the harshness of the liability provisions of the statute."[106] Acceptance of this approach ensures that defendants pay only for the harm they have caused. Thus, a defendant who has contributed only to the risk of harm at the site, or one who has proven that the actual harm is divisible and capable of apportionment, is not responsible for the entire cleanup cost associated with an actual release of hazardous waste into the environment. This approach will encourage companies dealing with hazardous waste to take the necessary precautions to prevent leakage of their particular waste so as to avoid facing joint and several liability in the event that other companies' waste actually leaks. Those who are made parties to a suit by the EPA because their waste was present at a site from which there was a release or threatened release will be able to limit their liability by showing that their waste did not actually leak and that a reasonable basis exists for calculating their contribution to the EPA's response cost.

The quest for fairness under CERCLA was taken a step further by the court in *United States v. A & F Materials Co.*[107] The court in *A & F*

[102] *Id.* at n.27.

[103] *See* Weber, *supra* note 3, at 1478 ("The majority of courts follow *United States v. Chem-Dyne Corp.* in adopting the *Restatement (Second) of Torts* approach.") (citations omitted).

[104] *See supra* notes 52-60 and accompanying text.

[105] 577 F. Supp. 1326 (E.D. Pa. 1983).

[106] *Id.* at 1339.

[107] 578 F. Supp. 1249 (S.D. Ill. 1984). The court felt that even the Restatement approach was too strict an approach for imposing joint and several liability. In endorsing an approach that would allow a court to consider equitable factors in apportioning liability, the court stated:

> After reviewing the legislative history, the Court concludes a rigid application of the Restatement approach to joint and several liability is inappropriate. Under the Restatement approach, any defendant who could not prove its contribution would be jointly and severally liable. This result must be avoided because both Houses of Congress were

Materials endorsed the principle set forth in the Gore Amendment,[108] stating that the "moderate approach promotes fairness because it does not indiscriminately impose joint and several liability."[109] Although the ultimate result under the moderate and Restatement approaches may vary, the underlying concern of both is fairness. Thus, regardless of which theory a court chooses to accept, both indicate that the theory asserted by the EPA in *O'Neil* must be rejected. The mandatory imposition of joint and several liability that would result from the EPA theory cannot be reconciled with the legislative and judicial treatment the issue has received.

In order to institute a flexible and fair approach to apportioning liability such that the defendants in a CERCLA action are held responsible only for the harm they have caused, the inquiry must delve into the actual environmental contamination present at the site or the costs incurred by the EPA in rectifying actual or potential harm to the environment. To allow an indivisible potential harm to establish joint and several liability would result in the mandatory imposition of joint and several liability, potentially exposing a party to liability for environmental damage not attributable to that party's conduct. A party could be held jointly and severally liable for the entire cleanup cost simply because her waste was present at a site where the *potential harm* was or would have been indivisible *had it occurred.* Such a result would directly conflict with the fairness consideration embraced by the federal courts, which have concluded that a defendant should be liable only for the harm she has caused.[110] A defendant who has contributed only to the risk of potential harm should be liable only for the cost of removing that risk of harm, not the entire cleanup cost associated with the site. Likewise, a defendant whose waste has leaked, but not contributed to an indivisible toxic soup, should be liable only for the cost of cleaning up her specific waste. Accordingly, in deciding the issue of divisibility of harm, courts

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> 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.

Id. at 1256.

[108] *Id.* See *supra* notes 55-58 and accompanying text for a description of the Gore Amendment.

[109] *A & F Materials*, 578 F. Supp. at 1257. At least one other court has accepted the moderate approach endorsed by *A & F Materials* in deciding a suit between two private parties. *See* Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1118 (N.D. Ill. 1988); *cf.* United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987) (holding that the court has discretion to use equitable factors in apportioning damages in contribution actions in order to mitigate the hardships of imposing joint and several liability upon defendants who have contributed only a small amount to a potentially large indivisible harm).

[110] *See supra* notes 83, 103-09 and accompanying text.

have repeatedly focused on the actual environmental harm that has occurred (the present condition of the site–rather than the potential condition) or the costs incurred by the EPA during cleanup.[111]

D. *Illustrative Example:* United States v. Alcan Aluminum Corp.

The proposition that the divisibility inquiry should be limited to the actual harm associated with the site is supported by the Third Circuit's recent decision in *United States v. Alcan Aluminum Corp.*[112] In *Alcan,* the court vacated a district court decision granting summary judgment against Alcan and imposing joint and several liability because Alcan's

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[111] *See* United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988) ("The generator defendants bore the burden of establishing a reasonable basis for apportioning liability among responsible parties. To meet this burden, the generator defendants had to establish that the *environmental harm* at Bluff Road was divisible among responsible parties.") (emphasis added); *see also id.* at n.22 (holding that the question of joint and several liability "focuses principally on the divisibility among responsible parties of the harm to the environment."). In United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1396 (D.N.H. 1985), the court held:

> [A] reasonable basis exists for determining the contribution of each liable generator to the harm relating to surface cleanup at the Ottati & Goss site. The basis is the number of drums sent to the site by each generator .... Each of the generators ... is liable for the [specific volumetric] percentages of the Ottati & Goss surface clean-up costs incurred by the government ....

Id. See also B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1206 (2d Cir. 1992) ("[T]he amount of liability imposed [on a generator] ... will be a function of the extent to which ... dumping of hazardous substances both engendered the necessity, and contributed to the costs, of cleanup."); City of New York v. Exxon Corp., 766 F. Supp. 177, 198 (S.D.N.Y. 1991) (The defendant, in order to avoid joint and several liability, must "establish that the environmental harm at the City landfills was divisible among responsible parties."). The *Exxon* court's focusing on the actual harm is further supported by the statement that

> the wholesale commingling of different generators' wastes ... precludes a finding that the harm in this case is divisible. ... [Defendant's] waste was mixed with the wastes of other generators. ... [I]t is scientifically impossible to determine the precise origin of any of the hazardous substances that have been detected at the City landfills.

Id. Cf. United States v. Marisol, Inc., 725 F. Supp. 833, 843 (M.D. Pa. 1989) (recognizing that a defendant's relative contribution to a waste site may have an impact on the issue of joint and several liability, thus focusing on the actual condition of or harm present at the site); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (1983) (focusing on the actual condition of the site or the actual spill that had occurred in concluding that the harm was indivisible). The *Chem-Dyne* court stated:

> Some of the wastes have commingled but the identities of the sources of these wastes remain unascertained. The fact of the mixing of the wastes raises an issue as to the divisibility of the harm. Further, a dispute exists over which of the wastes have contaminated the ground water, the degree of their migration and concomitant health hazard.

Id. at 811. In United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987), the court held that the harm was indivisible "due to the synergistic effects and the commingling of different wastes." *Id.* at 1060. Thus, the *Stringfellow* court focused on the divisibility, or lack thereof, of the actual harm or damage done to the environment rather than the potential harm that may have occurred. *Id.*

[112] 964 F.2d 252 (3d Cir. 1992).

hazardous substance was present at a site from which there was a release.[113] The court relied on the Restatement (Second) of Torts in holding that if the harm at the site is capable of apportionment, liability should not be joint and several.[114] The court explained that "of critical importance in this analysis is whether a harm is divisible and reasonably capable of apportionment, or indivisible, thereby subjecting the tortfeasor to potentially far-reaching liability."[115] In remanding the case on the issue of divisibility, the court directed that Alcan be given an opportunity to establish a reasonable basis for limiting its liability based on its actual contribution to the harm at the site.[116]

Clearly, the presence of Alcan's substances at the site posed a threat of harm to the environment, and the EPA arguably prevented a harm that could have been indivisible, absent EPA intervention. However, the Third Circuit refused to impose joint and several liability on that basis alone. Instead, it remanded, stating:

> [W]e find that the court should have conducted a hearing to determine the divisibility of harm to the Susquehanna River, and will remand the case for the court to do so. If Alcan can establish in that hearing that the harm is capable of reasonable apportionment, then it should be held liable only for the response *costs* relating to that portion of harm to which it contributed.[117]

The court thus focused its inquiry on the actual environmental harm present at the site and the cost incurred by the EPA in rectifying that harm,[118] rather than focusing on the potential or averted harm associated with the site. By focusing on the divisibility of costs incurred by the EPA, a party that has created only a threatened or potential harm would be liable for only the cleanup costs *specifically*

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[113] *Id.* at 271. "Accordingly, [the district court] held that Alcan was jointly and severally liable for the removal costs because Alcan's waste contained identifiable levels of hazardous substances and was present at the Site from which there was a release." *Id.* at 257. *See also* United States v. Northernaire Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987), *aff'd sub nom.* United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 495 U.S. 1057 (1990). The *Northernaire* court found joint and several liability appropriate because the source of the harm—"the presence of the hazardous substances at the Northernaire facility"—was indivisible. *Id.* at 748.

[114] *Alcan*, 964 F.2d at 269.

[115] *Id.* at 269.

[116] *Id.* at 271.

[117] *Id.* (emphasis added).

[118] *Id.* at 269 ("[Alcan] should only be liable for that portion of the harm fairly attributable to it.").

allocable to *removing* the *threat* of harm posed by that party's waste, assuming a reasonable basis for calculating that cost exists.[119]

Had the EPA's prevention of a potentially indivisible harm been sufficient to establish joint and several liability for all generators present at the site, there would have been no need to remand the issue of divisibility to the lower court, and Alcan would have faced potentially extensive liability irrespective of its contribution either to the actual harm at the site or to the cost incurred by the EPA. The *Alcan* scenario illustrates the potential for gross unfairness that would result if courts adopted the EPA's theory and imposed joint and several liability on the basis of an indivisible potential or averted harm. The need to limit the inquiry for purposes of determining divisibility to the actual harm that has occurred is clear. An acceptance of the EPA's argument would enable it to refute any defendant's argument that a rational basis for apportioning liability exists, regardless of its validity, by simply stating quite speculatively that, had the Agency not intervened, an indivisible harm *would have occurred.* In order to avoid this result and to satisfy the congressional intent of fairness,[120] the inquiry for purposes of determining divisibility is appropriately limited to the actual harm that has occurred[121]–whether that actual harm is a release of harmful chemicals into the environment or the costs associated with removing the risk of a potential release.

IV. ALLOCATION OF PRE-CLEANUP AND FIXED COSTS

The discussion has thus far focused primarily on the allocation of variable costs associated with the actual cleanup phase of an EPA response action–the costs of *removing* the hazardous substances from the site. However, significant costs can be incurred by the EPA before the agency actually begins to remove the waste. Some costs are simply nonvariable costs associated with every cleanup project. Among these costs are the preparation of the Remedial Investigation and Feasibility Study (RI/FS),[122] the purpose of which is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy,[123] and

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[119] Alcan might have been able to show a reasonable method of calculating the cost of removal per barrel, establish the number of its barrels left at the site, and thus establish the extent to which it had contributed to the response costs incurred by the EPA.

[120] *See supra* notes 52-60 and accompanying text.

[121] *See supra* note 111 and accompanying text.

[122] The Remedial Investigation and Feasibility Study is required by 40 C.F.R. 300.430(a)(2) (1992).

[123] *Id.*

certain administrative and transaction costs. Because these pre-cleanup and fixed costs can constitute a significant portion of the total cost incurred by the EPA in responding to a site,[124] it is important to discuss how rejection of the EPA's theory may affect the allocation of such costs among multiple defendants.[125]

An acceptance of the EPA's theory would render all defendants jointly and severally liable for these pre-cleanup and fixed costs in every case, just as it would impose mandatory joint and several liability among defendants for the costs of physically removing the waste from the site. A defendant who contributed to an indivisible potential or threatened harm at a site would be liable for the entire amount of administrative costs and for investigating and assessing the conditions of the site prior to cleanup, regardless of that defendant's contribution to the actual harm at the site. A defendant that has illustrated that the actual harm at the site is divisible and has shown a rational basis for calculating its contribution to that harm should be liable only for that portion of harm that defendant has in fact caused.

To illustrate the ramifications of the EPA's theory with respect to these pre-cleanup costs, assume that a defendant has contributed only to the threat of release at a site and not the actual release. Under the EPA's theory, the defendant could be jointly and severally liable for all of the pre-cleanup and administrative costs because it has contributed to an indivisible potential harm. However, as discussed above, the harm caused by an *actual* release versus that caused by the defendant's *threatened* release is notably different. Similarly, the task of determining the appropriate method of response for an actual spill is more complex and

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[124] *See* E. Donald Elliot, *Superfund: EPA Success, National Debate?*, NAT. RESOURCES & ENV'T, Winter 1992, at 11, 12 ("The single most damning statistic about the Superfund program is that it takes, on average, ten years to clean up each site, *but only about three years is actual on-site construction work!*"); *id.* at 13 (observing that "it takes seven years and at least $4 million in transaction costs at each site to conduct the necessary studies and design remedies before the final cleanup can begin").

[125] The language of CERCLA has been interpreted as providing the government with broad cost recovery rights. One court noted that among the activities for which the government can recover response costs are the following:

> (a) Investigations, monitoring and testing to identify the extent of danger to the public health or welfare or the environment.
>
> (b) Investigations, monitoring and testing to identify the extent of the release or threatened release of hazardous substances.
>
> (c) Planning and implementation of a response action.
>
> (d) Recovery of the costs associated with the above actions, and to enforce the provisions of CERCLA, including the costs incurred for the staffs of the EPA and the Department of Justice.

United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984).

expensive than that required for a mere threatened release. When only a threat of release has been created, the proper response is obvious–removal of the barrel, transformer, etc. However, when an actual release has occurred, various containment and removal strategies may be undertaken, and investigation for the purpose of selecting the proper method of response can become highly complex.[126] When an RI/FS is prepared for a site at which there are both threatened and actual releases, the portion of the total cost of such study attributable to addressing the threatened release will be less than that allocable to assessing and investigating the actual spill.[127] However, under the EPA's theory, all defendants at such a site are jointly and severally liable for these costs. Thus, the defendant creating only the threatened harm is liable to an extent in excess of his actual contribution to the pre-cleanup costs. Similarly, a defendant whose waste has leaked, but not contributed to an indivisible actual harm, could be held jointly and severally liable for these costs on the basis of the EPA's indivisible potential or averted harm theory.[128]

As with the actual costs of cleanup (removal), the notion embodied in the Restatement that a defendant should pay only for the harm he has caused[129] is not satisfied when a defendant is held jointly and severally liable for these pre-cleanup and fixed costs on the basis of an indivisible potential harm. The theory set forth by the EPA in *O'Neil* essentially treats all defendants as if their waste had leaked and commingled, irrespective of whether commingling actually occurred. This theory makes all defendants equally liable without regard to actual culpability or contribution to the waste at the site. For the same reasons set forth in refuting the EPA's argument with respect to joint and several liability for actual cleanup costs,[130] those defendants who have contributed only to an indivisible threatened or averted harm should not be jointly and severally liable for these pre-cleanup and administrative costs.

Under the Restatement approach, when the harm is divisible and a reasonable basis exists on which to apportion that harm, joint and several liability is inappropriate.[131] Therefore, a defendant wishing to avoid such liability must show a reasonable basis to apportion the harm. This

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[126] Elliot, *supra* note 124, at 12.

[127] *Id.*

[128] *See supra* notes 27-30 and accompanying text.

[129] *See supra* note 69 and accompanying text.

[130] *See supra* notes 42-64 and accompanying text (discussing legislative history); *supra* notes 65-74 and accompanying text (discussing the Restatement approach to joint and several liability); *supra* notes 75-111 and accompanying text (discussing case law interpreting joint and several liability under CERCLA and rejecting mandatory imposition of such).

[131] *See supra* notes 65-74 and accompanying text.

requirement presents more of a challenge with respect to pre-cleanup and fixed costs than with respect to removal costs, and may allow the EPA to enforce joint and several liability by claiming absence of a reasonable basis of apportionment. The EPA may argue that these costs are attributable to the site as a whole and thus not capable of apportionment among the various defendants.

While accurate division of the pre-cleanup and fixed costs will in most cases be practically impossible, the costs incurred by the EPA with respect to these pre-cleanup and administrative undertakings are, in a sense, divisible. For example, the defendant who has created only a potential harm has contributed to a lesser extent to the pre-cleanup and fixed costs than those defendants whose waste has actually spilled or leaked into the environment. Similarly, a defendant who establishes that his contribution to the actual harm is divisible from that of other defendants present should not be potentially liable for the total pre-cleanup and administrative costs incurred. In light of congressional concerns of fairness,[132] the mandatory imposition of joint and several liability for these often significant costs should be avoided. The EPA should not be permitted to impose joint and several liability for these costs by simply claiming that the costs are attributable to the site as a whole and incapable of allocation among defendants. Where the *actual* harm at a site is shown to be divisible, these costs should be apportioned.

One means of apportioning the pre-cleanup and administrative costs would be to assess liability in proportion to the particular defendant's contribution to the total removal costs. This would allow a defendant who has created only a threatened harm or release, and who is directly responsible for only a small percentage of the total actual removal costs at the site, to be liable only for his proportionately small amount of EPA administrative costs. Likewise, those defendants whose waste had leaked, but not contributed to an indivisible *actual* harm, could limit their liability for these costs by proving their contribution to the total amount of removal costs. Because a defendant's contribution to the actual removal costs is closely related to the actual environmental damage that his conduct has caused,[133] those defendants causing the greatest amount of

[132] *See supra* notes 52-60 and accompanying text.

[133] For example, a defendant that has created only a threatened harm has caused the EPA to incur the removal costs associated with removing that specific threat--most likely the cost of removing the non-leaking barrel, transformer, etc. However, a defendant whose waste has leaked and caused actual environmental contamination has engendered more substantial removal costs--the EPA will be forced to contain the spill, remove the waste, and rid the environment of its harmful effects (topsoil removal, water purification, etc.). Thus, the defendant's contribution to the EPA's total removal costs will directly reflect their contribution to the actual environmental damage.

environmental harm would face greater liability for the EPA's pre-cleanup and administrative costs. A defendant's liability would thus truly reflect his contribution to the environmental endangerment. This approach would satisfy the fairness concerns of Congress[134] and most accurately reflect the proposition set forth by the Restatement that a defendant should be liable only for that portion of total harm that he has in fact caused.[135] To hold otherwise would subject defendants to liability far in excess of their actual contribution to the pre-cleanup and administrative costs incurred by the EPA, and possibly allow the most culpable of defendants to escape their fair share of liability.

CONCLUSION

The enactment of CERCLA was prompted by the desire of Congress to clean up the nation's growing number of hazardous waste sites and thereby eliminate a serious threat to the health and welfare of the American public. While Congress intended to force those responsible for creating the problems associated with hazardous waste sites to bear the costs and responsibilities for remedying the condition,[136] it was not willing to abandon all concerns of fairness with respect to the scope of liability. The legislative history of the Act indicates that Congress rejected mandatory imposition of joint and several liability in the interest of fairness to the potentially numerous defendants.[137] While one of the primary concerns that motivated the enactment of CERCLA was to ensure the recovery of cleanup costs incurred by the EPA from responsible defendants, Congress did not envision imposing strict, joint and several liability on all defendants present at a site. Accordingly, Congress endorsed a flexible approach to liability, recommending that traditional and evolving principles of common law be relied upon for determining whether joint and several liability is proper in any given case.[138]

The courts have followed this recommendation, allowing issues of joint and several liability to be determined on a case-by-case basis in light of accepted common law principles.[139] The courts have repeatedly cited

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[134] *See supra* notes 52-60 and accompanying text.

[135] *See supra* notes 65-74 and accompanying text.

[136] *See* H.R. REP. No. 1016, 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 ("The legislation would also establish a federal cause of action . . . to enable the Administration to pursue rapid recovery for the costs incurred . . . from persons liable therefor . . . .").

[137] *See supra* notes 52-60 and accompanying text.

[138] *See supra* notes 49-51 and accompanying text.

[139] *See supra* notes 75-111 and accompanying text.

the Restatement (Second) of Torts in holding that the appropriateness of imposing joint and several liability under CERCLA depends on the divisibility of harm at the site.[140] They have further adhered to the logic set forth in the Restatement by imposing joint and several liability among defendants only when the *actual harm* at the site is indivisible.[141]

To allow the EPA to impose joint and several liability on the basis of an indivisible potential harm would essentially result in automatic joint and several liability, clearly frustrating the intent of Congress and running afoul of the substantial body of case law under CERCLA. Additionally, acceptance of the EPA's argument would directly conflict with the principle endorsed by the Restatement that a defendant pay only for the harm that he has in fact caused.[142] Therefore, the criticism directed at the EPA's argument by the *O'Neil* court was warranted.[143] Had Congress intended liability under CERCLA to be joint and several in every case, it could have included language to that effect in the Act or the Act's amendments. Congress might one day find it necessary to impose such liability, but until that day, any attempt by the EPA to expand the divisibility inquiry to include potential or averted harm or to impose joint and several liability on the basis of an indivisible potential or averted harm should be rejected.

B. Todd Wetzel

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[140] *See supra* notes 75-111 and accompanying text.
[141] *See supra* note 111 and accompanying text.
[142] *See supra* notes 65-74 and accompanying text.
[143] *See supra* notes 19-41 and accompanying text.