A LEGISLATIVE HISTORY OF LIABILITY UNDER CERCLA

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I. Legislative Proposals on CERCLA Liability

Contamination from abandoned hazardous waste dump sites, along with its attendant health and environmental consequences, threatened our nation in the late 1970s. The highly publicized Love Canal tragedy, which by 1980 had already imposed $27 million dollars in cleanup costs on the American public, was cause for great concern.[1] This event prompted Congress to act on legislation intended to protect the health and the environment and to provide funding for the immediate cleanup of newly discovered hazardous waste sites. Congress rose to the oc-

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[1] Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) [hereinafter Grad, *Legislative History*].

casion and produced a comprehensive legislative package to resolve the dilemma created by the staggering costs of hazardous waste cleanup.[2] Three bills, H.R. 85,[3] H.R. 7020[4] and S. 1480,[5] became part of the final, enacted legislative solution.

The final legislative vehicle which emerged from this process was H.R. 7020. H.R. 7020, commonly known as CERCLA, or Superfund,[6] unfortunately provides little more than a vague sketch of its intended liability scheme. Section 9607 of the bill states only that enumerated parties "shall be liable" for cleanup costs, leaving unclear the standard of liability it imposes.[7] The

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2 *See* Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 1980 U.S.C.C.A.N. (94 Stat.) 6119, 6123. *See also infra* note 6.

3 *See id.* at 1 n.5 (citing H.R. 85, 96th Cong., 1st Sess. (1979), 126 CONG. REC. H26,369-91 (daily ed. Sept. 19, 1980)).

4 *See id.* at 1 n.4 (citing H.R. 7020, 96th Cong., 2d Sess. (1980), 126 CONG. REC. H26,769-85 (daily ed. Sept. 23, 1980)).

5 *See id.* at 1 n.6 (citing S. 1480, 96th Cong., 1st Sess. (1979), 126 CONG. REC. S30,987 (daily ed. Nov. 24, 1980)).

6 Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 26 U.S.C. §§ 4611-4682, 42 U.S.C. §§ 6911(a), 9601-9657) [hereinafter CERCLA or Superfund]. Note, this article uses the terms "CERCLA" and "Superfund" interchangeably.

7 42 U.S.C § 9607(a) (1990) provides:

> 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 or 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
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> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for-
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> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural re-

focus of this article will be the legislative history and intent underlying the Superfund liability scheme.[8] The author will also examine existing case law on Superfund liability to clarify the vague scheme of liability hastily passed in the waning days of the lame duck session of the 96th Congress.

In order to understand fully the legislative intent underlying the liability provisions of the enacted version of H.R. 7020, it is essential that the legislative history of each of the bills which resulted in H.R. 7020 be thoroughly examined.

A. *Analysis of H.R. 85*

H.R. 85 was originally entitled the "Oil Pollution Liability and Compensation Act." This bill was introduced in the House on January 15, 1979. It was referred jointly to the Committee on Public Works and Transportation and the Committee on Merchant Marine and Fisheries.[9] This legislation was also later referred to the Committee on Ways and Means because it authorized excise taxes.

The Committee on Merchant Marine and Fisheries was the first to act, approving the measure on May 15, 1979.[10] The Committee on Public Works and Transportation followed on May 16, 1980.[11] Later, on June 20, 1980, the Committee on Ways and Means passed an amended version of H.R. 85.[12]

H.R. 85, as amended, included provisions for a comprehensive system of liability and compensation for oil spill damage and removal costs.[13] This system of liability provided that, with certain limits and defenses, operators or owners of vessels or facilities were to be "jointly, severally and strictly liable for all damages."[14] The bill was then sent to the floor for consideration by the full House.

> sources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release. . . .

Id.

8 *See* Superfund, *supra* note 6.

9 125 CONG. REC. H130 (daily ed. Jan. 15, 1979).

10 H.R. REP. No. 172, 96th Cong., 1st Sess., pt. 1 (1979).

11 H.R. REP. No. 172, 96th Cong., 2d Sess., pt. 2 (1980).

12 *Id.* at pt. 3.

13 *See* Grad, *Legislative History*, *supra* note 1, at 3 n.22 (citing H.R. 85, 96th Cong., 2d Sess., § 104, 126 CONG. REC. H9,187 (daily ed. Sept. 19, 1980).

14 *Id.*

Little actual debate on H.R. 85 occurred on the House floor. However, the House did address the liability provisions of the bill as amended by the Ways and Means Committee.[15] Congressman Biaggi authored an amendment to expand the scope of liability contained in the bill. Mr. Biaggi stated:

> [u]nder the present form of the bill, only the facility owner—usually the drilling contractor, is liable. The proposed amendment would also make the leaseholder liable. He is the one who hires the drilling contractor, controls his operations, and receives the benefits of the leasehold. He is also generally better able to show financial responsibility. The amendment should provide an additional incentive to leaseholders to select competent drillers and supervise them carefully. The amendment is consistent with present industry practices.[16]

The amendment was designed to compel all parties involved in the production and disposal of hazardous waste to monitor closely their operations. It was also intended to encourage those potentially liable to keep accurate and precise records. These records would serve a vital evidentiary function, demonstrating the extent of a party's contribution to the contamination.[17] As a result, the Biaggi amendment would enable potentially liable parties to spread the risk and to help establish causation, thereby triggering the strict liability standard provided by H.R. 85.

Congressman Snyder also sponsored an amendment to modify "the definition of 'owner' to include the operating holder of a leasehold interest. . . ."[18] This amendment would expand the number of potentially responsible parties subject to the liability provisions of H.R. 85.

H.R. 85 was passed by the House on September 19, 1980[19] and sent to the Senate. No further action occurred on the bill until some of its provisions, unrelated to liability, became incorporated into the final Senate Superfund bill.

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15 *See* Grad, *Legislative History*, *supra* note 1, at 2-3 nn.11-26.

16 126 CONG. REC. H26,374 (daily ed. Sept. 19, 1980) (statement of Rep. Biaggi (D-N.Y.)).

17 *Id.* (statement of Rep. Breaux (D-La.)).

18 *Id.* at H26,375 (statement of Rep. Snyder (D-Ky.)).

19 *Id.* at H26,391.

B. *Analysis of the Original H.R. 7020*

The House then began work on H.R. 7020, which was introduced on April 2, 1980 by Congressman Florio, currently Governor of New Jersey. The bill was intended to regulate inactive sites bearing hazardous wastes, other than oil, on land and in non-navigable waters by a reporting, monitoring and clean-up scheme. This bill was an amendment to the Resource Conservation and Recovery Act[20] and was entitled the "Hazardous Waste Containment Act of 1980."[21] The legislation was referred to the Committee on Interstate and Foreign Commerce, which approved the bill on May 16, 1980.[22]

H.R. 7020, in its original form, was rather limited in scope. None of its provisions was intended to apply to hazardous waste caused by oil or pollution in the navigable waters.[23] The bill declared as its goals a state-by-state inventory of inactive waste disposal sites and the cleanup of these sites for the protection of health and environment.[24]

On September 19, 1980 the House of Representatives considered H.R. 7020. Congressman Florio began the debate by outlining the Committee-reported bill and its key provisions.[25] One of the most widely debated provisions was the bill's liability

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20 42 U.S.C.A. §§ 6901-6987 (West 1985 & Supp. 1990). The Resource Conservation and Recovery Act ("RCRA") was passed by Congress in 1976 to compel responsible parties, including the United States, to dispose of toxic wastes in an environmentally sound manner. *See* Roger W. Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 3 WIS. L. REV. 635, 636-37 (1978).

21 126 CONG. REC. H26,336 (daily ed. Sept. 19, 1980).

22 H.R. REP. No. 96-1016, 96th Cong., 2d Sess., pt. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119.

23 *See* Grad, *Legislative History*, *supra* note 1, at 4 n. 30 (citing H.R. 7020, 96th Cong., 2d Sess., § 2; 126 CONG. REC. H9,452 (daily ed. Sept. 23, 1980)).

24 *See id.* at 4 n. 3 (citing H.R. 7020, 96th Cong., 2d Sess., § 4; 126 CONG. REC. H9,453 (daily ed. Sept. 23, 1980)).

25 126 CONG. REC. H26,337 (daily ed. Sept. 19, 1980) (statement of Rep. Florio (D-N.J.)). Congressman Florio began the House debate by discussing what he believed to be the most serious environmental problem facing the nation in 1980, namely, "improper hazardous waste management." *Id.* Mr. Florio demonstrated the seriousness of this problem with examples: "[i]n Toone, Tenn., Grey, Maine, and Jackson Township, N.J., people drank water poisoned by releases of hazardous waste from inactive chemical dump sites. A 'Valley of Drums' was created in Kentucky by the indiscriminate dumping of 17,000 industrial waste drums. . . ." *Id.* Florio also discussed a fire that raged through a chemical control site in Elizabeth, N.J., burning 15,000-20,000 improperly stored barrels of hazardous waste. *Id.* Congressman Gore added, "[o]ne hundred billion pounds of hazardous chemical

scheme. This provision was designed to make those persons who cause or contribute to hazardous waste releases at inactive sites strictly liable for the clean-up costs incurred. The bill also provided that such persons would be jointly and severally liable unless they could prove "that they were responsible for only a portion of the clean-up costs."[26]

The liability provision, as Mr. Florio[27] and his supporters noted, accomplished three objectives:

> It assures that the costs of chemical poison releases are borne by those responsible for the releases. It creates a strong incentive both for prevention of releases and voluntary cleanup of releases by responsible parties. Finally, it replenishes the fund so that additional emergencies may be responded to and additional sites cleaned up, if necessary.[28]

The House debate following Congressman Florio's opening remarks focused on which liability provisions should be incorporated into the final version of H.R. 7020. From the outset, most supporters of H.R. 7020 were in favor of stricter liability provisions which "[could] enable the [Environmental Protection Agency] Administrator to rapidly recover moneys expended for cleanup and serve as an incentive to potentially liable persons to ferret out and address hazardous waste problems with which they may be associated."[29]

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waste is dumped in this country every single year, 100 billion pounds, 90 percent of it improperly." *Id.* at H26,342 (statement of Rep. Gore (D-Tenn.)).

26 *Id.* at H26,338 (statement of Rep. Florio (D-N.J.)).

27 *Id.*

28 *Id.* Mr. Florio noted in his opening remarks that H.R. 7020 enjoyed "a wide range of support" from the private sector, including the chemical industry, "as well as mining, paper, textile, and steel interests." *Id.* Florio suggested that "the chemical industry, which would be responsible for the lion's share of the industry contribution, is even willing to support this legislation." *Id.*

29 126 CONG. REC. H26,339-40 (daily ed. Sept. 19, 1980) (memorandum of Rep. Staggers (D-W.Va.)). However, the impact of H.R. 7020 in the marketplace was subject to criticism. Congressman Madigan, referring to the proposed bill's joint and several liability provision, or the "zero release" provision, stated:

> [t]his outrageous concept undercuts existing environmental regulations, and, if enacted and enforced, could possibly bring most industrial activity to a complete stop. Many proponents of superfund legislation are insisting that any organization having contributed in any degree to a hazardous waste release be held responsible for the entire amount of the cleanup and damages. These punitive attitudes have created an environment that has not been conducive to the development of a good legislative product. These attitudes are why we are going into the final

C. *The Gore Amendments*

The House debates which followed focused on the Gore Amendments.[30] Congressman Gore offered two amendments to the liability section of H.R. 7020.[31] Mr. Gore considered the Superfund[32] bill to be one of the most important pieces of legislation of the 96th Congress.[33] Nevertheless, Gore and other Members of Congress felt the proposed bill was "particularly deficient with regard to its liability provisions."[34] It was on this basis that Congressman Gore proffered two amendments to H.R. 7020 that he believed would strengthen the liability provisions and "insure that those companies and individuals who are responsible for our hazardous waste problems will bear their share of the clean-up cost burden."[35]

The first amendment was the so-called third-party defense created pursuant to Section 3071(a)(1)(C) of H.R. 7020. The proposed amendment read as follows: "(2) [A] . . . defendant (including any person involved in the generation, transportation, treatment, storage, or disposal of hazardous waste) must demonstrate that he exercised due care with respect to all foreseeable acts or omissions of the third-party and that he exercised due care in light of all relevant facts and circumstances."[36]

The second and more controversial amendment addressed the joint and several liability provisions of Section 3071(a)(1)(c). This provision of H.R. 7020 provided a mechanism by which a defendant could:

> escape liability for a release, or threatened release of hazardous waste if he/she can demonstrate that such was 'caused solely by . . . an act or omission of a third party if the defend-

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> days of this session without having passed legislation to deal with the cleanup of hazardous waste sites.

Id. (statement of Rep. Madigan (R-Ill.)). These comments mirrored remarks delivered in the Senate when that body took up debate on this bill. *See, e.g.*, 126 CONG. REC. S30,972 (daily ed. Nov. 24, 1980) (statement of Sen. Helms (R-N.C.)).

30 126 CONG. REC. H26,781 (daily ed. Sept. 23, 1980) (statement of Rep. Gore (D-Tenn.)).

31 *Id.*

32 *See* Superfund, *supra* note 6.

33 126 CONG. REC. H26,781 (daily ed. Sept. 23, 1980) (statement of Rep. Gore (D-Tenn.)).

34 *Id.*

35 *Id.*

36 *Id.*

> ant establishes that he exercised due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such hazardous waste.' This language alters the existing common law rules of first, strict liability for abnormally dangerous/ultrahazardous activity and second and alternatively, liability for inherently dangerous activity that would otherwise be applicable to parties dealing with hazardous waste.[37]

This proposed amendment was essential to carrying out the underlying intent of the Superfund bill: to ensure that responsible parties bear the cost of clean-up operations.[38] The proposed amendment would further eliminate the possibility that "[a] defendant [could] avoid liability, despite being engaged in ultrahazardous activity, by contracting with a third party to dispose of the hazardous waste."[39] Under the liability scheme at Section 3071(a)(1)(c), common law negligence was rendered irrelevant to a finding of strict liability for an abnormally dangerous activity. Under H.R. 7020, as long as the defendant could sustain her burden of proof regarding the exercise of due care in selecting a transporter or disposer of hazardous waste, the defendant could not be held liable, and recovery would not be available against that defendant.[40]

The proposed liability scheme under H.R. 7020 was revolutionary in that it would effectively destroy the rule of strict liability that had been in effect for over 100 years.[41] The first amendment as offered by Congressman Gore:

> would insure that the common law rules of both strict and vicarious liability remain intact in cases in which a defendant seeks to shift the responsibility for costs resulting from his ul-

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37 *Id.* at H26,782.

38 *Id.* at H26,781.

39 *Id.* at H26,782.

40 *Id.*

41 *Id.* From existing case law, there was little doubt that activity involving hazardous waste would be considered abnormally dangerous or ultrahazardous, which would subject a responsible party to strict liability. Strict liability for abnormally dangerous activity originated in the historic case of Rylands v. Fletcher, 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Ex. 265, *aff'd*, L.R. 3 H.L. 330 (1868). Since then, the law of strict liability has expanded. Today, a large number of actions constitute abnormally dangerous activity for which strict liability would be imposed. Significantly, many of the activities to which the strict liability standard is applicable are for less dangerous actions than the handling, generation, and disposal of hazardous waste. 126 CONG. REC. H26,782 (daily ed. Sept. 23, 1980) (statement of Rep. Gore (D-Tenn.)).

> trahazardous activity to others with whom he is involved in a business relationship. [This] amendment would restrict the application of the third party defense to situations where the third party is not an employee or agent of the defendant, or where the third party's act or omission does not occur in connection with a contractual relationship.[42]

Representative Florio objected to the Gore Amendments in their original form because they contained a "provision which would have required that the intervening act or omission of a third-party also be 'negligent.' "[43] Florio believed this would add an unnecessary and overburdensome requirement on the defendant when alleging a third party defense.

Therefore, Gore added legislative language giving discretionary authority to a court to make an apportionment when warranted by the facts. "It allows the court to consider the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of the waste. . . ."[44]

These amendments represented a compromise to the liability provisions of H.R. 7020 which Florio and other House Members had believed were too harsh. This compromise accomplished the necessary changes to make the responsible parties accountable, while still accomodating the bill's sponsors. The amendments struck a middle ground between the common law rule and the liability scheme envisioned under H.R. 7020, removing the ability and incentive to contract away liability. H.R. 7020 also insured that the defendant would not escape liability if he acted negligently, even if the damage caused was the result of an act of an unrelated third-party.[45]

Upon adoption of this amendment, the bill's liability standard was clearly strict liability, in recognition of the ultrahazardous activity associated with hazardous waste. Congressman Gore stated:

> [W]hile the generation and disposal of hazardous waste [is] deemed a necessary evil in our society, 'the unavoidable risk of harm that is inherent in [handling waste] requires that it be carried on at [the defendant's] peril, rather than at the ex-

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42 126 CONG. REC. H26,783 (daily ed. Sept. 23, 1980) (statement of Rep. Gore (D-Tenn.)).

43 *Id.* at H26,785 (statement of Rep. Florio (D-N.J.)).

44 *Id.*

45 *Id.* at H26,782 (statement of Rep. Gore (D-Tenn.)).

> pense of the innocent person who suffers harm as a result of it.' The defendant, then, is basically an 'insurer' against the consequences of his abnormally dangerous conduct. As Prosser stated: He is liable although he has taken every possible precaution to prevent the harm and is not at fault in any moral or social sense.[46]

With the adoption of strict liability based on the common law theory of "ultrahazardous activity," H.R. 7020 could now effectuate the stated intent[47] of Superfund,[48] which is to place the burden of clean-up squarely upon the defendant.

Gore's second amendment focused on joint and several liability under the Superfund[49] bill which stated:

> (B) To the extent apportionment is not established under subparagraph (A), the court may apportion the liability among the parties where deemed appropriate based upon evidence presented by the parties as to their contribution. In apportioning liability under the subparagraph, the court may consider among other factors, the following:
>
> (i) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;
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> (ii) the amount of 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.[50]

Congressman Gore maintained that the joint and several liability provisions of Section 3071(a)(1)[51] of H.R. 7020 were rendered

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46 *Id.*

47 *Id.* at H26,781 (statement of Rep. Gore (D-Tenn.)).

48 *See* Superfund, *supra* note 6.

49 *Id.*

50 *Id.*

51 126 CONG. REC. H26,779 (daily ed. Sept. 23, 1980) (statement of Rep. Gore

meaningless by exceptions created by the bill itself.[52] For example, it was clear that Sections 3071(a)(2)(A), (B), and (C)[53] would effectively foreclose the possibility that any defendant would ever be held fully liable. Congressman Gore posited that paragraphs (2)(B) and (C) would emasculate the indivisible injury rule by providing that a court could apportion liability even where the defendants had not established that such apportionment would be feasible or warranted.[54] Mr. Gore further stated that "[o]ne obvious problem with the apportionment system erected by H.R. 7020 is that a plaintiff, the Government under the present bill, would be forced to seek payment from each of the defendants based on the amount designated by the court as that which he owes."[55] Unlike common law joint and several liability, the bill would provide that where the defendants fail to establish their respective liabilities, each party is responsible for the full amount, and the plaintiff may collect that full sum from any one of them.[56] "[I]f the defendant cannot meet this burden and show that he is not fully responsible, then he is fully liable. H.R. 7020 clearly abrogates this [common law] theory."[57]

(D-Tenn.)). The applicable liability provisions at issue were §§ 3071(a)(2)(A), (B) and (C), which read as follows:

> (2)(A) If a generator or transporter of hazardous waste establishes that only a portion of the total costs described in subsection (b) are attributable to hazardous waste generated or transported by him, such generator or transporter shall be liable under this subsection only for such portion. If the owner or operator of any inactive hazardous waste site establishes that only a portion of the total costs described in subsection (b) are attributable to hazardous waste which was treated, stored, or disposed of in a period during which he owned or operated the site, such owner or operator shall be liable under this section only for such portion.
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> (B) To the extent apportionment is not established under subparagraph (A), the court shall apportion the liability, to the maximum extent practicable, among the parties based upon evidence presented by the parties as to their contributions.
>
> (C) Following any apportionment under this paragraph, no person shall be required to pay in excess of his apportioned share of the total costs described in subsection (b).

Id.

52 126 CONG. REC. H26,783 (daily ed. Sept. 23, 1980) (statement of Rep. Gore (D-Tenn.)).

53 *Id.* at H26,779.

54 *Id.* at H26,784.

55 *Id.* at H26,785.

56 *Id.*

57 *Id.*

Congressman Gore insisted that his second amendment would move H.R. 7020 closer to the common law by requiring under paragraph (2)(A)[58] that a defendant must prove apportionability by a preponderance of the evidence.[59] As stated by Representative Madigan, "the usual common law principles of causation, including those of proximate causation, should govern the determination of whether a defendant 'caused or contributed' to a release or threatened release. . . ."[60] These amendments would also make the bill more consistent with the common law by providing that apportionment and the imposition of joint and several liability under Section (2)(B) would be discretionary with the court.[61]

The House then proceeded to consider and debate the Gore Amendments.[62] Congressman Florio stated he now supported the Gore Amendments because they provided for the discretionary application of joint and several liability.[63]

However, Congressman Stockman took exception to the amended liability provisions.[64] Mr. Stockman was concerned that a faltering industrial economy could not absorb the costs which the Gore Amendments would impose.[65] Congressman Gore quieted Mr. Stockman's concerns by reiterating that "[o]ne must prove the damage was caused by the defendant. There is not an automatic trigger. But once the damage is proven to have been caused by the defendant, then the strict liability standard would apply."[66] Congressman Gore further clarified the proposed liability provisions by stating, "[o]ne must first prove causation. If one cannot prove the defendant caused the damage which led to the suit, then the strict liability standard is never triggered."[67] The Gore Amendments did not receive any further opposition on the floor.

The Gore Amendments were viewed by many as an essential

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58 *Id.* at H26,779.

59 *Id.* at H26,784.

60 *Id.* at H26,785 (statement of Rep. Madigan (R-Ill.)) (quoting H.R. REP. No. 96-1016, 96th Cong., 2d Sess. (1980)).

61 *Id.* (statement of Rep. Gore (D-Tenn.)).

62 *Id.* at H26,785-88.

63 *Id.* at H26,785.

64 *Id.* at H26,786.

65 *Id.*

66 *Id.* at H26,787.

67 *Id.*

component of Superfund.[68] Congressman LaFalce commented in support, "[the Gore Amendments] are absolutely essential if we are to have meaningful liability provisions in Superfund."[69] Further, Congressman Matsui stated that the Gore language strengthened the bill.[70] Lastly, Congressman Jeffords summarized the underlying intent of the Gore Amendments when he stated, "[I] believe . . . the amendments being proposed by Mr. Gore to the liability provisions of this bill are necessary in order to conform the bill to prevailing State common law and the purpose of this act."[71]

Throughout the course of the debates on the Gore Amendments and H.R. 7020, Members of the House believed a strong liability provision was essential to effectuate the intended purpose of Superfund. That purpose was to provide public compensation for damage caused by hazardous substances. Because the strict liability and apportionment provisions of the Gore Amendments[72] were viewed as consistent with the intent of Superfund,[73] the amendments were adopted by the House.[74] The vote on amended H.R. 7020 was 351 for and 23 against, with 58 not voting. Thus, H.R. 7020 was passed and sent to the Senate on September 23, 1980.[75]

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68 *See* Superfund, *supra* note 6.

69 126 CONG. REC. H26,786 (daily ed. Sept. 23, 1980) (statement of Rep. LaFacle (D-N.Y.)).

70 *Id.* (statement of Rep. Matsui (D-Calif.)).

71 *Id.* at H26,788 (statement of Rep. Jeffords (R-Vt.). The Chemical Manufacturers Association also voiced its support for H.R. 7020 by letter dated September 22, 1980. Florio thus stated, "the Chemical Manufacturers Association believes that the House should approve effective, properly focused legislation addressing problems associated with abandoned, failing hazardous waste sites." *Id.* at H26,787. Jeffords added:

> The Commerce Committee version of H.R. 7020 is the product of a thoughtful bi-partisan compromise. It offers workable regulatory, legal, and funding resources to address abandoned waste sites. We support its enactment. Moreover, we do not object to the compromise which we understand has been worked out on the Gore Amendments.

Id. at H26,787 (statement of Rep. Jeffords (R-Vt.)). *See supra* notes 30-70 and *infra* notes 71-75 and accompanying text for a description of the compromise agreement on the Gore Amendments.

72 126 CONG. REC. H26,781 (daily ed. Sept. 23, 1980) (statement of Rep. Gore (D-Tenn.)).

73 *See* Superfund, *supra* note 6.

74 126 CONG. REC. H26,788 (daily ed. Sept. 23, 1980).

75 *Id.* at H26,798.

D. *Analysis of S. 1480*

On November 24, 1980 the Senate moved to consider S. 1480, the Environmental Emergency Response Act.[76] This bill was introduced on July 11, 1979 by Senators Muskie, Stafford, Chafee, Randolph and Moynihan, and later joined by approximately twenty co-sponsors. The bill was referred to the Committee on Environment and Public Works on July 11, 1979.[77] Later, the Committee referred S. 1480 to its Subcommittee on Environmental Pollution, which conducted hearings on the bill on July 20, 1979[78] and continued sporadic work on the bill through April 1980.

The Subcommittee on Environmental Pollution approved the bill in June 1980. The full Committee favorably sent the bill to the full Senate, as amended on July 11, 1980. The bill was then referred to the Committee on Finance for consideration. The Finance Committee reported the bill back to the Senate on November 18, 1980. The bill was finally considered by the Senate on November 24, 1980.

The 1980 Presidential Election on November 4, 1980 changed the composition of Congress, creating a lame duck session. This factor considerably altered the final version of Superfund[79] that became law.

E. *Senate Compromise Agreement to S. 1480*

From the initial consideration of S. 1480,[80] it became apparent that a compromise agreement proposed by Senators Stafford and Randolph had the only chance of passage given the time pressures presented by an outgoing Congress. Senate Majority Leader Robert C. Byrd, in his opening remarks, made it clear that the compromise legislation had wide support:

The Senators who are the principal parties with respect to this

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76 S. 1480, 96th Cong., 1st Sess. (1980), 126 CONG. REC. S30,897 (daily ed. Nov. 24, 1980).

77 *See* Grad, *Legislative History*, *supra* note 1, at 6 n.43 (citing 125 CONG. REC. S9,172 (daily ed. July 11, 1979)).

78 *See id.* (citing *Hazardous and Toxic Waste Disposal Part 4: Hearings on S. 1480 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. (1979)).

79 *See* Superfund, *supra* note 6.

80 126 CONG. REC. S30,897 (daily ed. Nov. 24, 1980).

> bill and who are most knowledgeable concerning the problems attendant thereto have worked diligently over a period of some days and many hours to achieve a compromise solution by way of amendment which is now ready to be offered.
>
> The distinguished minority leader and I have discussed the amendment with Mr. Randolph, who is the chairman of the committee; with Mr. Stafford, who is the ranking minority member of the committee; with Mr. Bradley, who is one of the foremost among those who are supporters of the effort to legislate in this area during this session; with Mr. Moynihan, who is on the Finance Committee; with Mr. Helms, who is equally interested; and with other Senators. We have come to the conclusion, based on their desire as well as ours to achieve a feasible solution, considering the time constraints and other factors, that Senator Baker and I will cosponsor the amendment that has been worked out and that we will oppose any amendments thereto.[81]

Further, the Minority Leader, Senator Howard Baker added:

> I believe that this is a good result. It is an appropriate thing for the Senate to do. I fully expect that the substitute which will be offered shortly, and which I will join in cosponsoring, will be dealt with in the Senate on a favorable basis. I believe it will be agreed to, and it is my hope that this will be done today . . . [I] join the majority leader in saying that this is an important initiative. This is a compromise with which all of us can live. We will oppose any amendments to it, and hope it is agreed to in the Senate today.[82]

The architects of the Stafford-Randolph compromise explained why their bill was preferable to both H.R. 85 and H.R. 7020, which had been previously sent by the House to the Senate. Senator Stafford introduced the compromise amendment to S. 1480, which created an entirely new bill.[83] The compromise provided "[f]or liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites. . . ."[84] Senator Randolph

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81 *Id.* at S30,916 (statement of Sen. Byrd (D-W.Va.)).

82 *Id.* (statement of Sen. Baker (R-Tenn.)).

83 *Id.* at S30,916.

84 *Id.* at S30,931 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph (D-W.Va.)). Senator Randolph offered an extensive list of hazardous waste disposal and cleanup disasters that had occurred throughout the United States to justify the legislation. *Id.*

stated that the purpose of the compromise was "[t]o make those who release hazardous substances strictly liable for cleanup costs, mitigation, and third-party damages. Thus, it assures that the costs of chemical poison releases are borne by those responsible for the releases."[85]

Senators Stafford and Randolph "[k]ept strict liability in the compromise by specifying the standard of liability under Section 311 of the Clean Water Act,[86] but . . . deleted any reference to joint and several liability, relying on common law principles to determine when parties shall be severally liable."[87] At the time Superfund was enacted, Section 311 of the Clean Water Act had been interpreted to impose strict liability.[88] Additionally, the Supreme Court in *Cannon v. University of Chicago*[89] held that "it is proper to assume Congress is aware of the judicial interpretation of its statutes."[90] In fact, the Court found that the legislative history of the statute directly supported these findings.[91]

The compromise bill utilized common law principles to determine when and if parties should be held jointly and severally liable.[92] It was clear that this would leave the courts vulnerable to

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85 *Id.* at S30,932.

86 *Id.* The liability provisions of Section 311 of the Clean Water Act, 33 U.S.C. § 1321, provide that when the "owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of [§ 1321(b)(3)] . . . [he shall] be liable to . . . the United States Government for the actual costs [of cleanup]. . . ." 33 U.S.C. § 1321 (1980).

87 126 CONG. REC. S30,932 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph (D-W.Va.)).

88 *See* Steuart Transp. Co. v. United States, 596 F.2d 609, 613 (4th Cir. 1979); Tug Ocean Prince, Inc. v. United States, 436 F. Supp. 907 (S.D.N.Y. 1977), *aff'd in part, rev'd in part on other grounds*, 584 F.2d 1151 (2d Cir. 1978) (quoting United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983)).

89 441 U.S. 677 (1979).

90 *See id.* at 696-97.

91 *Id.* According to Senator Randolph, the standard of liability was always intended to be strict: "We have kept strict liability in the compromise, specifying the standard of liability under Section 311 of the Clean Water Act. . . ." 126 CONG. REC. S30,932 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph (D-W.Va.)). Further, Senator Stafford stated, "[a]s reported by the committee, S.1480 and its accompanying report set the standard of liability as one of joint, several and strict liability." *Id.* at S30,986. Also, Congressman Broyhill stated concerning strict liability, "[t]he standard of liability in these amendments is intended to be the same as that provided in section 311 of the Federal Water Pollution Control Act; that is, strict liability." *Id.* at H31,965 (daily ed. Dec. 3, 1980) (statement of Rep. Broyhill (D-N.C.)).

92 *Id. See also infra* note 160.

extensive litigation in the area of liability.[93]

In touting the compromise bill, Senators Stafford and Randolph maintained that H.R. 7020 was too narrow in that it only addressed abandoned hazardous waste sites. Further, H.R. 85 was too limited as it confronted only spills of oil and hazardous substances into the navigable waters. Thus, Senator Stafford suggested that "[f]undamentally, [my compromise] amendment 2623 is a combination of the best of the three other bills [H.R. 85, H.R. 7020 and S. 1480], and an elimination of the worst, or at least the most controversial [provisions]. . . ."[94] The compromise authors also maintained that the House bills were flawed in that they erected separate classes of environmental emergencies.[95] Moreover, the House bills created distinctions as to types of waste and response mechanisms.[96]

Senator Randolph also commented that the compromise not only added a new third-party defense but also limited the liability of vessels, trucks, trains and aircraft.[97] Senator Stafford later noted what provisions had been deleted from S. 1480:

> We eliminated the federal cause of action, including medical causation and statute of limitations. We eliminated the term joint and several liability. We eliminated the scope of liability. We added a third party defense. . . .[98]

Citing the reasons for these changes, Senator Stafford stated:

> I am a realist. I know that Members of the Senate find S. 1480 too ambitious. I believe they are mistaken. I believe 23 other Senators agree with me because they have cosponsored S. 1480. But the fact remains that at this time and in this place S. 1480 cannot be enacted. But this final compromise can.[99]

The compromise legislation was viewed by many as gutting a progressive environmental bill. Senator Stafford retorted, "[s]o the Senate now has four measures before it dealing with releases of toxic chemicals into the environment [H.R. 85, H.R. 7020, S. 1480 in its original form, and the compromise bill]. Of course, the Senate has a fifth choice available to it and that is to pass no bill at all this

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93 126 CONG. REC. S30,932 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph (D-W.Va.)).

94 *Id.* at S30,935 (statement of Sen. Stafford (R-Vt.)).

95 *Id.*

96 *Id.*

97 *Id.* at S30,932 (statement of Sen. Randolph (D-W.Va.)).

98 *Id.* at S30,935 (statement of Sen. Stafford (R-Vt.)).

99 *Id.* at S30,936.

year. . . ."[100] Senator Mitchell further urged action by commenting:

> S. 1480 is a reasonable bill. It is an equitable bill. But we are in the final days of this session, and faced with the threat of a filibuster by the opponents of S. 1480. So S. 1480 cannot be enacted this year. The choice is between this compromise and no bill at all. . . .[101]

Thus, the compromise bill passed the Senate.

The liability provisions of the compromise bill provided for four classes of potential defendants: current owners and operators of hazardous waste disposal facilities; past owners and operators; generators of hazardous waste; and those who transport waste to disposal facilities.[102] The statute's liability provisions provide in pertinent part:

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

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100 *Id.* at S30,936.
101 *Id.* at S30,941 (statement of Sen. Mitchell (D-Me.)).
102 42 U.S.C. § 9607(a) (1989).

(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 104(i) [42 U.S.C.S. § 9604(i)].

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

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .[103]

Senator Cohen spoke on behalf of the Stafford-Randolph compromise and argued that it represented a consensus position between the Senate bill and the two House bills.[104] Further, Senator Cohen commented, "the Stafford-Randolph bill made a number of concessions to the House position, one of which was the elimination of joint and several liability provisions contained in the original version of S. 1480."[105]

Senator Helms in the closing moments of floor discussion on

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103 42 U.S.C. § 9607(a)(1)-(4) (1989).

104 126 CONG. REC. S30,948 (daily ed. Nov. 24, 1980) (statement of Sen. Cohen (R-Me.)).

105 *Id.*

the proposed compromise, voiced his acceptance of the elimination of joint and several liability by stating that it "received intense and well-deserved criticism from a number of sources, since it could impose financial responsibility for massive costs and damage awards on persons who contributed only minimally to a release or injury. . . ."[106] Mr. Helms thought that the retention of joint and several liability would be grossly unfair.[107] Senator Helms then clarified the liability scheme inherent in the Stafford-Randolph compromise:

> It is very clear from the language of the Stafford-Randolph substitute itself, from the legislative history, and from the liability provisions of Section 311 of the Federal Water Pollution Control Act [Clean Water Act],[108] that now the Stafford-Randolph bill does not in and of itself create joint and several liability.[109]

Finally, shortly before the vote on the compromise bill, Senator Stafford reiterated that the standard of liability would be the same as that found under Section 311(f)(1) of the Federal Clean Water Act.[110]

The Superfund measure was in part a revenue measure. Consequently, it was necessary to treat it as if it had formally been initiated in the House. As a result, the Senate proceeded to consider H.R. 7020, in which it substituted and incorporated the Senate compromise bill. Ultimately, H.R. 7020 was passed by voice vote and returned to the House for final consideration.[111]

II. House Consideration of Amended H.R. 7020 - The Retention of Strict Liability and Joint and Several Liability

Congressman Florio moved to consider H.R. 7020, as amended, on December 3, 1980 and concur in the Senate compromise.[112] Congressmen Florio and Broyhill were each allotted

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106 *Id.* at S30,972 (statement of Sen. Helms (R-N.C.)).

107 *Id.*

108 *See supra* note 86.

109 126 CONG. REC. S30,972 (daily ed. Nov. 24, 1980) (statement of Sen. Helms (R-N.C.)).

110 *Id.* at S30,986 (statement of Sen. Stafford (R-Vt.)).

111 *Id.* at S30,987.

112 126 CONG. REC. H31,950 (daily ed. Dec. 3, 1980) (statement of Rep. Florio (D-N.J.)). The Senate substitute appears *id.* at H31,950-64.

twenty minutes of debate time.[113]

Congressman Florio used a large portion of his time to assure supporters of the House-passed version of H.R. 7020 that the Senate amendments retained both the substance and intent of the House passed bills, H.R. 85 and H.R. 7020. "Because of its more comprehensive scope, H.R. 7020, as amended by the Senate, provides authority to respond to more kinds of releases than the House passed version. For example, the Senate bill would authorize the President to respond to releases of in-place toxic pollutants located in navigable waters."[114]

Regarding the Senate liability provisions, Florio maintained that the Senate version included "a strong liability scheme [that] will insure that those responsible for releases of hazardous substances will be held strictly liable for costs of response and damages to natural resources. . . ."[115] He noted that the defenses to liability adopted by the Senate were essentially identical to those in the House version.[116] The only difference between the Senate compromise and the House bills concerned limits on liability depending on the type of incident which occurs.[117]

Congressman Florio called attention to a number of drafting errors that were present in the Senate version of H.R. 7020. Specifically, one error pertained to the liability provision. Under the Senate version, Section 107(c)(2) provided that limits on liability would be inapplicable in certain circumstances, borrowing language directly from Section 311(f) of the Clean Water Act.[118] However, the draftsman of the Senate amendment inadvertently reversed the order of the terms "willful negligence" and "willful misconduct." Florio maintained that the intent of Congress was to provide the same rules for the application of limited liability as under the Clean Water Act. Florio stated the inadvertent order reversal was not intended to construe a different meaning than under Section 311(f) of the Clean Water Act.[119]

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113 *Id.* at H31,964.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 33 U.S.C. § 1321(f) (1990).

119 126 CONG. REC. H31,968 (daily ed. Dec. 3, 1980) (statement of Rep. Florio (D-N.J.)).

During the House debate, Mr. Florio noted that although the Senate bill did not refer to the terms "strict liability" or "joint and several liability"—terms that were contained in the House version—this was the Senate's intended standard of liability.[120] Congressman Florio again added that the standard of liability was intended to be the same as that provided in Section 311 of the Clean Water Act.[121] Mr. Florio assured House Members that despite the absence of specific language in the Senate bill, strict liability was preserved.[122]

Congressman Florio informed the House that the Senate bill created classes of persons, i.e., owners, operators, generators, and transporters who would be liable for all costs of removal and remedial action.[123] Florio emphasized that the standard under Section 311 of the Clean Water Act, as incorported in the Superfund legislation, would determine the liability of joint tortfeasors.[124] Florio, in an attempt to assuage House Members concerning the absence of specific joint and several liability language, asserted that the Coast Guard, the agency responsible for administering Section 311(k) of the Clean Water Act, was in fact imposing joint and several liability under appropriate circumstances. Florio added, "this established policy seems particularly applicable in cases of hazardous waste sites where several persons have often contributed to an indivisible harm."[125] In a further attempt to calm House Members, Mr. Florio noted that the Senate had created a funding level authorization equal to that of the House.[126]

Congressman Florio, in conclusion, remarked:

> [T]his is a good bill and those of us who overwhelmingly supported this bill when it came before the House can be happy to support it now. . . . [I]t should be made clear that without this legislation, there is a huge legislative void that exists. There is no authority. There is no funding to deal with certain types of hazardous waste spills and hazardous waste dangers to health

120 *Id.* at H31,965.
121 *See supra* note 86.
122 *See supra* note 118.
123 *Id.*
124 *See supra* note 86.
125 126 CONG. REC. H31,965 (daily ed. Dec. 3, 1980) (statement of Rep. Florio (D-N.J.)).
126 *Id.*

and to the environment.[127]

Just prior to the House vote, Mr. Florio stated he was equally incensed with the Senate's "take it or leave it" attitude, but he felt the primary concern "[i]s whether we are going to have legislation or whether we [are] not going to have legislation."[128] Congressman Florio further voiced his concern that some Members of the House felt that "[w]e should amend this, add things on, send it back to the Senate and let them take the heat, let them do something and be responsible for the bill dying if it dies. . . ."[129] Congressman Florio, in response to these comments, warned, "[I] am not prepared to play chicken with this issue because that is a game where there is only one loser and it is not the House, it is not the Senate, it is the American people."[130]

Congressman Broyhill, however, favored sending the bill back to the Senate with House amendments. Broyhill stated:

> Now, we are close, very close to a reasonable resolution of this major piece of legislation. Yet, it seems to me that we are being asked here to pass a bill that has dozens of defects in it when all we would have to do is to add reasonable amendments and send that back to the other body and have them pass a bill that will be administratively workable.[131]

Congressman Broyhill feared most that the Senate's liability provisions were uncertain.[132] He complained:

> [T]he bill is unexcusably [sic] vague in terms of identifying who should be liable and for what. For instance, under the language of Section 107 the owner or operator of a vessel or a facility can be held strictly liable for various types of costs and damages entirely on the basis of having been found to be an owner or operator of any facility or vessel. There is no language requiring any causal [connection] with a release of a hazardous substance.[133]

Congressman Broyhill believed that the original version of H.R. 7020 represented a reasonable legislative effort. Consequently, he was opposed to a House procedure that did not allow the House the

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127 *Id.* at H31,968.
128 *Id.* at H31,969.
129 *Id.*
130 *Id.*
131 *Id.* (statement of Rep. Broyhill (D-N.C.)).
132 *Id.*
133 *Id.*

opportunity to eliminate existing defects in H.R. 7020.[134] Mr. Broyhill further stated that passing such a vague piece of legislation would subject Congress to ignoble criticism in the courts. "This is not a Superfund bill—it's a welfare and relief act for lawyers,"[135] stated Broyhill, referring to the floodgate of litigation he believed would result from the passage of this bill.

Congressman Madigan also voiced his concerns about perceived flaws in the Senate bill. Madigan suggested that if the option were take it or leave it, the House should leave it.[136] Congressman Snyder also reasoned that the Senate bill would not accomplish the objectives

> [o]ur citizens want it to do—it does not help people. We can write a bill to do it—today—now. Let us do it and let us work to get the Senate to do what they know is right. . . . We took a strong stand for a solution by passing H.R. 85 and the House version of H.R. 7020, let us not walk away from it now.[137]

Yet, many supporters, including Congressman Vento, conceded that the bill was flawed but recommended it nevertheless because they felt that some legislative action was necessary now. Mr. Vento stated:

> [W]e must take immediate action to protect the public from further exposure to these toxic wastes. Delaying the passage of the compromise legislation will only prolong the overall danger that the public has been exposed to already. While Congress has missed building an overall framework to deal with toxic wastes, this measure is a step in what looms as a tougher fight in future Congresses to address the total problem adequately.[138]

Congressman Biaggi further asserted that if this bill were rejected or returned to the Senate with amendments for further consideration, "[w]e run a very real risk that no bill will be enacted this session."[139] Many others voiced their concern that an urgent need was present for some kind of legislation, and that "flawed though it may be . . . [this] is the last train that is going to leave the station in this session

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134 *Id.* at H31,970.

135 *Id.*

136 *Id.* at H31,971 (statement of Rep. Madigan (R-Ill.)).

137 *Id.* at H31,976 (statement of Rep. Snyder (D-Ky.)).

138 *Id.* at H31,973 (statement of Rep. Vento (D-Minn.)).

139 *Id.* at H31,974 (statement of Rep. Biaggi (D-N.Y.)).

of Congress. I think that it is absolutely imperative that we be on that train."[140] Due to the belief strongly held by many Members that something had to be done now, the Speaker of the House finally brought the debate to a close.[141]

On December 3, 1980, the House approved the bill. The vote was 274 in favor, 94 against and 64 not voting.[142] On December 9, 1980 the Superfund bill was presented to President Carter who signed it on December 11, 1980.

Throughout the course of these Congressional debates, the liability provisions received widespread attention. As evidenced by the debate on the Gore Amendments,[143] Members of the House of Representatives viewed strong liability provisions as an essential feature of any Superfund bill. Strict liability and joint and several liability were clearly intended to be part of the Superfund scheme. These provisions were present in H.R. 85 and H.R. 7020 when sent to the Senate for consideration. Although specific mention of these liability schemes was not found within the final bill, the Senate, after removing these terms from the House bills, did rely on Section 311 of the Clean Water Act to provide for strict liability. The Senate's rationale was that under common law, hazardous waste removal and storage was considered an ultrahazardous activity subject to strict liability.

Joint and several liability was also intended to be present in the final version of the legislation by the application of traditional and evolving principles of common law.[144] Members of the House and Senate insisted that four classes of persons[145] be held liable for all costs of removal and remedial action under a common law theory. Further, Congress understood that the courts were already imposing joint and several liability under appropriate circumstances.[146] Moreover, Congressman Florio reassured House Members that although the final bill did not refer specifically to strict liability or joint and several liability, they were in fact implied under Section

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140 *Id.* at H31,979 (statement of Rep. Clinger (R-Pa.)).

141 *Id.* at H31,981.

142 *Id.* at H31,981-82.

143 126 CONG. REC. H26,781 (daily ed. Sept. 23, 1980) (statement of Rep. Gore (D-Tenn.)).

144 126 CONG. REC. H31,965 (daily ed. Dec. 3, 1980) (statement of Rep. Florio (D-N.J.)).

145 *Id.* at H31,965 (daily ed. Dec. 3, 1980).

146 *Id.*

311 of the Clean Water Act and the common law.[147]

Thus, it was the intent of Congress that Superfund would be a strict liability and joint and several liability statute. In analyzing the case law under Superfund, Congressional intent must, therefore, be considered.

III. Case Law Pertaining to Strict Liability

The purpose of this section of the article is to analyze the ten years of case law on the issue of Superfund liability and Congressional intent. As demonstrated previously,[148] the clear intent of both the House and Senate was to provide for strict liability and joint and several liability. What follows is an examination of the standards of liability imposed by the courts since enactment of Superfund.

Superfund has been criticized as poorly drafted, riddled with procedural defects, and devoid of useful legislative history with regard to its liability provisions. Despite these criticisms, the courts have managed to resolve cases posing questions of liability with surprisingly consistent results. The legislative history of Superfund demonstrates that Congress established the standard of strict liability because "anyone engaged in the manufacture, transportation, usage, or disposal of 'hazardous substances' is engaged in an abnormally dangerous or ultrahazardous activity."[149] Since Superfund provides for strict liability, a showing of negligence or intentional harm is not required.

The District Court in *United States v. Bliss*[150] stated,

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147 *Id.*

148 *See supra* notes 1-147 and accompanying text.

149 Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW 923, 976 (1990) [hereinafter Barr, *CERCLA Made Simple*] (citing 126 CONG. REC. H31,964-65 (1980) (daily ed. Dec. 3, 1980) (statement of Rep. Florio (D-N.J.)); 126 CONG. REC. H31,978 (1980) (daily ed. Dec. 3, 1980) (statement of Rep. Jeffords (R-Vt.)); 126 CONG. REC. S30,932 (1980) (daily ed. Nov. 24, 1980) (statement of Sen. Randolph (D-W.Va.)); S. REP. No. 848, 96th Cong., 2d Sess. 12-15, 31-34 (1980)).

150 667 F. Supp. 1298 (E.D. Mo. 1987). In *Bliss*, Northeastern Pharmaceutical and Chemical Company, Inc. (NEPACCO), President, Edwin Michaels, and Vice-President, John Lee, arranged for the disposal of waste generated by NEPACCO which contained certain dioxins. IPC, through its District Manager, Gregory Browne, contracted with Russel Martin Bliss and Jerry-Russell Bliss, Inc., to dispose of the waste materials. *Id.* at 1303. During the course of disposal, Bliss, or one of his employees, picked up at least five tank truckloads from the NEPACCO

"[l]iability under CERCLA is strict, without regard to the liable party's fault or state of mind."[151] In many cases, the courts have concluded that Congress intended that responsible parties be held strictly liable, relying on the definition of "liability" in CERCLA Section 9601(32) and the definition which the legislative history provides.[152] Additionally, courts nationwide have inter-

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plant. *Id.* Bliss billed IPC, and IPC billed NEPACCO, charging more for disposal then Bliss charged IPC. *Id.* Bliss, or an employee of Bliss, sprayed the material at a number of horse riding rings to suppress dust. Soil samples taken by the Environmental Protection Agency at these sites revealed the presence of dioxin and/or TCP. *Id.*

The Court, in deciding the issues of liability stated, "[u]nder CERCLA, liability is strict, requiring no inquiry into state of mind. . . ." *Id.* at 1308. The Court also stated that "[t]o be liable under [CERCLA] Section 107(a)(3) a person need not have generated the hazardous substance. . . .(citation omitted). Also, under the broad interpretation accorded to Section 107(a), a party need not have actual ownership or possession of the waste to fall within the scope of that section. . . ." *Id.* at 1306-07. The court in *Bliss* further stated, in *dicta*, that a number of courts have applied Rule 56 of the Federal Rules of Civil Procedure to dispose of motions involving liability issues. *Id.* at 1309.

The Court also noted that the "structure of CERCLA and its legislative history make it clear that traditional tort notions, such as proximate cause, do not apply." *Id.* (citing United States v. Wade, 557 F. Supp. 1326, 1332-33 (E.D. Pa. 1983)). Accordingly, by applying the theories of strict liability and joint and several liability to the facts of the case at bar, the court found NEPACCO, Michaels, Lee, IPC, Russell Martin Bliss, and Jerry-Russell Bliss, Inc., jointly and severally liable under Section 107(a). 667 F. Supp. at 1302.

In determining who may be liable, the statute is very broad. *See* CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4) (1990). "[C]ourts have generally resolved ambiguity with respect to whether a particular party falls within one of the statutory definitions by inquiring into the degree of the defendant's control over some essential link in the disposal decisions. . . ." *Developments in the Law: Toxic Waste Litigation*, 99 HARV.L.REV. 1458, 1514 (1986) [hereinafter *Developments*]. *See also* United States v. Marisol, Inc., 725 F. Supp. 833 (M.D. Pa. 1989).

In *Marisol* the court stated, "[I]t is clear that the majority of courts who have considered the issue have held that CERCLA imposes strict liability." *Id.* at 837-38. *See also* United States v. Parsons, 723 F. Supp. 757 (N.D. Ga. 1989). This case also affirms the application of joint and several liability unless the harm to the environment caused by the disposal of hazardous substances is divisible and a reasonable basis exists to apportion the harm. *Id.* at 760-61 n.4 (citing United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983)).

151 *See* Barr, *CERCLA Made Simple*, *supra* note 149, at 976 (citing United States v. Bliss, 667 F. Supp. 1298, 1304 (E.D.Mo. 1987)).

152 *Id. See also* New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985), United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D.Md. 1986). In *Maryland Bank & Trust*, the United States brought an action to recover cleanup costs incurred by the EPA for the removal of toxic waste from a hazardous waste dump. The action was brought against a bank which owned the property and previously held a mortgage over the property. *Id.* at 575. This case presented the question

preted the legislative intent underlying Superfund[153] as warranting the application of strict liability.[154]

Furthermore, in *New York v. Shore Realty Corp.*,[155] the Second Circuit stated that a plaintiff is not required to prove that the acts of a defendant directly caused or contributed to the circumstance which required response action. Moreover, the underlying legislative history "[m]ake[s] it clear that traditional tort notions, such as proximate cause, do not apply."[156] One commentator has noted "[t]here is also nothing in the statute which requires that the [plaintiff] allege, and prove proximate causation before it is entitled to recover its clean-up costs under Section [9607]."[157] However, a causal link must still be established between the release which causes the damage and the defendant.[158] When considering strict liability under Superfund, courts have reasoned that since the imposition of strict liability is more likely to achieve the goals of rapid cleanup, cost-shifting to responsible parties, and cost-spreading throughout the industry, it is most likely the standard that Congress intended to impose.[159]

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whether a bank, which formerly held a mortgage on a parcel of land, later purchased the land at a foreclosure sale, and continued to own it, must reimburse the United States for the cost of cleaning up hazardous wastes on the land, when those wastes were dumped prior to the bank's purchase of the property. *Id.* at 574. In determining liability, the court stated, "[s]ection 107 [of CERCLA] imposes strict liability." *Id.* at 576. The court relied on CERCLA's legislative history to make this determination, citing S. REP. No. 848, 96th Cong., 2d Sess. 34 (1980). *Id.* As a result of its interpretation of CERCLA, the bank's motion for summary judgment was denied. *Id.*

It is important to note that the court in *Shore Realty* relied heavily on H.R. 85 in defining "owner." If other courts were to do the same, strict liability and joint and several liability would most certainly continue to be applied since H.R. 85 explicitly favored strict liability.

153 *See* Superfund, *supra* note 6.

154 *See* Barr, *CERCLA Made Simple*, *supra* note 149 at 976-77.

155 759 F.2d 1032, 1044 (2d Cir. 1985). *See also supra* note 149 and accompanying text.

156 *See supra* note 149; *see also Shore Realty Corp.*, 759 F.2d at 1044; *Bliss*, 667 F. Supp. at 1309.

157 *See* Barr, *CERCLA Made Simple*, *supra* note 149, at 977 (citing United States v. Cauffman, 21 ENVTL. REP. 2167, 2168 (C.D. Cal. 1984)). *Accord Shore Realty Corp.*, 759 F.2d at 1044; Violet v. Picillo, 648 F. Supp. 1283, 1292-93 (D.R.I. 1986).

158 *See* Idaho v. Bunker Hill Co., 635 F. Supp. 665, 674 (D.Idaho 1986).

159 *See* United States v. Price, 577 F. Supp. 1103, 1114 (D.N.J. 1983); The Superfund statute provides three defenses to strict liability. CERCLA, 42 U.S.C. § 9607(b), states in pertinent part:

There shall be no liability . . . for a person otherwise liable who can

IV. Case Law Pertaining to Joint and Several Liability

With respect to joint and several liability under CERCLA, while "[m]ost courts recognize that CERCLA does not mandate the imposition of joint and several liability, most readily apply such liability when a person or entity causes a single and indivisible harm."[160] Courts, when interpreting Section 113(f)(1), 42 U.S.C. § 9613(f)(1) of CERCLA, have held that these provisions create an express right of contribution among parties found liable as to the United States or any particular state.[161]

Throughout the legislative history, Congress clearly anticipated that the courts would "consider traditional and evolving principles of federal common law" when faced with issues of lia-

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establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;
(2) an act of war;
(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
(4) any combination of the foregoing paragraphs.

Id.

160 Lawrence S. Coven, *Liability Under CERCLA: After a Decade of Delegation, the Time is Ripe for Legislative Reform*, 17 OHIO N.U.L. REV. 165, 192 (1990) [hereinafter *Liability under CERCLA*] (citing United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 3156 (1989)). *See* Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1448 (W.D. Mich. 1989) ("[c]ourts have consistently held that except where harm is divisible, liability under CERCLA is joint and several"); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1464 (9th Cir. 1986) (Reinhardt, J., dissenting) (courts have unanimously held that Section 107 of CERCLA makes available joint and several liability).

161 *See* Coven, *Liability Under CERCLA*, *supra* note 160, at 193 (citing United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1048 (D.Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990)). *See also* United States v. New Castle County, 642 F. Supp. 1258 (D. Del. 1986); Colorado v. ASARCO, Inc., 608 F. Supp. 1484 (D. Colo. 1985); United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984).

bility.[162] As determined by the court in *United States v. Chem-Dyne Corp.*,[163] a court must consider traditional and evolving principles of federal common law, which Congress left to the courts to apply interstitially.[164] The court further reasoned, addressing the absence of any reference to joint and several liability in the final version of the Superfund bill, "the deletion, however, was not intended as a rejection of joint and several liability, but rather to have the scope of liability determined under common law principles."[165]

The Fourth Circuit in *United States v. Monsanto Co.*[166] adopted the *Chem-Dyne* court's interpretation of CERCLA's legislative history respecting joint and several liability and noted that the approach taken in *Chem-Dyne* was subsequently affirmed by Congress in its consideration of SARA's[167] contribution provision.[168]

In addition, case law has dictated that a defendant who is seeking apportionment has the burden of proving not only that the harm is divisible but also that there is a reasonable and rational basis for apportionment of damages.[169] The First Circuit,

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[162] *See* United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988). In *Monsanto*, federal and state governments sought to recover response costs as a result of a release and threatened release of hazardous material at a waste storage facility. *Id.* at 164-65. The district court found all the defendants jointly and severally liable as owners, operators and generators of hazardous waste. *Monsanto*, 653 F. Supp. 676-78. The Fourth Circuit affirmed the lower court's finding of joint and several liability by stating, "while CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm." *Monsanto*, 858 F.2d at 171 (citing *Shore Realty Corp.*, 759 F.2d at 1042 n.13; *Chem-Dyne Corp.*, 572 F.Supp. 802, 810-11).

[163] 572 F. Supp. 802 (S.D. Ohio 1983).

[164] *Id.* at 808.

[165] *Id.* at 806 (quoting 126 CONG. REC. S14,969 (daily ed. Nov. 24, 1980) (statement of Sen. Stafford (R-Vt.)).

[166] 858 F.2d 160, 172 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 3156 (1989).

[167] Superfund Amendments and Reauthorization Act ("SARA"). The 1986 SARA Amendments enacted by Congress codified judicial interpretations of CERCLA since 1980. SARA, Pub. L. No. 99-499, 100 Stat. 613 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.).

[168] *See supra* note 166, at 171-72 (citing H.R. REP. No. 235(I), 99th Cong., 2d Sess. 79-80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861-62). *See also Chem-Dyne Corp.*, 572 F. Supp. 802, 804-08.

[169] O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989). In *O'Neil*, thousands of barrels of hazardous waste were dumped on farm property causing a monstrous fire. The EPA undertook a cleanup of the area. The EPA found "massive trenches and pits 'filled with free-flowing, multi-colored, pungent liquid wastes' and thousands of

in *O'Neil v. Picillo*,[170] in upholding the lower court's decision on joint and several liability, stated:

> It is by now well settled that Congress intended that the federal courts develop a uniform approach governing the use of joint and several liability in CERCLA actions. The rule adopted by the majority of courts, and the one we adopt, is based on the Restatement (Second) of Torts; damages should be apportioned only if the *defendant* can demonstrate that the harm is divisible.[171]

The court further stated that even though the imposition of joint and several liability may produce an unfair result, "[c]ourts have continued to impose joint and several liability on a regular basis, reasoning that where all of the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty."[172] The court stated:

> in cases where different hazardous substances have been placed at a facility and have commingled over a long period of time, the resulting synergy and chemical reactions among the different substances make it virtually impossible to determine what portion of the harm was due specifically to the acts of a particular defendant or to the particular substance it put at the site.[173]

As discussed in Parts I and II,[174] a requirement that joint and several liability be imposed on defendants was deleted from the final legislation establishing CERCLA in 1980.[175] This deletion, as evidenced by the legislative history and supporting case law,[176] did not

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dented and corroded drums containing a veritable potpourri of toxic fluid." *O'Neil*, 682 F. Supp. 706, 709, 725 (D.R.I. 1988). The state's complaint named thirty-five defendants, all but five of whom entered into settlements. The district court found three of the remaining five companies jointly and severally liable under Section 107 of CERCLA. These defendants argued that their contribution to the pollution was insubstantial and that it was unfair to hold them jointly and severally liable for the state's costs not covered by the settlements. *O'Neil*, 883 F.2d at 177-78.

170 *See supra* note 169.

171 *Id.* at 178 (citing *Chem-Dyne Corp.*, 572 F. Supp. at 809-11; *Monsanto*, 858 F.2d at 171-73; *Bliss*, 667 F. Supp. at 1312-13).

172 *Id.* at 179; *See also Chem-Dyne Corp.*, 572 F. Supp. at 809-10.

173 *See* Barr, *CERCLA Made Simple*, *supra* note 149, at 978 (citing United States v. Franklin P. Tyson General Devices, No. 84-2663, at 4-9 (E.D. Pa. Jan. 29, 1988) (LEXIS, Genfed Library, Dist. file 841)).

174 *See supra* notes 1-147 and accompanying text.

175 *Id.*

176 *Id.*

result in the total rejection of joint and several liability, but rather gave the courts the ultimate authority to determine the scope of liability under common law principles.[177]

The court in *United States v. Stringfellow*[178] explained the rationale behind the application of joint and several liability under CERCLA. The court noted that the underlying purpose of CERCLA is environmental protection and the protection of public health and safety. The court implied that by imposing joint and several liability the legislative intent underlying the Superfund law would be sustained, ensuring that responsible parties fulfill their obligations to clean up hazardous waste contamination they produced.[179] Further, the court noted, "[b]y imposing joint and several liability, wealthy defendants must bear the brunt of financing the cleanup efforts and then seek indemnification, thereby negating the need for governmental involvement. By placing the burden on the guilty parties[180] to remedy the hazardous waste problem, the Superfund need not be disturbed."[181]

It is without question that CERCLA imposes significant costs, and, as expected, potentially responsible parties have devoted much effort to establish their contribution rights against other potentially liable parties. For example, in *Monsanto*[182] the court rejected a defendant's argument that the liability should be apportioned according to the volume each defendant deposited as compared to the total volume disposed of at the site by all parties. The court held that this proposed method of apportionment could not be accepted since the generators presented "no evidence . . . showing a relation-

177 *See, e.g., Chem-Dyne Corp.*, 572 F. Supp. 802, 808.

178 661 F. Supp. 1053, 1060 (C.D. Cal. 1987).

179 *Id.* at 1060. In *Stringfellow*, the United States and California sued to recoup costs of remediation from owners and operators of toxic waste disposal sites, generators of waste, and transporters of waste. *Id.* at 1058-59. The court held that the harm suffered at the Stringfellow site was indivisible and noted, "theoretically and practically" that the harm was "incapable of division among the defendants due to the synergistic effects of the commingling of different wastes." *Id.* at 1060. The court found it impossible to determine which defendants' waste contributed to the present releases and continuing threat of further releases. *Id.* Thus, the court held that the defendants were jointly and severally liable. *Id.*

180 *See* Coven, *Liability Under CERCLA*, *supra* note 160, at 195 (citing Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 988 (1988)).

181 *See id.*

182 *Monsanto*, 858 F.2d 160, 172-77.

ship between waste volume, the release of hazardous substances, and the harm at the site."[183]

Additionally, in *Kelley v. Thomas Solvent Co.*,[184] the court rejected the defendant's contention that joint and several liability could not be applied in the absence of joint action with other potentially responsible parties. The court held that joint and several liability within the meaning of CERCLA "is not dependent [upon] a showing of joint action among defendants. Under traditional and evolving principles of common law which CERCLA incorporates, where two or more defendants are responsible for an indivisible harm, each is subject to liability for the whole harm."[185]

The application of joint and several liability has been criticized in recent commentaries on the subject of CERCLA and toxic waste litigation. Recently, it was posited that:

> [a]voiding joint and several liability would clearly lessen the burden of cleanup costs to those whose apportionate share would be limited. Corporations would be able to determine their potential liability exposure thereby creating an incentive for business planning. Corporations would be required to maintain accurate and precise records to avoid joint and several liability which should only be utilized where apportionment is undiscernible.[186]

It has been further suggested that the "[c]ourts should permit original defendants to threaten third-party defendants with joint liability

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[183] *Id.* at 172. In *Monsanto*, the court, in interpreting the language in Sections 107(a)(3) and (4) of CERCLA, defined generators as those who "arranged for disposal . . . of hazardous substances . . . at any facility . . . *containing such hazardous substances* . . . from which there is a release . . . of a hazardous substance." *Id.* at 169 (emphasis added) (quoting 42 U.S.C. § 9607(a)(3)-(4). The court stated that this did not imply that the "plaintiff must trace the ownership of each generic chemical compound found at a site." *Id.* The court found that a showing of chemical similarity between the substances was sufficient to establish liability. *Id.*

[184] 714 F. Supp. 1439, 1448 (W.D. Mich. 1989).

[185] *Id.* In *Kelley*, the plaintiff sought to recover costs incurred by the Environmental Protection Agency in responding to releases of hazardous substances. *Id.* at 1441-42. The court stated:

> [t]he rule of law that emerges from *Chem-Dyne* and which has met with acceptance by other district courts, is that liability under Section 107(a) is joint and several *unless* a defendant or defendants can prove that the environmental injury is divisible *and* there is a reasonable basis for apportioning the harm . . . .

Id. at 1448-49 (quoting United States v. Miami Drum, No. 85-0038, slip. op. at 20 (S.D. Fla. Dec. 12, 1986)).

[186] *See*, Barr, *Liability Under CERCLA*, *supra* note 160 at 199-200.

for the shares of absent parties in suits for contribution."[187] These proposals appear to merit consideration by Congress.

V. Conclusion

Although the liability provisions of Superfund may appear vague without a critical examination of the underlying legislative history, the courts have correctly interpreted these provisions. The intended purpose of the law was to provide a rapid response to the threats posed by improperly managed hazardous waste sites, followed by prompt cleanup. The imposition of strict liability and joint and several liability clearly advances these important goals.

More than a decade after its enactment, Superfund is enforced in the courts through the aforementioned liability scheme, consistent with Congressional intent. Because Superfund works effectively to impose harsh costs on responsible parties, a legislative effort to modify the liability provisions is certain to be forthcoming. Any effort to modify Superfund in the future should emphasize the importance and success of the liability provisions in their current form. Congress should resist any efforts to lessen the severity of the liability scheme and carefully consider any proposed modifications that would weaken Superfund and circumvent its intended purpose.[188]

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187 *See Developments*, *supra* note 150, at 1525.

188 Congress is currently considering amendments to CERCLA which would alter the liability scheme as to municipal governments. The "Toxic Cleanup Equity and Acceleration Act," introduced in the Senate (S.1557) by Senators Frank Lautenberg (D-N.J.) and Timothy Wirth (D-Colo.) and authored in the House (H.R. 3026) by Congressmen Robert Torricelli (D-N.J.) and David Dreier (R-Cal.), is designed to protect local governments from cost-sharing under Superfund. The legislation would authorize only the federal government to sue local governments that generate or transport hazardous waste. *See* Robert G. Torricelli, *Municipal Liability Under Superfund—A Legislative Response*, 16 SETON HALL LEGIS. J. 491 (1992).