CERCLA Cost Allocation and Nonparties' Responsibility: Who Bears the Orphan Shares?

*Daniel R. Hansen**

State environmental authorities discovered this chemical wasteland in 1977 after combustible chemicals caused a dramatic explosion and towering flames to rip through the waste disposal site. After the fire, state investigators discovered large trenches and pits filled with free-flowing, multi-colored, pungent liquid wastes . . . .[1]

I.
INTRODUCTION

This description reflects the status of many waste sites at the end of the 1970s. The Environmental Protection Agency (EPA) estimated that in 1979, 30,000 to 50,000 inactive and uncontrolled hazardous waste sites existed in the United States.[2] Of those, between 1,200 and 2,000 presented a serious risk to public health.[3] To combat this threat to public health and the environment, Congress promulgated the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[4] in 1980.[5] In general, Congress established a trust fund, commonly known as the Superfund,[6]

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1. Violet v. Picillo, 648 F. Supp. 1283, 1286 (D.R.I. 1986).

2. *See* H.R. REP. No. 1016, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. (94 Stat.) 6119, 6120.

3. *See id.*

4. 42 U.S.C. §§ 9601-57 (1980).

5. In House Report 1016, the Interstate Foreign Commerce Committee described its intent with regard to the new legislation: "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." H.R. REP. No. 1016, 96th Cong., 2d Sess. 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. (94 Stat.) 6119, 6125.

6. *See* 42 U.S.C. § 9631 (1980). The Superfund was funded by general revenue, industry taxes, monies collected under the Act, and penalties and punitive damages collected under the Act. *Id.* Section 9631 was repealed by the Superfund Amendments and Reauthorization Act of 1986 (SARA). Pub. L. No. 99-499, 100 Stat. 1613 (1986).

and authorized the federal government to use the monies to finance government response activities and to pay certain claims arising from the response activities of private parties.[7] In addition, Congress provided federal and state governments and private parties a mechanism for suing those responsible for the generation, transportation, and disposal of hazardous wastes.[8] Finally, the Act gave the federal government the power to secure relief as necessary to abate hazardous waste releases that pose imminent and substantial danger to the public health.[9]

CERCLA was the product of a long and circuitous process of legislative compromise in the final days of the 96th Congress and, as a result, "is far from being a model of statutory or syntactic clarity."[10] Although CERCLA was amended in 1986 in the Superfund Amendments and Reauthorization Act (SARA),[11] it remains unclear in many respects. One area of particular obscurity is private cost recovery actions. Several courts have addressed the various aspects of private cost recovery under CERCLA, but consistency is uncommon.

This article's primary focus is cost recovery actions among potentially responsible parties (PRPs) and the allocation of responsibility among them. Particularly, it addresses the impact that nonparties' and insolvent parties' responsibility should have on such allocation. The article begins in Part II by describing the basic framework of CERCLA. Part III analyses contribution and its relationship to PRP cost recovery. Part IV introduces the issue of non-parties' shares of responsibility and argues that allocation should be gov-

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In its place, SARA provided the Hazardous Substance Superfund. *See* 26 U.S.C. § 9507 (1988). Funding sources include general revenue appropriations, certain environmental taxes, monies recovered under CERCLA and CERCLA-authorized penalties and punitive damages. *See id.*; Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1242 (6th Cir. 1991).

7. *See* 42 U.S.C. § 9611(a) (1988), *as amended by* Pub. L. No. 101-508, § 6301(1) (1990); City of New York v. Exxon Corp., 633 F. Supp. 609, 614 (S.D.N.Y. 1986).

8. *See* 42 U.S.C. § 9607(a) (1988); *Exxon*, 633 F. Supp. at 614.

9. *See* 42 U.S.C. § 9606(a) (1980).

10. *Exxon*, 633 F. Supp. at 613-14. CERCLA as finally enacted represented a compromise between competing bills in the House and Senate. In the Senate, there were "extensive eleventh-hour alterations," including the deletion of House provisions dealing with joint and several liability. *See id.* at 613 n.2. House Bill 7020 was largely conformed to Senate Bill 1640, which ultimately was the version enacted. Because legislative judgments differed substantially from the original bills to the final Act, the Committee Reports regarding CERCLA "are dubious sources for interpretation of the statute." *Id.* at 613-14 n.2.

11. Pub. L. No. 99-499 (1986) (codified as amended in scattered sections of 42 U.S.C.).

erned by a uniform federal rule. Part V develops a list of equitable factors to which courts commonly look in determining the shares and surveys the case law applying them. Part VI discusses the issue of nonparties' and insolvent parties' shares — that is, who should bear the cost of the orphan shares — and advocates a uniform federal rule based on the Uniform Comparative Fault Act (UCFA). The UCFA provides for the allocation of the entire cost among those who are solvent and before the court, based on comparative fault. Under this approach, plaintiffs and defendants collectively bear the burden of orphan shares. Finally, Part VII addresses the issue of who bears shares of responsibility allocated but later proven uncollectible. Again, a uniform rule should be adopted and that of the Uniform Comparative Fault Act best fits CERCLA. It permits, upon motion, the reallocation of uncollectible shares among the original parties, based on their proportionate responsibility. This rule also equitably distributes uncollectible shares among both plaintiffs and defendants.

The UCFA's approaches to these issues are consistent with CERCLA's liability scheme and policies. The proposed rules further the policies of encouraging voluntary cleanup, encouraging settlement, and ensuring the equitable allocation of responsibility. They also fit within CERCLA's strict liability scheme.

II.
CERCLA'S PRESENT FRAMEWORK

Section 107(a) Cost Recovery Action

CERCLA, as amended by SARA, basically is "an array of mechanisms to combat the increasingly serious problem of hazardous substance releases."[12] Section 107(a) permits both government and private plaintiffs to recover from responsible parties the costs incurred in cleaning up and responding to hazardous substances at waste sites.[13] Potentially responsible persons[14] include the current owner or operator, the owner or operator at the time of disposal,

12. United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988) (quoting Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1078 (1st Cir. 1986)), *cert. denied*, 490 U.S. 1106 (1989).

13. *See* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989), *modified on other grounds*, No. 88-2860, 1990 U.S. App. LEXIS 1380 (5th Cir. Jan. 23, 1990). Section 107(a) provides the principal mechanism for recovery of costs expended in the cleanup of waste disposal sites. *See id.* A prima facie case for a private plaintiff under CERCLA section 107(a) requires four elements:

(1) the site is a facility;

(2) a release or threatened release of a hazardous substance occurred at the site;

one who arranged for disposal or treatment, and one who transported the substance for disposal or treatment.[15]

Under section 107(a), if the four elements constituting a prima facie case are met,[16] the responsible person "shall be liable for" costs of removal by the government or any other person, costs of injury to natural resources, and the costs of any health effects

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(3) the release caused plaintiff to incur necessary response costs consistent with the national contingency plan; and

(4) defendants are responsible persons.

See United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989); CPC International, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 786 (W.D. Mich. 1989); United States v. Bliss, 667 F. Supp. 1298, 1304 (E.D. Mo. 1985). Each element has been the subject of much case law and commentary. The particulars are not important for the purposes of this article.

14. "Person" is defined in CERCLA as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (1990).

15. *See* 42 U.S.C. § 9607(a) (1988); *CPC International*, 731 F. Supp. at 786-87. Many courts have held that CERCLA's liability provisions apply retroactively to pre-enactment disposal activities, despite an absence of legislative history supporting retroactive application. *See* United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1505-06 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); *Monsanto*, 858 F.2d at 174-75; United States v. Hooker Chemicals & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1988); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732-34 (8th Cir. 1986) [hereinafter NEPACCO], *cert. denied*, 484 U.S. 848 (1987); United States v. Shell Oil Co., 605 F. Supp. 1064, 1069-73 (D. Colo. 1985). Courts typically rely on section 107(a)'s proscription of conduct in the past tense to conclude that Congress intended such application. *See Meyer*, 889 F.2d at 1506; *Hooker Chemicals*, 680 F. Supp. at 546; *NEPACCO*, 810 F.2d at 732; *Shell Oil*, 605 F. Supp. at 1075. Section 107(a) provides in part that "any person who at the time of disposal . . . *owned or operated* any facility, . . . who by contract, agreement, or otherwise *arranged* for disposal or treatment, . . . and . . . who accepts or *accepted* any hazardous substances for transport, . . . shall be liable. . . ." 42 U.S.C. § 9607(a) (1988) (emphasis supplied). Moreover, courts have held that retroactive application survives due process scrutiny, reasoning that because it was foreseeable that improper waste disposal could cause enormous damage to the environment, imposition of liability under CERCLA is not irrational or arbitrary. *See Monsanto*, 858 F.2d at 174; *NEPACCO*, 810 F.2d at 734. The *Monsanto* court cited Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), for the test that one complaining of a due process violation based on retroactive application must show " 'that the legislature has acted in an arbitrary and irrational way.' " *Monsanto*, 858 F.2d at 174 (quoting *Usery*, 428 U.S. at 15). Furthermore, because CERCLA spreads the costs of waste disposal among all parties that played a role in creating the hazardous conditions, the consequences of joint and several liability are not " 'particularly harsh and oppressive.' " *Monsanto*, 858 F.2d at 174 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.13 (1977)); *NEPACCO*, 810 F.2d at 734. The *Monsanto* court cited *United States Trust Co.* for the proposition that "retrospective civil liberty [is] not unconstitutional unless it is particularly harsh and oppressive." *Monsanto*, 858 F.2d at 174 (citing *United States Trust Co.*, 431 U.S. at 17 n.13). Courts have also rejected arguments that retroactive application converts CERCLA into a bill of attainder or an *ex post facto* law. *See Monsanto*, 858 F.2d at 174-75.

16. *See supra* note 13.

study.[17] Courts have interpreted this section as imposing strict liability.[18] CERCLA is silent, however, on the extent of that liability. In the final version of Senate Bill 1480, a section imposing joint and several liability was removed.[19] Courts have not treated this as a rejection of joint and several liability; rather, they have found that Congress intended them to apply common law principles of liability.[20] Courts also are in agreement that Congress intended them to take a uniform approach in applying the principles of common law liability.[21] Accordingly, courts interpret section 107(a) to permit joint and several liability among responsible persons, at least when the government is a plaintiff.[22] Thus, the government can look to a single responsible party to recover its entire response costs.[23] In SARA, Congress confirmed as correct the courts' interpretation of section 107(a) as imposing joint and several liability.[24]

Joint and several liability focuses on the indivisibility of the harm in apportioning liability among the responsible parties.[25] In theory, if a PRP can distinguish its harm at the site from harm caused by others, it will only be liable for its own portion. PRPs bear the burden of establishing a reasonable basis for apportioning liability.[26] If, however, a PRP cannot meet this burden, its liability will be joint

17. 42 U.S.C. § 9607(a) (1990). The term "liability" is defined to mean the "standard of liability which obtains under" section 1321 of the Clean Water Act. 42 U.S.C. § 9601(32) (1988)(citing 33 U.S.C. § 1321). In Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979), the Court of Appeals for the Fourth Circuit held that liability under this section is strict.

18. *See* United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1316 (9th Cir. 1986); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); Violet v. Picillo, 648 F. Supp. 1283, 1290 (D.R.I. 1986).

19. 126 CONG. REC. S14,964 (Nov. 24, 1980).

20. *See* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 806-08 (S.D. Ohio 1983); *Monsanto*, 858 F.2d at 171 n.23.

21. *See* O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *Monsanto*, 858 F.2d at 171-73; United States v. Bliss, 667 F. Supp. 1298, 1312-13 (E.D. Mo. 1987); *Chem-Dyne*, 572 F. Supp. at 809-11.

22. *See Monsanto*, 858 F.2d at 171; *Chem-Dyne*, 572 F. Supp. at 810-11.

23. *See* O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989); *Monsanto*, 858 F.2d at 172.

24. *See Monsanto*, 858 F.2d at 171 n.23 (citing H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 79-80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861-62).

25. *See Monsanto*, 858 F.2d at 171-72 & n.21; *Chem-Dyne*, 572 F. Supp. at 809-10.

26. *See Monsanto*, 858 F.2d at 172 (citing *Chem-Dyne*, 572 F. Supp. at 810). "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 that he causes." *Id.* at 171 (citing Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 260 n.8 (1979)). This common law is based on the Restatement (Second) of Torts section 433A:

(1) Damages for harm are to be apportioned among two or more causes where
(a) there are distinct harms, or

and several with the other PRPs. Courts typically find that where wastes of varying and unknown degrees of toxicity and migratory potential commingle, it is impracticable to determine the amount of environmental harm caused by each party.[27] Thus, the effect of placing the burden on the defendants has been that responsible parties rarely escape joint and several liability.[28] Courts reason that where all the contributing causes cannot fairly be traced, Congress intended those partially culpable to bear the cost of the uncertainty.[29]

Defenses to Section 107(a) Liability

Congress provided three express exceptions to section 107(a) liability in section 107(b). By the language of section 107, these are the only defenses.[30] Liability will not attach if a person can prove by a preponderance of the evidence that the release or threat of release was caused solely by "an act of God," "an act of war," or "an act or omission of a third party."[31] The third party defense is fur-

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(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

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

RESTATEMENT (SECOND) OF TORTS § 433A (1965). Section 433B of the Restatement provides in part:

> Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965).

27. *See* O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989)(citing *Chem-Dyne*, 572 F. Supp. at 809-11; *Monsanto*, 858 F.2d at 171-73). When the hazardous waste at the site represents a commingling of several hazardous substances, apportionment based on volume alone is not considered reasonable. *See Monsanto*, 858 F.2d at 172. "Volumetric contributions provide a reasonable basis for apportioning liability only if it can be reasonably assumed, or it has been demonstrated, that independent factors had no substantial effect on the harm to the environment." *Id.* at 172 & n.27. To be reasonable, volumetric apportionment must account, at minimum, for the relationship among waste volume, the release of hazardous substances and the harm at the site. *See id.* at 172 & n.25. Further, if the hazardous substances have been commingled, any reasonable apportionment requires evidence of the individual and interactive qualities of the substances deposited there. *See id.* at 172.

28. *See* O'Neil v. Picillo, 883 F.2d at 178-79.

29. *Id.* at 179.

30. *See* 42 U.S.C. § 9607(b) (1988).

31. 42 U.S.C. § 9607(b) (1988). The term "act of God" is defined in section 101(1) to mean "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, or irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." 42 U.S.C. § 9601(1) (1988). Congress clearly intended this defense to apply in only extreme circumstances. "Act of war" is not defined, but by its terms, has only minimal application.

ther limited in that the third party cannot be an employee or agent of or have a contractual relationship with the defendant.[32] Also, before the third party defense is available, the otherwise liable person must prove that it (1) exercised due care in light of all relevant facts and circumstances and (2) took precautions against foreseeable acts or omissions of the third party.[33] Needless to say, these defenses have provided little shelter from CERCLA's reach.[34]

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32. 42 U.S.C. § 9607(b)(3) (1988). In SARA, Congress defined the term "contractual relationship." *See* 42 U.S.C. § 9601(35) (1988). This definition effectively outlines the elements of the innocent landowner defense. Landowners are not liable if they acquired the property after the disposal or placement of the hazardous substance at the facility and "did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." In addition, to avoid liability, landowners must show that they "exercised due care with respect to the hazardous substance," and "took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." *Id.* §§ 9601(35)(A), 9607(b)(3)(a)-(b). The innocent landowner defense is not available to owners or operators who acquired the property before disposal of the waste. *See id.* § 9601(35)(C). This defense is further limited in that "the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." *Id.* § 9601(35)(B). For the purposes of determining an adequate inquiry, "the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection." *Id.* Finally, if the landowner obtained actual knowledge of the release or threatened release during ownership and then transferred the property without disclosing this information, the defense is unavailable. *Id.* § 9601(35)(C).

33. *See id.* §§ 9607(b)(3)(a)-(b).

34. *See* United States v. Monsanto, 858 F.2d 160, 168-69 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 n.1 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1048-49 (2d Cir. 1985); *In re* Diamond Reo Trucks, Inc. (Kemph v. City of Lansing, E.I.C., Inc.), 115 B.R. 559, 567-68 (Bankr. N.D. Mich. 1990); Louisiana-Pacific Corp. v. Asarco, Inc., 735 F. Supp. 358, 363 (W.D. Wash. 1990); United States v. Marisol, Inc., 725 F. Supp. 833, 838-39 (M.D. Pa. 1989); United States v. Fleet Factors Corp., 724 F. Supp. 955, 961-62 (S.D. Ga. 1988), *aff'd*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991); Kelly v. Thomas Solvent Co., 714 F. Supp. 1439, 1445-46, 1451-52 (M.D. Tenn. 1989); O'Neil v. Picillo, 682 F. Supp. 706, 720 n.2, 727-29 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied sub nom.* American Cyanamid Co. v. O'Neil, 493 U.S. 1071 (1990); United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546, 558 (S.D.N.Y. 1987); United States v. Stringfellow, 661 F. Supp. 1053, 1061-62 (C.D. Cal. 1987); Violet v. Picillo, 648 F. Supp. 1283, 1293-95 (D.R.I. 1986), *overruled on other grounds*, United States v. Davis, 794 F. Supp. 67 (D.R.I. 1992). *But see* United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1346-50 (D. Idaho 1989).

Liability to Private Plaintiffs

The concepts of joint and several liability apply against PRPs in a suit by the federal government or a state.[35] Whether joint and several liability is available for private plaintiffs, however, is not as clear. When the plaintiff is *not* a potentially responsible party, courts have applied joint and several liability.[36] EPA agrees with this development.[37] Thus, the general rule permits joint and several liability in favor of a non-PRP plaintiff unless the harm is proven divisible.[38]

When the plaintiff is a PRP, however, the liability rules change. PRP defendants originally raised defenses of unclean hands and strict statutory construction, suggesting that PRPs could not sue for recovery of response costs.[39] Courts have now uniformly rejected these defenses, thus allowing PRPs to sue for response costs under CERCLA.[40] The remaining question was the extent of liability PRP defendants owed to PRP plaintiffs. Three different approaches developed. First, in *Sand Springs Homes v. Interplastic Corp.*,[41] the District Court for the Northern District of Oklahoma held PRP defendants jointly and severally liable for response costs to PRP plaintiffs who had incurred cleanup costs.[42] The court reasoned

35. *See supra* notes 13-29 and accompanying text.

36. *See* County Line Investment Co. v. Tinney, 933 F.2d 1508, 1516 (10th Cir. 1991); Jones v. Inmont Corp., 584 F. Supp. 1425, 1428 (S.D. Ohio 1984).

37. *See* Actions Under CERCLA § 107(a), 55 Fed. Reg. 8798 (1990). "EPA has long taken the position that the liability of potentially responsible parties is strict, joint, and several, unless they can clearly demonstrate that the harm at the site is divisible. This standard of liability applies no matter whether the plaintiff is governmental or private." *Id.*

38. *See* City of New York v. Exxon Corp., 766 F. Supp. 177, 197-99 (S.D.N.Y. 1991); United States v. Kramer, 757 F. Supp. 397, 412-14 (D.N.J. 1991); United States v. Alcan Aluminum Corp., 755 F. Supp. 531, 541-42 (N.D.N.Y. 1991); PVO Int'l, Inc. v. Drew Chem. Corp., 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,077, 16 Chem. Waste Lit. Rep. 669, 683 (D.N.J. 1988).

39. In Mardan Corp. v. C.G.C. Music Ltd., 600 F. Supp. 1049 (D. Ariz. 1989), *aff'd on other grounds*, 804 F.2d 1454 (9th Cir. 1986), the District Court for the District of Arizona held that the unclean hands defense was a bar to a suit between PRPs under CERCLA. *Id.* at 1057-58. The court reasoned that a private suit under section 107(a) is actually an equitable action and therefore the equitable defense was applicable. *Id.*

40. *See, e.g.*, Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913, 916 (N.D. Okla. 1987)("[A] private party, even though a responsible party under CERCLA, who voluntarily pays CERCLA response costs may bring an action in its own behalf to collect cleanup costs against the parties allegedly responsible for the production and dumping of hazardous wastes."); Chemical Waste Mgt., Inc. v. Armstrong World Industries, Inc., 669 F. Supp. 1285, 1291-92 (E.D. Pa. 1987)("[A] PRP may recover response costs from another PRP.").

41. 670 F. Supp. 913 (N.D. Okla. 1987).

42. *Id.* at 915-16.

simply that because the injury was indivisible, liability was joint and several.[43] Thus, the first approach is that of joint and several liability against PRP defendants. In contrast, the District Court for the District of Missouri, in *United States v. Conservation Chemical Co.*,[44] found that a PRP's claim against another PRP is in the nature of contribution and that contribution, by its terms, implies several, not joint and several, liability. Under this rule, then, PRP defendants can be held liable only for their share of the responsibility. Finally, in *Allied Corp. v. Acme Solvents Reclaiming, Inc.*,[45] the District Court for the Northern District of Illinois disagreed with *Conservation Chemical*, noting that section 107(a) claims are not always in the nature of contribution.[46] The *Allied* court adopted a "moderate approach" to joint and several liability.[47] Under this third approach, defendants have the burden of establishing that the harm is divisible. To carry this burden, they must prove their contribution. If successful, their liability would be several. If the harm is indivisible, however, the court would have the option to impose several, or joint and several, liability depending on any existing equitable factors and fairness.[48]

The current trend is toward the *Conservation Chemical* rule rejecting joint and several liability in favor of viewing a PRP plaintiff's claim as one for contribution, where equitable allocation of liability controls. Several courts have applied this rule either explicitly or implicitly.[49]

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43. *Id.*

44. 619 F. Supp. 162, 229 (W.D. Mo. 1985).

45. 691 F. Supp. 1100 (N.D. Ill. 1988).

46. *Id.* at 1118. The *Allied* court discussed the effects of denying joint and several liability: a blanket prohibition on joint and several liability would "discourage a willing PRP from cleaning up on its own" and "would leave the willing PRP holding the bag for the insolvent companies." *Id.*

47. *Allied*, 691 F. Supp. at 1118. The moderate approach was first advocated in United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984). The issue in *A & F Materials* was the extent of liability of a PRP to the government, rather than to another PRP. *See id.* at 1252-56.

48. *See Allied*, 691 F. Supp. at 1118.

49. For example, in Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989), a PRP plaintiff sought recovery for its response costs against other PRPs. The Court of Appeals for the Fifth Circuit explained that although plaintiff Amoco and defendant Borden would share joint and several liability to a government response action, "[w]hen one liable party sues another to recover its equitable share of the response costs, the action is one for contribution." *Id.* at 672. Thus, the trial court must determine each party's equitable share. *Id.* Also, the district court in E.I. Dupont De Nemours & Co. v. Starzyk, No. 89 C 7147, 1990 WL 205823 (N.D. Ill. Nov. 26, 1990), considered the plaintiff PRP's action for recovery of costs incurred as a result of a consent decree with EPA as one for contribution. Because EPA identified the plaintiff as a PRP, a finding

III.

CONTRIBUTION AND ITS CONNECTION TO PRP COST RECOVERY

Soon after CERCLA was implemented, PRPs held jointly and severally liable, believing they had paid more than their fair share, sought recovery from other PRPs. Courts recognized such actions under the common law theory of contribution.[50] According to this theory, a person held jointly and severally liable who has paid more than its share of the damages has a right to contribution from other joint tortfeasors.[51]

In 1986, Congress explicitly recognized a PRP defendant's right of contribution by adding section 113(f)(1) to CERCLA.[52] The section provides to any person a right of contribution from any other person who is liable or potentially liable under section 107(a).[53] Section 113(f)(1) provides in part the following:

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which the court believed was unreviewable, "[t]his action [was] essentially a third-party complaint for contribution." *See id.* at *4. In *Dupont*, the court granted the defendant's motion for summary judgment because the defendant convincingly proved that it was not liable or potentially liable under section 107(a), and therefore, an action for contribution against it could not succeed pursuant to § 113(f) of CERCLA. *Id.* Finally, in *Lone Star Indus., Inc. v. Horman Family Trust*, the generators sued the owners of two hazardous waste sites to recover the generator's response costs. Although the plaintiff sued under both the cost recovery and contribution provisions of CERCLA, the district court considered the action to be one for contribution where joint and several liability was not applicable. No. 89-C-957G, 1990 U.S. Dist. LEXIS 19287 (D. Utah May 31, 1990)(mem.), *rev'd on other grounds*, 960 F.2d 917, 921 (10th Cir. 1992) (holding that plaintiff's complaint did state a cause of action "for equitable contribution by defendants").

50. *See* United States v. New Castle County, 642 F. Supp. 1258, 1262-69 (D. Del. 1986); United States v. Conservation Chemical Co., 619 F. Supp. 162, 222-30 (W.D. Mo. 1985); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 30-31 (E.D. Mo. 1985); Colorado v. Asarco, Inc., 608 F. Supp. 1484, 1492 (D. Colo. 1985). *But see* United States v. Westinghouse Electric Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,483, 20,485 (S.D. Ind. 1983)(no common law contribution action under CERCLA).

51. *See* RESTATEMENT (SECOND) OF TORTS § 886A (1979).

52. *See* 42 U.S.C. § 9613(f)(1) (1988).

53. *See* 42 U.S.C.A. § 9613(f)(1) (West Supp. 1992). In full, section 113(f)(1) provides as follows:

> (1) Contribution
>
> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

Id.

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under . . . section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.[54]

Originally, the relationship between sections 107(a) and 113(f) appeared obscure. Courts first faced with § 113 (f) contribution held it was appropriate only after a party was adjudged liable under § 107(a). The District Court for the Northern District of Illinois, in *Rockwell International Corp. v. IU International Corp.*,[55] wrote that "[t]he purpose of § 9613(f) [§ 113(f)(1)] is simple: to provide parties found liable under CERCLA with an avenue for obtaining compensation from other responsible parties."[56] Although the *Rockwell* court held that a declaratory judgment determining what proportion of liability each potentially joint and several defendant should bear is proper before adjudication of their underlying liability,[57] "[t]o receive any actual compensation through an action for contribution, the party must have been found liable as a defendant in an earlier or pending action."[58] Similarly, in *Sand Springs Home v. Interplastics Corp.*,[59] the District Court for the Northern District of Oklahoma concluded that "contribution is available under CERCLA where joint liability is established."[60] The *Sand Springs* court reasoned that if joint liability could not be imposed, contribution would be meaningless.[61] This conclusion is also confirmed by legislative history: "A right of contribution is only of value to a defendant who has been held jointly and severally liable."[62]

Yet, the final sentence of section 113(f) provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section

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54. *Id.*

55. 702 F. Supp. 1384 (N.D. Ill. 1988).

56. *Id.* at 1389.

57. *Id.*

58. *Id.*

59. 670 F. Supp. 913 (N.D. Okla. 1987).

60. *Id.* at 917.

61. *Id.*

62. United States v. New Castle County, 642 F. Supp. 1258, 1267 n.9 (D. Del. 1986) (quoting letter from U.S. Department of Justice, Office of Legislative Affairs to Rep. Florio).

9606 or section 9607."[63] Courts have subsequently interpreted this provision as allowing the creation of a private cause of action between responsible parties for the recovery of response costs under section 113(f). For example, in *Amoco Oil Co. v. Borden, Inc.*,[64] the Fifth Circuit held, "When one liable party sues another to recover its equitable share of the response costs, the action is one for contribution, which is specifically recognized under CERCLA."[65] Thus, the connection between sections 107(a) and 113(f) is complete: section 107(a) establishes who is subject to liability for costs and the extent of costs recoverable and section 113(f) provides the mechanism for recovery.[66]

Contribution Defenses

Section 113(f)(1) makes clear that contribution may only be sought from liable or potentially liable persons.[67] Thus, before allocating response costs, a court must determine whether all defendants are liable or potentially liable under section 107(a). The three defenses provided in section 107(b) against section 107(a) liability—act of God, act of war, or act or omission of a third party—are available.[68] These are not the only defenses in suits for contribution, however. The Court of Appeals for the Third Circuit recognized the following additional statutory defenses: an action may be barred by a three-year statute of limitations under section 113(g); a party that has resolved its liability to the government in the form of a settlement is not liable for contribution under section 113(f)(2);

63. 42 U.S.C.A. § 9613(f)(1) (West Supp. 1992).

64. 889 F.2d 664 (5th Cir. 1989).

65. *Id.* at 664 (citing 42 U.S.C. § 9613(f)); *see also* Lone Star Indus., Inc. v. Horman Family Trust, No 89-C-957G, 1990 U.S. Dist. LEXIS 19287 (D. Utah May 31, 1990) (mem.) (action by generators against owners for response costs considered an action in contribution), *rev'd on other grounds*, 960 F.2d 917 (10th Cir. 1992); Chemical Waste Mgt. v. Armstrong World Indus., 669 F. Supp. 1285, 1291-92 (E.D. Pa. 1987) (owner may maintain action in contribution against generators for response costs).

66. In Lone Star Indus., Inc. v. Horman Family Trust, No. 89-C-957G, 1990 U.S. Dist. LEXIS 19287 (D. Utah May 31, 1990)(mem.), *rev'd on other grounds*, 960 F.2d 917 (10th Cir. 1992), for example, a generator sued the owners of hazardous waste sites to recover the generator's response costs under both sections 107(a) and 113(f). The federal district court considered the action to be one for contribution under section 113(f). *See id* at *1. Also, in *Chemical Waste Mgt.*, 669 F. Supp. 1285, an owner of a hazardous waste site brought an action against generators of hazardous waste seeking recovery of response costs. The federal district court held that "a PRP may maintain a suit for contribution against *another* person who is or may be liable for response costs." *Id.* at 1291 (citing 42 U.S.C. § 9613(f) (1986)).

67. *See* 42 U.S.C.A. § 9613(f)(1) (West Supp. 1992).

68. *See* 42 U.S.C. § 9607(b) (1988); *see also supra* notes 30-34 and accompanying text (discussing these defenses).

and agreements to hold harmless or indemnify are enforceable between private parties under section 107(e).[69] In general, courts have been reluctant to allow defendants to escape suit at the preliminary stage of determining liability or potential liability under section 107(a). Rather, they apply the same strict liability principles to actions by private plaintiffs as they do in cases involving the government as plaintiff, leaving any equitable arguments for the cost allocation stage of the trial.[70]

Allocation Under Contribution

Although the statute does not set out the elements of a contribution claim, it does state that contribution actions "shall be governed by Federal law," and, in resolving contribution claims, "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[71]

69. *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3d Cir. 1988) (citing 42 U.S.C.A. §§ 9607(e), 9613(f)(2), 9613(g) (West 1983 & West Supp. 1988)), *cert. denied*, 488 U.S. 1029 (1989); H.R. REP. No. 253(I), 99th Cong., 1st Sess. 1, 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862; Richard C. Belthoff, Jr., *Private Cost Recovery Actions Under Section 107 of CERCLA*, 11 COLUM. J. ENVTL. L. 141, 183 (1986).

70. One court, however, strayed from the section 107(a) strict liability approach. In Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989), the Court of Appeals for the Fifth Circuit engrafted a causation element onto a PRP's cost recovery claim, requiring that the plaintiff prove that the release or threatened release caused it to incur response costs. *Id.* at 669-70. The *Amoco* court admitted that it was entering "unexplored territory," because courts had not been faced with a scenario suggesting that the plaintiff's response action was not justified. *Id.* at 670. Amoco purchased certain property "as is" from Borden, who alone generated the hazardous waste on the property. *Id.* at 666-67. The hazardous waste was a pile of phosphogypsum containing radionuclides. *Id.* at 666. Borden claimed it was not responsible for the response costs, which were estimated at six to eleven times the price Amoco had paid for the property. *See id.* The court rejected Amoco's argument that any quantity of a hazardous substance is sufficient to impose liability, reasoning that this approach "would permit CERCLA's reach to exceed its statutory purposes by holding parties liable who have not posed any threat to the public or the environment." *Id.* at 670. Ironically, the causation element was noted by the court as not affecting the strict liability of parties falling within the statutory definitions of responsible persons. *See id.* at 670 n.8. Also, the court distinguished "cases involving multiple sources of contamination, [where] a plaintiff need not prove a specific causal link between costs incurred and an individual generator's waste." *Id.* The effect of the Fifth Circuit's causation element in *Amoco* is unclear; but at least two federal district courts have recommended that *Amoco* not be followed. *See* United States v. Alcan Aluminum Corp., 755 F. Supp. 531, 538-39 (N.D.N.Y. 1991); United States v. Western Processing Co., 734 F. Supp. 930, 942 (W.D. Wash. 1990). To the extent that the *Amoco* court's addition of a causation element impinges on the ability to hold a defendant strictly liable pursuant to section 107(a), the recommendation should be heeded.

71. 42 U.S.C.A. § 9613(f)(1) (West Supp. 1992).

IV.
NONPARTIES' RESPONSIBILITY

Issue

Given that PRP defendants' liability will not be joint and several in a PRP cost recovery action, a PRP plaintiff who has cleaned a hazardous waste site will attempt to seek cost recovery from as many other PRPs as are identifiable. Problems arise, however, when some of the responsible actors are insolvent or otherwise unavailable. Regardless of whether the defendant PRPs are not before the court or are insolvent, the issue is the same: who should bear the burden of the orphan shares of responsibility. Plaintiff PRP? Defendant PRPs? Or all PRPs?[72]

The issue of orphan shares originates from the relatively recent advent of state tort-reform statutes. Many of these statutes provide for the apportionment of fault among all actors, present or not.[73] The policy underlying such statutes is that a defendant actor's share should represent only its own fault. While there is uniform agreement that shares allocated to nonparties are not binding, factfinders can and do determine nonparties' shares. Accordingly, the plaintiff not only bears the burden of arguing that any nonparties' fault is minimal, it also bears the burden of uncollectible shares.

Uniform Federal Rule

Apart from suggesting that "courts may allocate response costs among liable parties using such equitable factors as the court deter-

72. Because the analysis is the same for both absent and insolvent parties, this discussion refers to nonparties and parties insolvent at the time of suit as "nonparties." The situation occurring when a party is present and solvent at the time of trial, but subsequently is found to be insolvent, presents a similar issue which is discussed in Part VII. *See infra* notes 191-94 and accompanying text. For a detailed discussion of the impact of insolvency on allocation from an *ex ante* economic perspective, see Lewis A. Kornhauser & Richard L. Revesz, *Apportioning Damages Among Potentially Insolvent Actors*, 19 J.L. STUD. 617 (1990).

73. *See, e.g.*, COLO. REV. STAT. § 13-21-111.5 (1987 & Supp. 1991); ILL. ANN. STAT. ch. 110, para. 2-1117 (Smith-Hurd Supp. 1991); IND. CODE ANN. §§ 34-4-33-1 to -13 (Burns 1985 & Supp. 1991); IOWA CODE ANN. §§ 668.1-.14 (West 1987)(UCFA); MONT. CODE ANN. § 27-1-703 (1991); N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (West Supp. 1991); UTAH CODE ANN. §§ 78-27-37 to -43 (1987 & Supp. 1990); WYO. STAT. § 1-1-109 (1977). For states that apportion damages only between parties before the court, see ARK. CODE ANN. § 16-64-122 (Michie 1987 & Supp. 1991); CONN. GEN. STAT. ANN. § 52-572h (West 1991); IDAHO CODE § 6-801 to -803 (1990); KAN. STAT. ANN. § 60-258a (Supp. 1990); KY. REV. STAT. ANN. § 411.182 (Michie/Bobbs-Merrill Supp. 1990); 42 PA. CONS. STAT. ANN. § 7101-02 (1982 & Supp. 1991); WASH. REV. CODE ANN. §§ 4.22.005-.925 (West 1988 & Supp. 1991)(UCFA).

mines are appropriate,"[74] CERCLA is silent on apportionment methodology. Courts, therefore, are left to develop some rule of apportionment. Although section 113(f)(1) mandates that contribution claims "be governed by Federal law,"[75] the content of that federal law (i.e., whether a court should fashion a rule or apply state law) is unclear.[76] As the United States Supreme Court noted, "Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules."[77]

The Supreme Court, in *United States v. Kimbell Foods, Inc.*,[78] formulated a series of tests for deciding whether federal or state law should give content to a federal rule. If Congress has expressly directed courts to develop federal standards or adopt state law, then the issue is settled.[79] In the absence of evidence of congressional intent, the issue "is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.' "[80] First, federal programs that by their nature must be uniform in character throughout the nation necessitate the formulation of federal rules.[81] Conversely, when there is little need for a nationally uniform body of law, a federal rule may incorporate state law.[82] Second, if application of state law would frustrate specific objectives of the federal programs, then a court should fashion a rule responsive to those federal interests.[83] Finally, a court should consider whether "application of a federal rule would disrupt com-

74. 42 U.S.C. § 9613(f)(1) (1988).

75. *Id.*

76. *See* United States v. Conservation Chem. Co., 619 F. Supp. 162, 229 (W.D. Mo. 1985)("Where Congress has authorized federal courts to formulate federal rules of decision, our federal system does not permit the controversy to be resolved under state law."); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809 (S.D. Ohio 1983)("Neither statutes nor decisions of a particular state can be conclusive when fashioning federal law."). In the contribution context, courts have recognized that particular state laws should not control. For example, the Court of Appeals for the Third Circuit in Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989), rejected the state common law doctrines of unclean hands and caveat emptor as defenses to contribution, reasoning that the doctrines were contrary to the policies underlying CERCLA. *See id.* at 88-90.

77. United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-28 (1979).

78. 440 U.S. 715 (1979).

79. *See id.* at 740.

80. *Id.* at 728 (quoting United States v. Standard Oil Co., 332 U.S. 301, 310 (1947)).

81. *Id.*

82. *Id.*

83. *Id.*

mercial relationships predicated on state law."[84]

With respect to PRP liability under CERCLA to the government, courts unanimously conclude that state law should play no part and that a uniform federal rule should be fashioned.[85] Legislative history supports this conclusion: "To insure the development of a uniform rule of law, and to discourage business[es] dealing in hazardous substances from locating primarily in States with more lenient laws, the bill [H.R. 7020] will encourage the further development of a Federal common law in [the area of CERCLA liability]."[86] Regarding Senate Bill 1480, Senator Randolph declared, "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."[87]

Applying the *Kimbell* tests to contribution or a PRP cost recovery claim compels that courts likewise fashion a federal rule for nonparties' responsibility. As noted, Congress provided no guidance. Thus, the issue depends on the need for uniformity, the frustration of federal objectives, and/or interference with commercial relationships founded on state law. Under the first *Kimbell* test, the need for uniformity is high.[88] Discussing the effect of the release of

84. *Id.* at 728-29.

85. *See* United States v. Northeastern Pharmaceutical and Chem. Co., 579 F. Supp 823, 844 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. A & F Materials Co., 578 F. Supp. 1249, 1255 (S.D. Ill. 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809 (S.D. Ohio 1983); United States v. Stringfellow, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,385, 20,385-86 (C.D. Cal. Apr. 5, 1984); *see also* United States v. Kayser-Roth Corp., 724 F. Supp. 15, 20 (D.R.I. 1989)("liability under [CERCLA] must not depend on the particular state in which a defendant happens to reside"); United States v. Wade, 577 F. Supp. 1326, 1327 (E.D. Pa. 1983). One district court stated that "[b]ecause hazardous waste disposal and release is a problem of national magnitude and involves substantial federal interests the courts have concluded that Congress intended [them] to apply federal common law principles to fill in gaps in CERCLA's statutory scheme." United States v. Bliss, 16 Chem. Waste Lit. Rep. 1061, 1067 (E.D. Mo. 1988)(citing Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); United States v. A & F Materials Co., 578 F. Supp. 1249, 1255 (S.D. Ill. 1989); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809-10 (S.D. Ohio 1983)).

86. United States v. New Castle County, 642 F. Supp. 1258, 1267 (D. Del. 1986)(quoting 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1980)(statement of Rep. Florio)).

87. 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980)(statement of Sen. Randolph).

88. *See* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809 (S.D. Ohio 1983)(citing United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979); United States v. Standard Oil Co., 332 U.S. 301, 311 (1947)). The *Chem-Dyne* court concluded, "Federal programs that by their nature are and must be uniform in character throughout the nation necessitate the formulation of federal rules of decision. CERCLA

a joint tortfeasor on the right of other tortfeasors to contribution, one federal district court concluded, "This is an issue on which a uniform federal rule should be adopted so that consistent principles of contribution and allocation of damages develop in actions under CERCLA."[89] Application of the numerous diverging allocation methods under state law would result in widely disparate treatment of similarly situated PRPs. Moreover, because contribution is treated by courts as distinct from an action for cost recovery by the government, application of state rules might encourage forum shopping whereas a uniform rule would not.

Pursuant to the second *Kimbell* inquiry, application of some states' allocation methods might conflict with or frustrate objectives of CERCLA's programs. For example, Utah's Liability Reform Act of 1986 is in conflict with CERCLA's liability scheme.[90] Under the Utah Act, an allocation of fault, which includes strict liability, is made for all actors, present or not, and judgment is entered against each party defendant based on its allocation.[91] CERCLA, on the other hand, provides for contribution and allocation of costs based on equitable factors.[92] This allocation is broader than a pure fault evaluation. Thus, statutes like Utah's, which allocate nonparties' fault to plaintiffs, may violate CERCLA's policy of achieving an equitable apportionment of the responsibility through contribution.[93]

The third *Kimbell* test is whether a uniform federal rule would

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is such a federal program." 572 F. Supp. at 809 (citations omitted). The court noted the danger of adopting a non-uniform rule: "A liability standard which varies in the different forum states would undermine the policies of the statute by encouraging illegal dumping in states with lax liability laws." *Id.* (quoting 126 CONG. REC. H11,787 (daily. ed. Dec. 3, 1980)(statement of Rep. Florio)).

89. Lyncott Corp. v. Chemical Waste Mgt., Inc., 690 F. Supp. 1409, 1417 (E.D. Pa. 1988).

90. *See* UTAH CODE ANN. § 78-27-37-43 (1987); Stephens v. Henderson, 741 P.2d 952, 953 (Utah 1987).

91. *See id.* § 78-27-40 (1987). The term "fault" is defined in the Code to mean

> any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

Id. § 78-34-37(2).

92. *See* 42 U.S.C.A. § 9613(f) (West Supp. 1992).

93. Several courts have simply fashioned a uniform federal rule based on CERCLA policies without addressing the intervening arguments. *See* Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1118 (N.D. Ill. 1988); United States v. Conservation Chem. Co., 628 F. Supp. 391, 402 (W.D. Mo. 1985); Colorado v. Asarco, Inc., 608 F. Supp. 1484, 1490 (D. Colo. 1985).

disrupt existing commercial relationships predicated on state law. Under the rule advocated in this article, certain groups of PRPs could be considered as one person for the purposes of allocation of responsibility. One such group is PRPs who have allocated costs between themselves by contract. Even assuming these agreements are interpreted under state law, a uniform rule regarding nonparties' responsibility would not disrupt such relationships. On balance, a uniform federal rule for allocating nonparties' responsibility should be fashioned.

V.

SOURCES OF FEDERAL COMMON LAW FOR ALLOCATION OF RESPONSE COSTS

Ignoring for a moment the impact of nonparties' responsibility, two important and related issues remain. First, although CERCLA provides that allocation may be made on the basis of equitable factors, is there a proper method of apportionment? Second, assuming a methodology, what factors are important to allocation?

Allocation Methodology

In general, a uniform rule for allocation in a cost-recovery action may encompass three possible methods: (1) allocation by equal shares;[94] (2) allocation by comparative fault;[95] and (3) allocation by

94. The concept of equal shares, or pro rata shares, in contribution actions originates from the Restatement (Second) of Torts. Section 886A provides a right of contribution to a tortfeasor who is jointly and severally liable and has paid more than its equitable share of the common liability. *See* RESTATEMENT (SECOND) OF TORTS § 886A (1979). It imposes the limitation that "[n]o tortfeasor can be required to make contribution beyond his own equitable share of the liability." *Id.* Equitable shares can be apportioned under the Restatement in one of two ways: in equal shares, called pro rata shares, or in comparative fault shares. *See id.* § 886A cmt. h. Allocation by equal shares is also recommended in the Uniform Contribution Among Tortfeasors Act (UCATA), 12 U.L.A. 57 (1975). Under the UCATA, a joint tortfeasor that has paid more than its pro rata share has a right to contribution from other joint tortfeasors. *See* Uniform Contribution Among Tortfeasors Act § 1, 12 U.L.A. 63 (1975). "In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires[,] the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply." *Id.* § 2, 12 U.L.A. at 87. Under pro rata apportionment, then, costs are divided equally among all party joint tortfeasors.

95. Both the Restatement (Second) of Torts and the Uniform Comparative Fault Act (UCFA) provide for allocation in a contribution action based on comparative fault. Section 886A of the Restatement allows equitable shares for contribution purposes to be apportioned by comparative fault. *See* RESTATEMENT (SECOND) OF TORTS § 886A cmt. h. Similarly, under the UCFA, damages are apportioned "according to the proportionate fault of the parties." *See* Uniform Comparative Fault Act § 1 cmt., 12

factors.[96] These have been discussed at length by other commentators,[97] most of whom conclude that some form of comparative fault is the best solution. Due to the discretion that Congress provided courts under section 113(f) (i.e., "the court *may* allocate response costs . . . using such equitable factors *as the court determines* are appropriate"[98]) however, the source of law for allocation is not critical, provided the ultimate apportionment is equitable. Courts that have confronted allocation, look to certain factors and to the equities of the case, not necessarily to a particular methodology. The next section lists several common factors used by courts.

U.L.A. 44 (Supp. 1992). Moreover, when allocating liability, "the court may determine that two or more persons are to be treated as a single party." *Id.* § 2(a)(2), 12 U.L.A. at 45. Fault under the UCFA includes strict tort liability. *See id.* § 1(b), 12 U.L.A. at 44. The UCFA is a general tort damage allocation act and therefore is not limited to contribution actions. In this respect, it provides that any fault attributed to the claimant "diminishes proportionately the amount awarded as compensatory damages," *id.* at § 1(a), 12 U.L.A. at 44, and after allocation, "[t]he court shall . . . enter judgment against each party liable on the basis of rules of joint-and-several liability." *Id.* at § 2(c), 12 U.L.A. at 49. This joint and several liability provision is contrary to CERCLA's mandate that courts apportion by factors, and therefore should be inapplicable to contribution actions and PRP cost-recovery actions. *See supra* notes 39-49 and accompanying text (majority of courts have rejected joint and several liability in contribution or contribution-type actions).

96. Shares by factors originated as a proposed alternative to joint and several liability in the House of Representatives when CERCLA was being considered. Then-Representative Albert Gore, Jr., of Tennessee introduced six factors that he thought a court should consider in allocating liability to CERCLA defendants: (1) ability of the parties to distinguish their contribution; (2) amount of the hazardous waste; (3) degree of toxicity; (4) degree of involvement in generation, transportation, treatment, storage or disposal; (5) degree of care; and (6) degree of cooperation with federal and state officials. *See* 126 CONG. REC. 26,781 (1980). Congress did not adopt Gore's suggestion in the original enactment of CERCLA. But during SARA's consideration, the House Judiciary Committee Report suggested that the Gore factors would be relevant criteria for allocating costs under the contribution provision. *See* H.R. REP. No. 253(iii), 99th Cong., 1st Sess. 19 (1985), *reprinted in* 1986 U.S.C.C.A.N 3038, 3042.

97. Carroll E. Dubec & William D. Evans, Jr., *Recent Developments Under CERCLA: Toward a More Equitable Distribution of Liability*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,197, 10,200-02 (June 1987); Barry L. Malter & Jerome C. Muys, *Private Cost Recovery and Contribution Actions under CERCLA*, 10 ALI-ABA COURSE MATERIALS J. 27 No. 1 (1985); Thomas C.L. Roberts, *Allocation of Liability Under CERCLA: A "Carrot and Stick" Formula*, 14 ECOLOGY L.Q. 601 (1987); Kristian E. Anderson, Note, *The Right to Contribution for Response Costs Under CERCLA*, 60 NOTRE DAME L. REV. 345 (1985); Steven Baird Russo, Note, *Contribution Under CERCLA: Judicial Treatment After SARA*, 14 COLUM. J. ENVTL. L. 267, 276-78 (1989); Ellen J. Garber, Comment, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 ECOLOGY. L.Q. 365, 374-76 (1987); Dale Guariglia, Comment, *Apportionment and Contribution Under the "Superfund" Act*, 53 U.M.K.C. L. REV. 594, 615-22 (1985); Developments, *Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1535-39 (1986).

98. 43 U.S.C.A. § 9613(f)(1) (West Supp. 1992) (emphasis added).

Factors Used in Allocating Costs Among PRPs

Section 113(f) provides that a court may allocate costs using such equitable factors as it determines are appropriate.[99] Courts have used the following equitable factors:

1. The ability of the parties to demonstrate that their contribution can be distinguished.
2. The amount of hazardous waste.
3. The degree of toxicity of the hazardous waste.
4. The degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste.
5. The degree of care exercised by the parties.
6. The degree of cooperation by the parties with local, state and federal government officials.
7. The circumstances and conditions involved in the property's conveyance, including the price paid and discounts granted.
8. The site owners' relative degree of responsibility.[100]

These factors represent only a starting point, however, as any fact concerning the responsibility of a party can be relevant. Of course, not all factors are applicable in all cases. In suits between generators, only the first six may be relevant. In suits between owners, only the last four may be relevant. In suits between owners, operators, and generators, all may be relevant.[101] A survey of cases that resulted in the above list follows. It is intended to provide a sense of how courts allocate responsibility between different types of PRPs.

Equitable Factors Derived from Case Law

In *United States v. Laskin*,[102] the District Court for the Northern District of Ohio considered the effect of a consent decree on non-settling defendants. The non-settlers argued that the consent decree would increase their potential share of the damages.[103] The court disagreed and presented its methodology for apportioning future liability:

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99. *See* 42 U.S.C. § 9613(f)(1) (Supp. 1990).

100. *See e.g.*, Gore factors, *supra* note 96, and Russo, *supra* note 97, at 278, n.61.

101. Several courts have allocated response costs between owners/operators and generators. *See, e.g.*, United States v. Northernaire Plating Co., 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,200 (W.D. Mich. 1989)(costs allocated two-thirds to generators and one-third to owner); Amoco Oil Co. v. Dingwell, 690 F. Supp. 78 (D. Me. 1988)(consent decree between plaintiff generators and defendant owner/operator allocating sixty-five percent of costs to owner/operator was fair); BCW Associates, Ltd. v. Occidental Chem. Corp., No. 86-5947, 1988 U.S. Dist. LEXIS 11275 (E.D. Pa. Sept. 30, 1988)(costs allocated two-thirds to plaintiff owners/operators and one-third to defendant generator).

102. No. C84-2035Y, 1989 WL 140230 (N.D. Ohio Feb. 27, 1989).

103. *See id.* at *6.

> [I]t is clear that whatever method is utilized it must take into account a disparate group of liable parties, i.e. owners/operators, prior owners/operators, generators and transporters. Furthermore, the relative fault of liable parties within each group will depend upon the factual circumstances. Thus, . . . different factors such as volume, toxicity, migratory potential, etc., come into play in assessing the culpability of each party. Thus, if these varying factors are to be given effect, the apportionment must be made upon the basis of some variation of comparative fault doctrine.[104]

The *Laskin* court would "not tolerate either a 'windfall' or a 'wipeout' which results in an apportionment of responsibility which arbitrarily or unreasonably ignores the comparative fault of the parties, where there is a reasonable basis for allowing that comparison to be made."[105]

The District Court for the Western District of Michigan, in *United States v. Northernaire Plating Co.*,[106] addressed the allocation issue in the context of cross-claims for contribution by parties held jointly and severally liable to the government. The claims were made by two generators against an owner. The court cited six factors as useful for allocation: (1) the ability of the parties to demonstrate that their contribution can be distinguished; (2) the amount of hazardous waste; (3) the degree of toxicity of the hazardous waste; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties; and (6) the degree of cooperation by the parties with local, state and federal government officials.[107] These six factors are commonly known as the "Gore factors" after then-Representative Albert Gore, Jr., of Tennessee, who introduced them as an alternative to joint and several liability during the initial promulgation of CERCLA.[108] The *Northernaire* court allocated the removal costs one-third to the

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104. *Id.* (quoting United States v. Conservation Chem. Co., 628 F. Supp. 391, 401 (W.D. Mo. 1985)).

105. *Id.*

106. 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,200 (W.D. Mich. 1989).

107. *See id.* (citing H.R. REP. No. 253, 99th Cong., 1st Sess. 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3024).

108. *See* 126 CONG. REC. 26,781 (1980); *see also supra* note 96. Several courts have cited the Gore factors as useful equitable factors when allocating costs in contribution. *See Northernaire*, 20 Envtl. L. Rep. (Envtl. L. Inst.) at 20,200; Lone Star Indus., Inc. v. Horman Family Trust, No. 89-C-957G (D. Utah May 31, 1990)(mem.), *rev'd on other grounds*, 960 F.2d 917 (10th Cir. 1992); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989), *modified on other grounds*, No. 88-2860, 1990 U.S. App. LEXIS 1380 (5th Cir. Jan. 23, 1990); Amoco Oil Co. v. Dingwell, 690 F. Supp. 78 (D. Me. 1988).

owner and two-thirds to the generators collectively.[109] The court considered important for purposes of allocation the facts that the owner was responsible under CERCLA as a landowner, was aware of the electroplating conducted at the site, failed to construct or maintain an adequate sewer, failed to notify the tenant generators that the sewer was inadequate, and failed to cooperate with the EPA in the investigation and cleanup. With respect to the generators, the court considered that they had carelessly and negligently left substantial amounts of contaminated wastes, produced substantially toxic and hazardous substances, were the sole generators of the wastes, took no action to correct the problem, and were wholly uncooperative with the federal and state officials.[110]

In *Amoco Oil Co. v. Dingwell*,[111] the United States District Court for the District of Maine considered the fairness of cost allocation within a settlement between plaintiff generators and defendant operator. The court cited the Gore factors as criteria relevant to determining whether the apportionment of damages was fair.[112] Specifically, the court found that "[i]n a dispute between waste generators and a site operator, the last three factors [degree of involvement, degree of care, and degree of cooperation] . . . are most important for the Court's consideration."[113] Applying these three factors, the *Amoco* court first found that the degree of involvement was equally proportionate among the parties: the generators were involved in the generation and transportation of the waste and the operator was involved in the storage and disposal of the waste.[114] Second, the court found that the degree of care factor weighed heavily in favor of the generators: the generators hired the operator to clean the storage tanks and dispose of the waste and the operator failed to do so.[115] The third factor, degree of cooperation, also weighed in the generators' favor: the generators cooperated with federal and state officials and put up millions of dollars to finance the initial phase of the remedial action, whereas the operator did not actively cooperate in the cleanup effort.[116] The *Amoco* court held that the consent decree holding the operator liable for sixty-

109. *See Northernaire*, 20 Envtl. L. Rep. (Envtl. L. Inst.) at 20,201.

110. *Id.* at 20,200-01.

111. 690 F. Supp. 78 (D. Me. 1988).

112. *Id.* at 86.

113. *Id.* (citing United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984)).

114. *Id.*

115. *Id.*

116. *Id.*

five percent of the generators' costs was a fair allocation.[117]

In *Amoco Oil Co. v. Borden, Inc.*,[118] the Court of Appeals for the Fifth Circuit addressed in dicta the apportionment of response costs under a CERCLA contribution action between liable parties. The *Borden* court asserted that in such an action, "a court has considerable latitude in determining each party's equitable share."[119] Additionally, relevant factors that a court should consider in apportioning response costs include the six Gore factors and "the circumstances and conditions involved in the property's conveyance, including the price paid and discounts granted . . . ."[120]

The Court of Appeals for the Third Circuit, in *Smith Land & Improvement Corp. v. Celotex Corp.*,[121] held, in part, that the doctrine of caveat emptor is not a complete defense to contribution, but may be considered in mitigation of the amount due.[122] Two other equitable considerations that the court cited for adjusting the amount of contribution between a current and former owner were the amount of the discount in the price of the property and the cost of response activities.[123]

In *United States v. Monsanto Co.*,[124] the Court of Appeals for the Fourth Circuit held that a site owner's relative degree of fault would be relevant in an action for contribution but failed to discuss exactly what fault entailed.[125] The *Monsanto* court cited one other Gore factor that would be relevant for apportionment: "the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of hazardous substances."[126]

The District Court for the Eastern District of Pennsylvania apportioned the shares of response costs incurred by plaintiffs by assigning two-thirds to the plaintiffs, the owner and operator of a warehouse, and one-third to the defendant, the generator of lead dust, in *BCW Associates, Ltd. v. Occidental Chemical Corp.*[127] Fire-

117. *Id.* at 87.

118. 889 F.2d 664 (5th Cir. 1989), *modified on other grounds*, No. 88-2860, 1990 U.S. App. LEXIS 1380 (5th Cir. Jan. 23, 1990).

119. *Id.* at 672.

120. *Id.* at 672-73 (citing H.R. REP No. 253, 99th Cong., 1st Sess., pt. 3, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042).

121. 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

122. *Id.* at 90.

123. *Id.*

124. 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

125. *Id.* at 168 n.13.

126. *Id.* (citing H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 3, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042).

127. No. 86-5947, 1988 U.S. Dist. LEXIS 11,275 (E.D. Pa. Sept. 30, 1988).

stone Tire and Rubber Company had conducted grinding operations to remove lead paint from tires in a warehouse then owned by Occidental Chemical Corporation. BCW Associates, Ltd., purchased the warehouse from Occidental and later leased it to Knoll International, Inc., which stored furniture in the warehouse, thereby disturbing the lead dust Firestone had left there. The court found the two plaintiffs, BCW and Knoll, liable as an owner and an operator respectively. It held defendant Firestone liable as a generator.[128] The court did not find the former owner, Occidental, to be subject to apportionment of responsibility.[129]

The *BCW* court considered many facts relevant to its apportionment of shares of response costs among the three parties. As to the current owner, the court considered the following: BCW purchased the warehouse from Occidental "as is"; BCW was aware it was purchasing a dusty, old warehouse; the purchase price negotiated by BCW reflected acceptance of the risk that something might be wrong with the warehouse; BCW chose not to exact an indemnification clause from Occidental; BCW retained two engineering firms to inspect the warehouse and neither detected the hazardous dust; BCW initiated cleanup of the warehouse, in part because Knoll, BCW's lessee, threatened to vacate and enforce an indemnification clause; and BCW received a substantial economic benefit from the cleanup in the form of increased land value over the cost it originally paid Occidental.[130] Among the facts the court considered relevant in apportioning operator Knoll's response costs were the following: Knoll knew that it had leased a dusty, old warehouse and was suspicious of its environmental condition; Knoll declined to investigate the warehouse's condition to any great extent; Knoll's activities were the cause of the threatened release of the lead dust; Knoll overreacted to the lead dust to an extent beyond necessary costs; Knoll received an economic benefit from the cleanup in the form of an increase in the value of its lease; and the cleanup satisfied Knoll's CERCLA and OSHA responsibilities.[131] The court considered the following to be relevant to generator Firestone's allocated share: Firestone's tire-grinding operations were the source of the lead dust; Firestone's housekeeping practices were poor; Firestone was not overly concerned about the health risk imposed by the dust; Firestone obtained no economic benefit from the cleanup; and Fire-

128. *See id.* at *61.
129. *Id.*
130. *Id.* at *28-*30.
131. *Id.*

stone was twice-removed from the current ownership of the warehouse.[132] The following facts exonerated former owner Occidental from cost apportionment: Occidental was once-removed from the ownership of the warehouse; Occidental received only minimal benefit from the cleanup; Occidental did not generate the lead dust; Occidental did not cause or contribute to the threatened release of the dust; Occidental's housekeeping practices were commendable; and Occidental's activities in the warehouse after the warehouse was purchased by BCW were minimal.[133]

In *United States v. Tyson*,[134] the District Court for the Eastern District of Pennsylvania held General Devices Inc., an owner of a hazardous waste dump at the time of disposal, liable for fifty percent of the response costs incurred or to be incurred by generators under CERCLA's contribution provision. Pursuant to section 113(f), the *Tyson* court apportioned General Devices' share of the response costs using an equitable factor analysis.[135] The following facts were relevant to apportionment: General Devices acquired fifty-one percent of the stock and actively participated in the management of the company that owned the lagoons at the time of waste disposal; General Devices knew or should have known that the lagoons were being used as a repository of industrial and sewage waste; General Devices did nothing to stop the dumping which it should have known was in violation of state law; General Devices owned entirely the lagoons from the date the dumping ceased; General Devices hired a disposal company with no expertise in industrial waste and which failed to clean the site fully; General Devices took no steps to remove the contaminated soils after the lagoons were filled with dirt; and General Devices did not apply for a permit from the state to store the hazardous substances.[136]

The *Tyson* court rejected General Devices' argument that its passivity should weigh in its favor.[137] The court concluded that during the twenty years that General Devices was involved with the lagoons, it knowingly allowed hazardous substances to leach into the groundwater and aquifer, did not notify regulators of the presence of the hazardous substances, neglected to protect the public, and refused to cooperate with federal and state government

132. *Id.* at *28-*31.
133. *Id.* at *31.
134. No. 84-2663, 1989 U.S. Dist. LEXIS 15761 (E.D. Pa. Dec. 29, 1989).
135. *Id.* at *26.
136. *Id.* at *32-*36.
137. *Id.* at *36-*37.

officials.[138]

In *Chemical Waste Management, Inc. v. Armstrong World Industries, Inc.*,[139] an operator of a hazardous waste and chemical disposal facility sought recovery of its response costs from generators of hazardous waste. The District Court for the Eastern District of Pennsylvania held that an operator of a facility where waste has been deposited may maintain an action against the generators of the waste for the recovery of response costs.[140] Responding to the generators' argument that the operator would unjustly benefit from complete recovery, the court noted that it was not adjudicating the degree of recovery, which would depend on many factors, such as the operator's failure to comply with the Resource Conservation and Recovery Act (RCRA).[141] The court also cited three of the six Gore factors to consider when apportioning costs: the operator's relative fault; the volume of waste deposited; and the relative toxicity of such waste.[142]

Finally, the District Court for the District of Minnesota, in *FMC Corp. v. Northern Pump Co.*,[143] held that a former owner of a hazardous waste site was not liable to the present owner for its subsidiary's disposal of hazardous wastes. The court refused to apportion any costs to the former owner, although it was potentially liable under CERCLA.[144] The court predicated its holding on three findings: the former owner's potential liability was based on its subsidiary's disposal of hazardous waste before the property was sold to the current owner; the current owner released the former owner from liability by agreement, including liability based on future causes of action under CERCLA; and the former owner did not dispose of hazardous waste at the site and its subsidiary's waste disposal could not legally be imputed to it.[145] The *FMC* court's order subsequently was vacated by the Eighth Circuit after the parties agreed to dismiss their appeal.[146] The merits of the lower court's opinion, however, may continue to be relevant.

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138. *Id.* at *37.

139. 669 F. Supp. 1285 (E.D. Pa. 1987).

140. *Id.* at 1292.

141. *Id.*

142. *Id.* at 1292 n.10.

143. 668 F. Supp. 1285 (D. Minn. 1987), *vacated*, 871 F.2d 1091 (8th Cir. 1988).

144. *Id.* at 1290.

145. *Id.* at 1290-91.

146. *See* FMC Corp. v. Northern Pump Co., 871 F.2d 1091 (8th Cir. 1988).

VI.

UNIFORM RULE FOR NONPARTIES' RESPONSIBILITY[147]

Assuming that in a PRP cost recovery action a court will allocate costs using certain equitable factors, the remaining issue is who should bear the cost of orphan shares of responsibility. The advantage to defendant PRPs of including nonparties' responsibility in the allocation is obvious: The defendants' liability for costs will be diminished. The argument that a PRP should only be liable for its own fault is appealing. As this section will show, however, the policies and logistics of CERCLA allocation require that nonparties' responsibility be apportioned among all PRPs—including plaintiffs and defendants—who are present and solvent.

Because CERCLA does not answer the question of how to allocate nonparties' responsibility, federal common law must fill the gap. As previously discussed, courts should adopt a uniform rule consistent with CERCLA's liability scheme and policies.[148] This section presents several sources of common law that courts may use to develop such a rule. Where applicable, each is evaluated with respect to CERCLA. The section concludes that in an action seeking cost recovery from other PRPs by a PRP who has cleaned up a waste site, a court should adopt the Uniform Comparative Fault Act's (UCFA) approach that ignores nonparties' responsibility and allocates response costs among only those parties who are solvent and before the court.

Effect of Settlement

CERCLA's language lends some insight into the issue of nonparties' responsibility. Section 113 provides that a settlement between a PRP and the United States or a State "reduces the potential liability of the [other potentially liable persons] by the amount of the settlement."[149] The policy of encouraging settlement drives this provision. The percentage of fault of parties who have settled is never determined, because only the amount of the settlement is of concern. Nonsettling PRPs bear the risk that the fault of a PRP

147. The arguments in this section refer to allocation in a PRP cost recovery action. But because this type of action essentially is seen as one for contribution, the same arguments apply to allocation in a contribution action.

148. *See supra* notes 74-93 and accompanying text. Legislative history and case law acknowledge that Congress intended courts to fill in interstices of CERCLA through the creation of federal common law. *See* United States v. Chem-Dyne Corp., 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,986, 20,987-88 (S.D. Ohio 1983); Lyncott Corp v. Chemical Waste Mgt., Inc., 690 F. Supp. 1409, 1417 (E.D. Pa. 1988).

149. 42 U.S.C.A. § 9613(f)(2) (West Supp. 1992).

who settles will be less than that PRP's share of the liability. Not only does this illustrate Congress' intent that nonsettling parties bear the expense of orphan shares, it also suggests an intent that courts should not be concerned with determining the shares of actors who are not parties to the litigation.

On the other hand, courts have recognized a different rule for settlements between PRPs. At least two courts have held that, in settlements between private PRPs, the plaintiff's claim is reduced by the amount of the settling PRP's fault rather than the amount of the settlement. In *Lyncott Corp. v. Chemical Waste Mgt., Inc.*,[150] the court adopted the UCFA's approach to settlements between private PRPs, holding that, in a contribution claim, a released PRP's equitable share is to be attributed to the plaintiff.[151] The same approach was adopted in *Edward Hines Lumber Co. v. Vulcan Materials Co.*[152] Thus, some courts seem willing to determine a settling party's share and to protect nonsettling defendants from paying a portion of that settling party's share in a PRP cost recovery action.

The difference between these rules governing settlement is probably brought about by a shift in policy once the government is paid. One of the primary goals of CERCLA is to preserve the Superfund. A contribution rule that reduces the plaintiff's claim by the amount of settlement leaves the burden of orphan shares on nonsettlers. This rule is applied to settlements between the government and PRPs to ensure that the government obtains full recovery. But once the government is no longer a party, the need to protect the Superfund disappears. At that point, courts may more equitably allocate the costs among remaining PRPs. Equitable allocation includes imposing the burden of an insufficient settlement on the plaintiff PRP. This makes sense, as a plaintiff should bear the risk that the party with which it negotiated a settlement might be responsible for a larger portion of the costs. The question remains, however, whether responsibility of parties plaintiff has not or cannot negotiate with should be considered in the allocation of response costs.[153]

150. 690 F. Supp. 1409 (E.D. Pa. 1988).

151. *See id.* at 1418.

152. No. 85 C 1142, 1987 WL 27,368 (N.D. Ill. Dec. 4, 1987). The *Edward Hines* court held that in settlements between private PRPs, a nonsettling defendant is allowed to offset its liability by an amount proportionate to the settling defendant's responsibility. *Id.*

153. A court should not reallocate costs among PRPs that have made their allocation a matter of contract. In Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 1458 (N.D. Cal. 1989), the court dismissed a CERCLA contribution action by a vendor of property who

Case Law

Without expressly addressing the issue, two courts have allocated the total response costs among only those PRPs before the court, even though other potentially responsible parties existed. In *Amoco Oil Co. v. Dingwell*,[154] the court granted a consent judgment in the plaintiffs' favor, enforcing a settlement agreement between the plaintiff generators and the defendant operator, which allocated the plaintiff's response costs sixty-five percent to the operator and thirty-five percent to the generators. The *Amoco* court evaluated the agreement using an equitable factors analysis as prescribed in section 113(f) and found it to be fair.[155] The court considered three factors—degree of involvement, degree of care, and degree of cooperation—only insofar as they applied to the parties to the agreement, notwithstanding that EPA had identified other persons as potentially responsible.[156] In fact, the court expressly left open the question whether the terms of the settlement agreement should be binding on third persons not joined in the action.[157]

In *United States v. Northernaire Plating Co.*,[158] the court allocated the shares of the United States' response costs one-third to an owner and two-thirds to two generators. The court applied an equitable factors analysis in allocating shares of the costs.[159] Another entity, Top Locker Enterprises, Inc., had purchased the assets of one of the two generators after that generator had abandoned the site and two years prior to EPA's cleanup.[160] As a condition of the sale, Top Locker was to assume the responsibility of disposing of the toxicants left at the site.[161] Top Locker, however, went bankrupt and vacated the premises without removing the hazardous wastes.[162] Notwithstanding Top Locker's involvement, its responsi-

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incurred response costs against a purchaser and subsequent purchasers. The cause of action for contribution was dismissed because, in the various sales of the property, all the parties had contemplated and made cleanup costs a matter of contract and because a state court contract action was pending. *Id.* The court reasoned that the negotiated rights of the parties should outweigh the federal statutory right of contribution. *Id.* Similarly, a PRP group's allocation of costs among themselves by contract should render a court's reallocation needless.

154. 690 F. Supp. 78 (D. Me. 1988).

155. *See id.* at 86.

156. *See id.*

157. *See id.* at 87.

158. 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,200 (W.D. Mich. 1989).

159. *Id.* at 20,200-01.

160. *Id.* at 20,201.

161. *Id.*

162. *Id.*

bility was not considered in the court's allocation of the entire response costs among the remaining three parties.[163]

Analogy to Maritime Law

Like CERCLA, maritime law is supplemented by federal common law.[164] The concepts of comparative negligence and strict liability are combined.[165] In *Edmonds v. Compagnie Generale Transatlantique*,[166] the United States Supreme Court held that a plaintiff longshoreman was entitled to recover his total damages less his proportion of fault from the defendant shipowner without a reduction for the nonparty employer's fault.[167] The court found the imposition of a nonparty's fault on a defendant to be "in accord with the common law rule which allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the inci-

163. *Id.* The nearest CERCLA cases have come to resolving whether nonparties are subject to allocation of fault is in resolving whether a dissolved corporation can be liable under CERCLA. As might be expected, CERCLA itself is silent on the liability of dissolved corporations. *See* United States v. Distler, 741 F. Supp. 643, 645 (W.D. Ky. 1990). In Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448 (9th Cir. 1987), the Court of Appeals for the Ninth Circuit held that a corporation which had been dissolved nine years before CERCLA's enactment and twelve years before the plaintiff incurred cleanup costs could not be sued for contribution. *Id.* at 1450-51. The court relied on California law to determine that corporations lacked capacity to be sued once dissolved. *Id.* at 1450. This result has been approved by at least two district courts, but the state law approach has been rejected. In United States v. Sharon Steel Corp., 681 F. Supp. 1492 (D. Utah 1987), the District Court for the District of Utah held that a corporation that was dissolved but still in the process of winding up its affairs was liable under CERCLA. *Id.* at 1497-98. The court reasoned that CERCLA's liability provisions preempted state law capacity statutes, which would have prevented suit against a dissolved corporation. *Id.* The *Sharon Steel* court rejected the distinction between capacity to be sued and liability: "Every statute limiting liability defines, at least in part, one's capacity to be sued." *Id.* at 1497. Because a state capacity statute would limit the liability of a party otherwise liable under CERCLA, the court concluded that Congress must have intended to preempt that statute. *Id.* at 1498. This reasoning was followed in *Distler*, 741 F. Supp. at 645, There, the District Court for the Western District of Kentucky determined that the liability of a dissolved corporation should be based on a national, uniform rule. *Id.* at 646. The court concluded that, although there was abundant authority for CERCLA's retroactive application, "there is no precedent for imposing liability on a dissolved corporation nine years after it has wound down and distributed its assets." *Id.* at 647.

164. *See* Texas Industries v. Radcliff Materials, 451 U.S. 630, 642 (1981).

165. *See* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 258 n.2, 260 (1979).

166. 443 U.S. 256 (1979).

167. *Id.* at 260.

dent."[168] In *Edmonds*, the maritime rule that a plaintiff may recover its total damages less only its proportion of fault furthered two policies: (1) that the nonparty employer's fault should not be borne by the longshoreman and (2) that a court should not change what Congress understood to be law and refused itself to modify.[169] An argument against application of the maritime rule to CERCLA allocation is that the *Edmonds* Court was following a strong policy of providing a primarily defenseless longshoreman his full recovery against a deep-pocket shipowner. An analogous policy is not typically present in CERCLA contribution actions. Also, adopting this rule would impose the burden of orphan shares on the defendants

168. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 433A, 875, 879 (1965 & 1979)).

169. *See id.* at 270, 273. The Texas Supreme Court adopted the maritime rule of recovery for strict products liability in Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984). Under the court's "comparative apportionment system," a plaintiff's damages are reduced by the percentage of causation attributed to it as compared with all others whose actions or products combined to cause the plaintiff's injuries. *See id.* at 428-29. "Additionally, each defendant found to have been a cause of the plaintiff's injuries shall be jointly and severally liable for the entire amount that the plaintiff is entitled to recover, subject to a right of contribution for payments in excess of the defendant's percentage share." *Id.* at 429. This rule was meant to further "the fundamental policy of tort law to compensate those who are injured." *Id.* Other factors cited by the court were that the defendant's conduct endangered the plaintiff while the plaintiff's conduct only endangered himself; the plaintiff sought recovery for physical injury while the defendants sought economic recovery; and a solvent manufacturer is better able to spread the loss than is a plaintiff. *See id.*

Congress adopted a rule similar to the maritime rule in the Federal Employers' Liability Act (FELA). FELA provides a comparative negligence rule of recovery. *See* United States v. Western Processing Co., 19 Chemical Waste Lit. Rep. 1383, 1390 (W.D. Wash. 1990).

> Contributory negligence; diminution of damages
>
> In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages *for personal injuries to any employee*, or where such injuries have resulted in his death, the fact that the employee may have been guilty of *contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 53 (1986)(emphasis added). The adoption of this rule shows Congress' willingness to approve a comparative fault type recovery where policy necessitates full recovery to a plaintiff. Assuring PRPs who voluntarily clean up hazardous waste sites recovery of response costs less only their portion of fault would certainly encourage PRP cleanup, but may unfairly favor plaintiff PRPs over defendant PRPs. The voluntariness of cleanup can be taken into account in allocating responsibility among the parties before the court.

alone, a result that may be inequitable and therefore contradictory to what PRP cost recovery contemplates.

In some cases, such a rule would be equitable. The maritime rule might result in an equitable allocation if, for example, a plaintiff PRP had very little responsibility, cooperated wholeheartedly, and expended large amount of funds to clean up the environment, while, in contrast, the PRP defendants were primarily responsible, were uncooperative, and polluted without regard for the environment. Note that if the plaintiff is not a PRP, joint and several liability usually is applied, shifting the entire cost, including the orphan shares, to defendants. This mirrors the equities behind the maritime rule.

Uniform Laws

Two other possible sources for federal common law regarding the impact of nonparties on the allocation of costs are the Restatement (Second) of Torts and the UCFA.

The Restatement

Section 886A of the Restatement provides a right of contribution to a tortfeasor who is jointly and severally liable and has paid more than its equitable share of the common liability.[170] It imposes the

170. *See* RESTATEMENT (SECOND) OF TORTS § 886A (1979). At least three courts have considered the Restatement's approach to contribution. In Lone Star Industries, Inc. v. Horman Family Trust, No. 89-C-957G, 1990 U.S. Dist. LEXIS 19287 (D. Utah May 31, 1990) (mem.), *rev'd on other grounds*, 960 F.2d 917 (10th Cir. 1992), the district court considered the application of the Restatement to an indemnity claim by landowners against a waste generator. Plaintiff generator sued the defendant landowners for response costs it incurred in performing a Remedial Investigation Study pursuant to a consent decree. The landowners had consented to the deposit of certain materials without knowledge of their hazardous propensities. The landowners, relying solely on the Restatement, argued that the generator was an indemnitor who "supplied a defective chattel or performed defective work upon land or buildings as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect." No. 89-C-9576, 1990 U.S. Dist. LEXIS 19,287, at *24 (quoting RESTATEMENT (SECOND) OF TORTS § 886B(2)(d) (1979)). The court disagreed with this "standard of cost allocation," finding CERCLA requires instead that courts allocate response costs "using such equitable factors as the court determines are appropriate." *Id.* (quoting 42 U.S.C. § 9613(f)(1)). The court concluded that "[t]he Restatement's formula for indemnity or contribution is a different test entirely, and has no application in the face of clear statutory provisions to the contrary." *Id.*

This case shows a court's reluctance to adopt an allocation method which does not allow the consideration of equitable factors. The Restatement's indemnity allocation is an all-or-nothing rule, whereas CERCLA's allocation may result in any level of division. Yet, apart from indemnity, the Restatement allows the court to select either a pro rata or a comparative fault rule for allocating "equitable shares." Allocating costs

limitation that "[n]o tortfeasor can be required to make contribution beyond his own equitable share of the liability."[171] According to the Restatement, equitable shares can be apportioned in one of two ways: by equal shares, called pro rata shares, or by comparative fault shares.[172] Regardless of the method of apportionment, however, the Restatement provides that "[i]n determining equitable shares of the obligation, it seems wise, particularly in comparative-negligence states, to confine the determination to parties to the action rather than to attempt to calculate the equitable shares for alleged tortfeasors who are not parties and not bound by the decisions."[173] To fill the gap, a separate contribution action against a tortfeasor who was not a party to the original action is available.[174]

The Restatement's allocation rule which ignores nonparties' responsibility is arguably consistent with CERCLA provisions and policies. CERCLA's provisions require simply that courts allocate costs based on equitable factors. The Restatement allows allocation based on comparative fault and limits a party's contribution to its equitable share of the entire liability without reduction for the responsibility of nonparties. It also allows subsequent contribution

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based on comparative fault arguably would allow the consideration of equitable factors, thus making the Restatement's rule consistent with CERCLA's requirements. On the other hand, the court wrote that "[t]he Restatement's formula for indemnity *or contribution* is a different test entirely," suggesting that CERCLA's "clear statutory provisions" requiring allocation by equitable factors leave no room for allocation based on pro rata shares or comparative fault. *Id.* (emphasis added). The court, however, did not address contribution issues other than indemnity. Therefore, its rejection of the Restatement's indemnity or contribution allocation cannot be viewed as a rejection of the Restatement's allocation in its entirety.

The other two courts that have considered the Restatement's contribution rules in CERCLA cases have adopted them. In Colorado v. Asarco, Inc., 608 F. Supp. 1484 (D. Colo. 1985), the court held that a right of contribution exists under CERCLA, and the Restatement's rules on contribution, as majority rules, should govern the mechanics. The *Asarco* court found that the Restatement's contribution rules were consistent with CERCLA's statutory joint and several liability scheme and its primary purpose, expeditious cleanup. *Id.* at 1491. The *Asarco* decision, however, occurred before contribution was codified in 1986.

Another court adopted the Restatement's approach to allocation in an action before contribution was codified. In Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913 (N.D. Okla. 1987), the United States District Court for the Northern District of Oklahoma accepted the parties' stipulation that section 886A of the Restatement would govern the mechanics of contribution. *Id.* at 917. The precise manner in which the rules were to apply, however, was premature for decision. *Id.*

171. RESTATEMENT (SECOND) OF TORTS § 886A(2) (1979).

172. *See id.* at § 886A(2) cmt. h.

173. *Id.* at § 886A(2) cmt. i.

174. *Id.* For courts that have considered the Restatement's contribution rules in the CERCLA context, see *supra* note 170 and accompanying text.

actions by parties against nonparties. Assuming that a determination of equitable shares based on comparative fault is equivalent to allocating response costs by court-determined equitable factors, then the Restatement is consistent with CERCLA's allocation provision. The Restatement, however, has no provision for the comparison of strict liability—the liability imposed under CERCLA. Moreover, the Restatement allows allocation based on pro rata or equal shares, which may in some cases be contrary to CERCLA's requirement that costs be allocated by equitable factors.[175]

An argument can be made that the policies of the Restatement's approach to contribution and allocation are consistent with CERCLA's policies. CERCLA's contribution provision seeks to encourage private cleanup, to encourage settlement, and to ensure equitable allocation of costs. Allocating the plaintiff's costs among the parties before the court, as the Restatement directs, would ensure a greater recovery than if the plaintiff had to bear the orphan shares, and thus, would help to encourage voluntary cleanup. Placing nonparties' responsibility on those before the court would encourage joinder, and therefore settlement, by bringing all parties to the bargaining table sooner. Furthermore, allocating orphan shares among all the solvent parties before the court would be more equitable in most cases than forcing one PRP to bear the orphan shares of responsibility. Although the rule of section 886A of the Restatement arguably advances CERCLA's policies, its conflict with CERCLA's strict liability scheme requires its rejection. Fortunately, there is a better rule.

The Uniform Comparative Fault Act

The Uniform Comparative Fault Act creates a right to contribution between two or more persons who are jointly and severally liable for the same injury.[176] The basis for contribution is each

175. This aspect of the Restatement's allocation rule is inconsistent with CERCLA policies. There is no incentive to clean up voluntarily when a plaintiff can recover only a pro rata share from each defendant regardless of that defendant's fault. Also, high-fault PRPs who bear a large proportion of the fault would wait for the court to allocate costs rather than settle with a PRP plaintiff.

176. *See* UNIF. COMPARATIVE FAULT ACT § 4(a), 12 U.L.A. 53 (Supp. 1992). Several courts have adopted portions of the Uniform Comparative Fault Act in resolving CERCLA private cost recovery issues. One court held that "the effect of settlements upon non-settling parties should be determined in accordance with the 1977 Uniform Comparative Fault Act for the reason that the principles of that model act are the most consistent with, and do the most to implement, the Congressional intent which is the foundation for CERCLA." United States v. Laskin, No. C84-2035Y, 1989 WL 140,230 (N.D. Ohio Feb. 27, 1989). In Lyncott Corp. v. Chemical Waste Mgt., Inc., 690 F.

person's equitable share of the obligation, including the share of the claimant.[177] Equitable shares are determined according to the proportionate fault of the parties.[178] The term "fault" is defined to include strict tort liability.[179]

The total fault under the UCFA is to be allocated among each claimant, defendant, third party defendant, and person who has been released from liability by agreement.[180] The trier of fact is to "ignor[e] other persons who may have been at fault with regard to the particular injury but who have not been joined as parties."[181] The reasoning behind limiting allocation of the entire claim to parties to the action is as follows:

> The limitation to parties to the action . . . is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him.[182]

Parties held liable may sue those who were not joined in the original action in a separate contribution action.[183]

Supp. 1409 (E.D. Pa. 1988), the UCFA was also applied in the CERCLA context of what effect a release of one tortfeasor has on the right of another tortfeasor to contribution. The court found that the principles of the UCFA are more consistent with CERCLA than are the principles of the Uniform Contribution Act and the Uniform Contribution Among Tortfeasors Act. *Id.* at 1417-18. Finally, in Edward Hines Lumber Co. v. Vulcan Materials Co., No. 85 C 1142, 1987 WL 27,368 (N.D. Ill. Dec. 4, 1987), the United States District Court for the Northern District of Illinois held that "a consent decree between the plaintiff and a subset of the defendants in a CERCLA action is subject to the Uniform Comparative Fault Act." *Id.* at *2 (citation omitted). The *Edward Hines* court found that this rule would encourage settlements by relieving a settling defendant from any liability to co-defendants and would protect nonsettling defendants "by assuring that their liability will reflect only their responsibility for the cleanup costs, regardless of the amount the settling defendant tendered to plaintiff." *Id.*

177. *See* UNIF. COMPARATIVE FAULT ACT § 4(a), 12 U.L.A. 54 (Supp. 1992).

178. *See id.* § 2. In determining a party's proportion of fault, the nature of the conduct and the extent of the causal relation between the damages and the conduct are to be considered. *Id.* § 2(b).

179. *See id.* § 1. According to the California Supreme Court, to compare fault in strict tort liability is to apportion the loss equitably. *See* Daly v. General Motors Corp., 575 P.2d 1162, 1172 (Cal. 1978).

180. *See* UNIF. COMPARATIVE FAULT ACT § 2(a), 12 U.L.A. 49 (Supp. 1992). The UCFA also permits a court to treat two or more persons as a single party. This may be useful in a CERCLA case where the conduct or interests of two or more parties is so similar that they should be treated as one, leaving the division of their combined fault to them.

181. *Id.* § 2 cmt.

182. *Id.*

183. *See id.* § 5(b), 12 U.L.A. 55 (Supp. 1992). The UCFA provides an example of how the second contribution action would work:

Of the possible sources of federal common law for the purpose of allocation in a contribution action, the UCFA's allocation methods are the most compatible with CERCLA's provisions and policies. First, the UCFA's mechanism of allocation directly fits CERCLA's strict liability scheme. CERCLA requires the allocation of response costs among liable parties using equitable factors. The UCFA provides a means for determining the equitable share of the total obligation of each party, based on each party's established percentage of fault.[184] Fault under the UCFA is determined in relation to the nature of the conduct of each party and the extent of the causal relation between the conduct and the damages claimed.[185] This is sufficiently broad to allow allocation by equitable factors. Also, CERCLA imposes strict liability, and the UCFA expressly allows the comparison between parties held strictly liable. Finally, the UCFA would allow two or more parties to be treated as a group.[186] This allows parties who have settled to have their responsibility determined together and, according to the majority of courts, imposed on the plaintiff. It also would permit defendant PRPs who have contractually allocated responsibility as among themselves to be treated as a single party for purposes of allocation of responsibility in a contribution action.

Moreover, the UCFA is consistent with CERCLA's policies.

A sues B. His damages are $20,000.
A is found 40% at fault.
B is found 60% at fault.
Judgment for A for $12,000 is paid by B.
B then brings a separate action seeking contribution from C, who was not a party to the original action.
C is found to be liable for the same injury, and as between B and C, C is found to be 50% at fault.
Judgment for contribution for $6,000 is awarded to B.
If A had voluntarily joined or been brought in as a party to this second action, proportionate fault would have been determined for all parties, including A and B, and contribution against C would have been awarded on that basis.

Id. § 5 cmt. at 55-56.

184. *See id.* § 2 cmt. at 50.

185. *See id.* The conduct of a party as it relates to fault, according to the UCFA, depends on all the circumstances, including the following:

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

Id. The relative closeness of the causal relationship of the conduct of the defendants and the harm to the plaintiff is also considered. *Id.*

186. *Id.* § 2(a)(2) at 49.

CERCLA's contribution provisions basically seek to advance three policies: to encourage voluntary cleanup, to encourage settlement, and to ensure equitable allocation of costs.[187] Allocating a plaintiff PRP's costs among the parties before the court would encourage voluntary cleanup by assuring the plaintiff a greater recovery than if defendant PRPs' shares were reduced by any nonparties' fault. Second, because the rule would encourage joinder of solvent PRPs by both plaintiff and defendant,[188] it would encourage settlement by bringing all possible parties to the bargaining table at an early date. The UCFA's approach also assures an equitable allocation of costs. By ignoring nonparties' responsibility, no one PRP is burdened with orphan shares of responsibility; rather, plaintiff and defendants collectively absorb them. To the extent plaintiffs' response was voluntary, that fact can be taken into account in determining its equitable share. Beyond this, there is no reason to treat plaintiff PRPs and defendant PRPs differently. Finally, adopting the rule would avoid the procedural difficulties of determining the responsibility of all PRPs—which in many CERCLA cases number in the dozens and in some cases, the hundreds—and of determining non-binding shares of unrepresented parties.[189]

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187. Through CERCLA's contribution provisions, Congress basically sought three objectives: (1) to encourage voluntary cleanup; (2) to encourage settlement; and (3) to assure equitable allocation of costs. *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988) (Congress desires to encourage cleanup by any responsible party and assure fair apportionment of the expense), *cert. denied*, 488 U.S. 1029 (1989); AM Int'l, Inc. v. International Forging Equip., 743 F. Supp. 525, 527 (N.D. Ohio 1990) (scope of CERCLA liability serves to encourage private cleanup, discourage careless disposal and ensure the monitoring of generators); Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1389 (N.D. Ill. 1988) ("Congress sought through CERCLA not only to expedite the cleanup of hazardous waste sites but also to assure the equitable allocation of associated costs among all responsible parties."); Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1118 (N.D. Ill. 1988) (CERCLA seeks expeditious and voluntary cleanup by responsible parties); United States v. New Castle County, 642 F. Supp. 1258, 1269 (D. Del. 1986) (right to contribution meets three CERCLA policies: it encourages private parties voluntarily to clean up hazardous sites for which they are responsible, it saves Superfund resources, and it provides an incentive to settlement); *see also* 42 U.S.C. § 9613(f)(1) (Supp. 1990) (allocation based on equitable factors); H.R. REP. NO. 253(I), 99th Cong., 1st Sess. 3, 59 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841 (purpose underlying contribution provision was to "encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups"); 131 CONG. REC. S11,857 (daily ed. Sept. 20, 1985)(statement of Sen. Thurmond) ("[T]he right to contribution should be codified in order to encourage responsible parties to engage in cleanup and settlement.").

188. As the UCFA recognizes, if nonparties are ignored, "[b]oth plaintiff and defendants will have significant incentive for joining available defendants who may be liable." UNIF. COMPARATIVE FAULT ACT § 2 cmt.

189. An example of the application of the UCFA's rule of equitable contribution is Ambriz v. Kress, 148 Cal. App.3d. 963 (Ct. App. 1983). In this case arising from an

Finally, under such a rule, defendant PRPs are not without recourse. A defendant PRP may bring a second contribution action against any other solvent parties that emerge.[190] Based on its compatibility with CERCLA's liability scheme and policies, the Uniform Comparative Fault Act's rule allocating responsibility only among parties before the court should be adopted.

VII.
PARTIES SUBSEQUENTLY DETERMINED TO BE INSOLVENT

An issue related to that of nonparties' responsibility is what should happen when a judgment based on shares of responsibility allocated to a party defendant is later proven uncollectible. Consistent with the analysis of nonparties' responsibility, both the plaintiff and the defendants should bear the burden of the uncollectible shares of responsibility. Both the Restatement and the Uniform Comparative Fault Act compel this result.[191] However, the UCFA rule is recommended. It specifically provides for insolvent parties' shares to be allocated among the solvent parties, including the plaintiff, according to their respective proportions of fault.[192] The motion for reallocation must be made within one year of the origi-

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automobile accident, the plaintiff was found to be 20% at fault, while a solvent defendant was found 10% at fault and an insolvent defendant 70% at fault. The court held that the insolvent party's share was properly apportioned two-thirds to plaintiff and one-third to the remaining defendant. *Id.* at 968. The court stated that the reasoning inherent in the rule that an insolvent defendant's shortfall should be borne proportionately by the solvent defendants "should apply to all defendants, including any cross-defendant who, fortuitously, happens to be a plaintiff." *Id.* at 969.

190. One district court which adopted the UCFA's settlement rule noted that "since the courts have rules that joinder is permissive in these cases, and since not all parties will necessarily be joined, a separate lawsuit for contribution may be the best was [sic] to ensure that a defendant pays no more than its fair share for a cleanup." United States v. Western Processing Co., 756 F. Supp. 1424, 1431 (W.D. Wash. 1990).

191. *See* RESTATEMENT (SECOND) OF TORTS § 886A cmt. i (1979); UNIF. COMPARATIVE FAULT ACT § 2(d), 12 U.L.A. 49 (Supp. 1992). Another uniform law, however, indicates that insolvent parties' fault could be borne by plaintiffs, defendants, or both in a private cost recovery action. The Uniform Contribution Among Tortfeasors Act (UCATA) leaves the decision to the "principles of equity." UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 2 (Commissioners' Comment), 12 U.L.A. 87 (1975). The UCATA, however, is inconsistent with CERCLA's liability scheme. It allocates responsibility by pro rata shares and expressly excludes relative degrees of fault as a consideration. *See id.* One court has rejected the UCATA on this ground. *See* Lyncott Corp. v. Chemical Waste Mgt., Inc., 690 F. Supp. 1409, 1417-18 (E.D. Pa. 1988). Moreover, allocation based on pro rata shares that ignores fault would encourage highly responsible parties to wait for trial rather than settle.

192. *See* UNIF. COMPARATIVE FAULT ACT § 2(d), 12 U.L.A. 49 (Supp. 1992).

nal judgment.[193]

As argued in the previous section, the UCFA's approach to allocation is consistent with CERCLA's liability scheme. Reallocation of an insolvent party's fault under the UCFA is also consistent with CERCLA's policies. It would encourage voluntary cleanup by ensuring the plaintiff a greater amount of recovery than if it were forced to bear an insolvent party's shares. Also, settlement might be encouraged by the threat of possible reallocation among existing parties. Furthermore, allocation of uncollectible shares among plaintiffs and defendants would ensure an equitable allocation, as compared to forcing one party to bear the entire cost of uncollectible shares.[194] Finally, the one-year limitation on motions for reallocation based on the subsequent insolvency of parties reasonably limits PRP defendants' exposure to increased responsibility.

VIII.
CONCLUSION

Private parties' rights and liabilities under CERCLA are complicated and, frequently, uncertain. One area of particular obscurity is the allocation of shares of responsibility in a contribution or PRP cost recovery action. CERCLA requires that allocation be based on equitable factors but does not specify those factors or explain how to compare the different parties' responsibility. In response, this article derived several common factors from the case law and surveyed their application.

The article also addressed the impact of nonparties' responsibility on the allocation of shares among present parties. CERCLA is silent on who should bear the cost of orphan shares in a contribution or PRP cost-recovery action. Nor have courts provided any guidance, although they soon must. The structure and impact of CERCLA require that a uniform rule be fashioned. The Uniform Comparative Fault Act provides the best rule. It allocates responsibility among only those solvent and before the court and, in this way, distributes the burden of orphan shares among both plaintiffs and defendants. Apart from case-specific equities, such as voluntariness of plaintiff's response, which can be taken into account in allocating shares, there is no reason to treat plaintiff PRPs and de-

193. *Id.*

194. The UCFA recognizes that this rule "avoids the unfairness both of the common law rule of joint and several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint and several liability, which would cast the total risk of uncollectibility upon the claimant." *Id.* § 2 cmt.

fendant PRPs differently. The UCFA rule is also consistent with CERCLA's strict liability scheme and its underlying policies relating to allocation.

Finally, the article discussed the issue of who should bear shares of responsibility allocated but later proven to be uncollectible. Here also, a uniform federal rule should be fashioned, based on the Uniform Comparative Fault Act. The UCFA allows, upon motion, the reallocation of uncollectible shares among the other parties, based on their proportion of responsibility. Thus, neither the plaintiff nor the defendants bear the entire burden of uncollectible shares. The rules advocated in this Article attempt to achieve equitable results in an inherently inequitable liability scheme. Although they do not answer all CERCLA questions, their application can reduce some uncertainty and aid in the attainment of equity in cost allocation.