Joint and Several Liability under Superfund

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INTRODUCTION

Improper and inadequate disposal of hazardous wastes constitutes an environmental problem of epic proportions. About ninety percent of the fifty-seven million tons of hazardous industrial waste produced annually in the United States is disposed of improperly. A study prepared for the Environmental Protection Agency reported that anywhere from 32,000 to 50,000 disposal sites

1. Section 1004(5) of the Resource Conservation and Recovery Act of 1976 (RCRA) defines hazardous waste to be:
   a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
   (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
   (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

2. For decades, thousands upon thousands of tons of hazardous chemical wastes have been deposited in our environment. The sites where they are dumped, with their contents of long-lasting chemicals, now represent lethal time capsules which year by year release their toxic contents into our surface waters, our groundwaters, and seriously degrade our landscape, and that essential element of our life support system—our water supply.


Love Canal is only one of several crisis situations involving the release of hazardous substances. Other incidents include: the “Valley of the Drums” in Kentucky, where 20,000 to 30,000 barrels of discarded, leaking and unlabeled wastes were discovered; Charles City, Iowa, where arsenic and ortho-nitroanitive are suspected of leaking into the water supply of 300,000 people; Moscow Mills, Missouri, where waste oil containing dioxin, which causes significant symptoms at levels of 5 parts per trillion, was sprayed at a horse arena. Id. at 33; Congressional Research Service of the Library of Congress, 96th Cong., 2d Sess., Six Case Studies of Compensation for Toxic Substances Pollution: Alabama, California, Michigan, Missouri, New Jersey, and Texas 279, 281 (Comm. Print 1974).

store some hazardous wastes. Approximately 1,000 to 2,000 of these sites may store significant quantities of hazardous wastes. As the amount of hazardous wastes generated gradually increases, the shortage of safe disposal sites becomes more significant. Furthermore, the costs of the most limited restoration of inactive haz-

4. FRED C. HART ASSOCIATES, PRELIMINARY ASSESSMENT OF CLEANUP COSTS FOR NATIONAL HAZARDOUS WASTE PROBLEMS 10-16 (1979) [hereinafter cited as PRELIMINARY ASSESSMENT]. The estimates in this report are extremely rough. Hazardous Waste Hearings, Part 4, supra note 2, at 12, 37.

5. PRELIMINARY ASSESSMENT, supra note 4, at 10-16.

6. U.S. Environmental Protection Agency, Finding a Safe Disposal Site Takes Time, ENVIRONMENT MIDWEST 14 (1981). According to a new study, the total volume of hazardous waste will increase from 60 million to 85 million tons between 1980 and 1990. 12 ENV'T REP. (BNA) 104 (May 15, 1981). This study also predicted that the hazardous waste market would expand by 42%. Id. The weight of evidence, however, would indicate that such expansion is unlikely. Congressman James J. Florio of New Jersey, a leading sponsor of the Superfund legislation, has reported that there is a substantial shortage of disposal sites and that 50 to 125 new disposal sites will be needed by 1985. Public Must Accept Risk in Siting New Waste Facilities, Conference Told, 12 ENV'T REP. (BNA) 314, 315 (July 3, 1981) [hereinafter cited as Risk in Siting]. In addition, Florio warned that this shortage probably will be exacerbated if more existing facilities close or if permits to continue operating under the new hazardous waste regulations are denied to a significant number of the other facilities. Id. Finally, new disposal sites may be rapidly filled by wastes that were removed from old sites cleaned up under Superfund. Id.

Public opposition is also hindering the development of new disposal sites. Farkas, Overcoming Public Opposition to the Establishment of New Hazardous Waste Disposal Sites, 9 CAP. U.L. REV. 451 (1980). As a result, alternatives to disposal sites have been suggested. See Risk in Siting, supra this note, at 315. Such alternatives include:

- Reduce the quantity of hazardous wastes to be managed through changes in processes, operating conditions, and feedstocks;
- Reduce the volume of wastes by separating hazardous from non-hazardous materials and disposing them separately;
- Detoxify hazardous materials through chemical reactions;
- Destroy wastes by converting hazardous materials to non-hazardous, although this applies only to large waste volumes;
- Incinerate organic wastes;
- “Fix” or solidify wastes to make hazardous components nonleakable before placing them in landfills;
- Spread organic wastes on land; and
- Place wastes in landfills.

Id.

The Supreme Court of Illinois recently upheld an order to close a landfill and to remove 200,000 drums of hazardous waste at a cost of up to $20 million. Village of Wilsonville v. SCA Serv., Inc., 86 Ill. 2d 1, 27, 426 N.E.2d 824, 841 (1981). The Illinois Environmental Protection Agency licensed the facility at Wilsonville, and the United States Environmental Protection Agency, in addition to declaring it “secure,” chose the site to deposit PCBs removed from an illegal dump. The court, however, found that the defendant had supplied most of the data that these agencies relied upon and that this date was inaccurate. 86 Ill. 2d at 37, 426 N.E.2d at 837. This decision rendered a devastating blow to the hazardous waste industry. If other courts follow this precedent and refuse to consider the cost of removal of wastes or alternatives to removal, the hazardous waste disposal industry may be crippled.
ardous waste disposal sites range from $3 to $6 billion. Complete restoration may cost up to $40 billion.

Because existing federal legislation failed to address the problems caused by inactive hazardous waste sites and because an emergency response fund for current and future releases of hazardous substances was deemed necessary, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, commonly referred to as Superfund. Superfund establishes a $1.6 billion fund for the clean up of hazardous waste facilities posing an imminent danger to the environment and the public health and welfare. Under this Act, the President is authorized to order private parties connected with the disposal of the hazardous substances to clean up the facility and to seek reimbursement for any Superfund money expended in the clean up efforts.

Many compromises led to the approval of Superfund in the final days of a lame duck session of the Ninety-sixth Congress.

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7. PRELIMINARY ASSESSMENT, supra note 4, at 37.
8. Id.
13. The elimination of a federal cause of action for medical claims and other third party damages ranks among the most controversial compromises. Of this deletion, Senator George Mitchell remarked: "This Senate has made the judgment that property is more significant than human beings. We are telling the people of this country that under our value system property is worth compensating, but a human life is not." 38 CONG. Q.W. REP. 3435 (Nov. 29, 1980). Other federal statutes provide limited and haphazard compensation to individuals injured by hazardous substances. Trauberman, Compensating Victims of Toxic Substances Pollution: An Analysis of Existing Federal Statutes, 5 HARV. ENVT'L. L. REV. 1, 4-28 (1981). Tort law also presents many obstacles to recovery, such as statutes of limitation and proximate causation. See Comment, Environmental Health: An Analysis of Available and Proposed Remedies for Victims of Toxic Waste Contamination, 7 AM. J. L & MED. 61 (1981); Note, Denial of a Remedy: Former Residents of Hazardous Waste Sites and New York's Statute of Limitations, 8 COLUM. J. OF ENVTL. L. 161 (1982); Note, Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes, 64 MINN. L. REV. 949 (1980);
such compromise was the deletion of a provision making those parties connected with the disposal of the hazardous substances jointly and severally liable$^{14}$ for the expenses of clean up measures.$^{15}$ The legislative history and statutory language of Superfund indicate that the issue of joint and several liability was not completely resolved with this deletion. It appears instead that traditional and evolving principles of common law shall govern the determination of whether joint and several liability will be applied.$^{16}$ To administer Superfund effectively and to fulfill its purposes, the courts will have to impose joint and several liability by relying upon the evolving principles of common law.

This note will discuss the approach that Superfund takes to provide for joint and several liability. It will examine the basic provisions of Superfund, with particular attention to the liability section. Next, the legislative history on the issue of joint and several liability will be reviewed. A discussion of section 311 of the Federal Water Pollution Control Act, upon which Superfund’s liability provision is statutorily based, shall follow. The history and the application of joint and several liability under the common law, especially in pollution cases, will also be examined and analyzed. Application of joint and several liability to cases involving the release of hazardous substances shall be discussed. Finally, imposition of joint and several liability under Superfund will be recommended.

**EXAMINATION OF SUPERFUND**

Superfund establishes a $1.6 billion Hazardous Substances Response Fund derived from a tax on the chemical and petroleum

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14. Under joint and several liability, each of two or more persons is liable for the entire amount of damages to an injured person. That person can sue one or more of the defendants separately or together. Cf. Humble Oil & Refining Co. v. Bell, 172 S.W.2d 800, 802 (Tex. Civ. App. 1943).


16. *Id.* See *infra* notes 54-62 and accompanying text.
1982] Liability under Superfund 493

industries and from federal funds. Under Superfund, the utilization of this fund and other hazardous waste remedies rests within the discretion of the President, who has subsequently delegated much of this authority to the Environmental Protection Agency. If a hazardous substance or a pollutant posing an imminent and substantial danger to public health is released into the environment, or if there is a substantial threat of such a release, the President is authorized to respond in several ways. Under section 104 of Superfund, the President may order the removal of hazardous substances or pollutants, and implement remedial action, such as on-site treatment of hazardous substances. Such federal intervention, however, is conditioned on the President's determination that

17. 26 U.S.C. §§ 4611, 4612, 4661 (Supp. IV 1980) (amendments to the Internal Revenue Code); 42 U.S.C. §§ 9631-9633 (Supp. IV 1980). The taxes imposed on oil and on 42 specific chemical compounds will provide 87.5% of the fund, and the remaining 12.5% will be taken from the Treasury Department's general tax revenues. Superfund Closes the Gap, ENVIRONMENT MIDWEST 29 (1981).

18. 42 U.S.C. §§ 9604, 9606 (Supp. IV 1980). The President has delegated primary responsibility for enforcing Superfund to the Environmental Protection Agency. Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981). Other agencies with authority are the Treasury Department, the Department of Transportation, the Department of Labor, the Department of Justice, the Department of Health and Human Services, and the Federal Maritime Commission. Superfund at Square One: Promising Statutory Framework Requires Forceful EPA Implementation, 11 ENVTL. L. REP. 10,101, 10,102 (May 1981) [hereinafter cited as Superfund at Square One]. In addition, Superfund created a new agency, the Agency for Toxic Substances and Disease Registry. 42 U.S.C. § 9604(i) (Supp. IV 1980). With the assistance of the states and of named environmental and public health agencies, the Agency for Toxic Substances and Disease Registry is to establish a national registry of serious diseases and illnesses, as well as a national registry of individuals exposed to toxic substances. 42 U.S.C. § 9604(i)(1) (Supp. IV 1980). If public health emergencies apparently caused by exposure to toxic substance occur, the agency is required to provide medical care and testing to exposed individuals. 42 U.S.C. § 9604(i)(4) (Supp. IV 1980).

19. 42 U.S.C. § 9604(a)(1) (Supp. IV 1980). Superfund draws a distinction between “removal” and “remedial” action. Removal refers to “the cleanup or removal of released hazardous substances from the environment. . . .” 42 U.S.C. § 9601(23) (Supp. IV 1980). Removal includes such actions as may be necessary to monitor, assess and evaluate the release or threat of release, the disposal of the materials that were removed, or the implementation of other actions necessary to prevent, reduce or mitigate damage to the public health or the environment. Id. Specific removal action extends to security fencing, provisions for alternative water supplies, and temporary evacuation and housing of threatened individuals. Id.

Remedial refers to actions designed as a permanent remedy. 42 U.S.C. § 9601(24) (Supp. IV 1980). Remedial action can be taken instead of or in addition to removal action. Id. Examples of remedial action include: storage and confinement of the release at the original site; recycling or reuse, diversion, destruction, segregation of reactive waste; and repair or replacement of leaking containers. Id. Remedial action also covers the costs of permanent relocation of residents, businesses and community facilities where the President concludes that such relocation is more cost effective than and environmentally preferable to various removal and remedial measures. Id.
the party responsible for the actual or threatened release will not himself properly carry out removal or remedial action. Assuming such a finding is made, the President is also authorized to order the Attorney General under section 106 to secure the relief necessary to abate the danger. In addition, the President may issue such orders as may be necessary to protect the public health and environment.

Superfund requires the states to participate in financing clean up efforts. After $1 million has been expended or six months has elapsed from the initiation of clean up measures, the President cannot continue response action absent extreme emergency unless the state has entered a contract or cooperative agreement with the federal government. Under this contract, the state must agree to undertake the following tasks: first, to assure future maintenance of the removal and remedial actions implemented by the federal government; second, to assure the availability of hazardous waste disposal facilities in compliance with subtitle C of RCRA; and third, to bear or to assure ten percent of the expenditure for remedial action, including all future maintenance, and at least fifty percent of the total expenditure where the state was partially responsible for the release or where the state owned or operated the facility which released hazardous substances or pollutants.

Under Superfund, the costs of cleaning up hazardous substances

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20. 42 U.S.C. § 9604(a)(1) (Supp. IV 1980). Section 9604 lists other powers the President may exercise. For instance, the President may conduct investigations, monitoring, surveys, and testing to determine the existence and extent of a release, the source and nature of the hazardous substances or pollutants involved, and the degree of danger to the public health and environment. Furthermore, the President may undertake such studies or investigations needed for implementing removal and remedial actions, recovering the costs thereof, and enforcing the provisions of Superfund.


22. Id. Wilful violation or failure to comply with a presidential order may result in a fine of $5,000 for each day the violation occurs. 42 U.S.C. § 9606(b) (Supp. IV 1980).

23. 42 U.S.C. § 9604(c)(3) (Supp. IV 1980). The role of the states in responding to releases from hazardous waste sites under Superfund has been expanded by the National Contingency Plan (NCP). Final, National Contingency Plan Issued Giving States Greater Role Under Superfund, [Current Developments] Envir. Rep. (BNA) No. 11, at 364 (July 16, 1982). Pursuant to § 105 of Superfund the EPA promulgated the final version of the NCP on July 12, 1982. 47 Fed. Reg. 31,180 (1982). The NCP allows states to serve on regional response teams, to assist in developing federal, regional, or local plans, to be notified of possible or actual discharge or releases, and to submit candidates for priority cleanup. 47 Fed. Reg. 31,205, 31,208, 31,210, 31,215 (1982) (to be codified at 40 C.F.R. §§ 300.32(b), 300.32(b)(2), 300.32(b)(5), 300.33 (b)(5), 300.36(c), 300.66(d)).


is ultimately to be born by those private individuals responsible for the disposal. Section 107 imposes liability for the costs of cleaning up the release of hazardous substances and the damages for injury, destruction or loss of natural resources upon four categories of individuals.26 Those individuals include: present owners and operators of a vessel or a facility; any person who at the time of disposal operated or owned a hazardous waste disposal facility; any person who arranged with a transporter for the disposal or treatment of hazardous substances; and, any person who has accepted hazardous substances for transport to a disposal or treatment facility.27 Generally, the parties that are potentially liable under Superfund are referred to as owners, operators, generators, and transporters.

Owners of disposal sites are liable for cleanup costs and damages under two circumstances, if they owned the land at the time that the hazardous substances were disposed of on their land,28 or if they currently own and operate a disposal facility.29 Operators are liable if they ran a facility that accepted hazardous substances.30 Generators of hazardous substances are liable if they dispose of the

26. 42 U.S.C. § 9607 (Supp. IV 1980). Section 9607(a) provides:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

hazardous substances at a facility they own or operate. They are also liable when they arrange by contract or agreement for the disposal of the hazardous substances at a facility owned and operated by someone else. Finally, transporters are also liable under two circumstances. First, if they agree to transport the hazardous substances to a facility chosen by the shipper, then they are liable for a somewhat limited amount of costs and damages. In the second situation, the transporter may be fully liable as an owner and operator of a vessel if the transporter selects the disposal facility.

Section 107(a) identifies specific parties who may potentially be liable for the costs and damages associated with a release of hazardous substances from a disposal facility. Section 107(a), however, does not define the scope of liability. Although section 107 does provide for strict liability, the question of whether that liability is joint or several is never addressed. The use of the connector "and" between the categories of liable parties arguably could be interpreted to mean that each party is jointly liable, but frequently the conjunctive "and" and the disjunctive "or" are found to be interchangeable. Furthermore, it is not only unclear whether members of differing categories of liable parties are jointly and severally liable, but also whether members within a single category are

31. Id.
36. Id. Scope means the extent of liability.
37. 42 U.S.C. § 9607(a) (Supp. IV 1980). Although the term "strict liability" is not mentioned, it is implied. Section 9601(32) provides that the liability under Superfund is the same as under § 311 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321 (1976), amended by 42 U.S.C. § 9601(32) (Supp. IV 1980). Section 311 of the FWPCA has been interpreted to apply strict liability. Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979); Burgess v. M/V Tamano, 654 F.2d 964, 982 (1st Cir. 1977). Furthermore, strict liability can be implied by failure to list general defenses based upon the exercise of due care. Superfund at Square One, supra note 18, at 10,103. However, § 9607(b) provides three limited defenses that include act of God, act of war and third party responsibility. 42 U.S.C. § 9607(b) (Supp. IV 1980). For the third party defense to apply, the defendant must show by a preponderance of the evidence that the third party, who is not related by employment or contract, caused the pollution and that the defendant exercised due care in respect to the hazardous substances and the third party. 42 U.S.C. § 9607(b)(3)(a) and (b) (Supp. IV 1980). The common law exception to strict liability for common carriers is not recognized under Superfund, since common carriers are included in the parties to be held liable. 42 U.S.C. § 9601(20)(B)(i) (Supp. IV 1980); Note, Superfund: Conscripting Industry Support for Environmental Cleanup, 9 ECOLOGY L.Q. 524, 525-26 (1981) [hereinafter cited as Note, Conscripting Industry Support].
jointly and severally liable. Because generators of the hazardous substances are the deep pockets in the hazardous substance cycle, whether liability is joint and several is a crucial question for both the generators and the government. Therefore, the legislative history of Superfund must be examined to determine whether Congress intended liability to be joint or several.

**Legislative History Concerning Joint and Several Liability**

After three years of working on hazardous waste fund bills and oil spill bills, Congress enacted Superfund as a compromise bill...
that differed significantly from previous proposals.\textsuperscript{42} Three bills, namely House Bill 85,\textsuperscript{43} House Bill 7020\textsuperscript{44} and Senate Bill 1480,\textsuperscript{46} were partially incorporated in the final act.\textsuperscript{46} Throughout congressional consideration of Superfund, the issue of joint and several liability was highly debated.

Under the earlier versions of H.R. 7020 and S. 1480, joint and several liability was imposed upon parties connected with the disposal of hazardous substances in a somewhat modified form. The original H.R. 7020 initially imposed joint and several liability upon responsible parties but allowed them to recover any money expended in excess of their proportionate share from the established fund.\textsuperscript{47} This bill, however, was subsequently amended to provide traditional joint and several liability.\textsuperscript{48} Like the original H.R. 7020, the first version of S. 1480 also allowed reimbursement from the fund.\textsuperscript{49} In addition, S. 1480 included rules of contribution to be

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\textsuperscript{43} H.R. 85, 96th Cong., 1st Sess. (1979). This bill was limited to the clean up of oil spills from a fund derived from a tax on oil. Joint and several liability was applied to owners and operators of vessels or facilities. 1A F. Grad, Treatise on Environmental Law § 4A.04[2][b] (1st ed. Supp. 1981).

\textsuperscript{44} H.R. 7020, 96th Cong., 2d Sess. (1980).

\textsuperscript{45} H.R. 1480, 96th Cong., 2d Sess. (1980).


\textsuperscript{47} Section 3041(c) of H.R. 7020 provided:

Apportionment of Costs of Responsible Parties—Where there are two or more responsible parties with respect to any inactive hazardous waste site, if one of such responsible parties is ordered to take action under this section which results in the expenditure of amounts which he establishes to be in excess of his proportionate share of such costs, such party may recover such excess amount from the Fund.


\textsuperscript{48} Congressman Albert Gore, Jr. of Tennessee introduced an amendment, which would allow apportionment of damages only after the defendant established by a preponderance of the evidence that he was responsible for only a specific portion of the damage done. 126 Cong. Rec. H9464 (daily ed. Sept. 23, 1980) (statement of Rep. Gore). If a defendant could not establish his liability for the damages, then he could be held fully liable. Id. at H9465. Gore explained that an obvious problem with the apportionment system under H.R. 7020 was that the Government "would be forced to seek payment from each of the defendants based on the amount designated by the court as that which he owes." Id. Gore maintained that the Government should be able to collect fully from one defendant who contributed to an indivisible harm and that the defendants should bear the burden of seeking contribution from others who were also responsible for the injury. Id. Gore's amendment was adopted. Id. at H9468. The amended H.R. 7020 was subsequently approved by the House of Representatives. Id. at H9478-79.

\textsuperscript{49} Section 4(a) of S. 1480 provides that a party will only be liable for his contribution to the release or damages if he establishes by a preponderance of the evidence that his activity was not a significant factor in causing or contributing to the release, discharge, disposal or
applied to parties that were found to be jointly and severally liable. 50

The Senate significantly amended S. 1480. On November 24, 1980, the Senate considered S. 1480 and approved a compromise version of S. 1480 by way of amendment. 51 Under the amended S. 1480, all references to joint and several liability were deleted. 52 In listing the changes made by the compromise bill, Senator Randolph 53 maintained that common law principles would determine "when parties should be severally liable." 54 After the Senate ap-

the damages sustained and that his contribution can be distinguished or apportioned. S. REP. No. 484, 96th Cong., 2d Sess. 38 (1980).

50. To achieve more equitable apportionment of liability, § 4(f)(4) provided the following factors which the courts could consider:

(1) The ability of the party to demonstrate that his contribution to the release can be distinguished;

(2) The amount of hazardous substance involved. Of course, a small quantity of a highly toxic material, or above which releases or makes more dangerous another hazardous substance, would be a significant factor;

(3) The degree of toxicity of the hazardous substance involved;

(4) The degree of involvement of the person in the manufacture, treatment, transport, or disposal of the hazardous substance; and

(5) The degree of cooperation between the person and the Federal, State, or local government in preventing harm to public health or the environment from occurring from a release. This includes efforts to mitigate damage after a release occurs.

Id. at 38-39.

51. 126 CONG. REC. S14,988 (daily ed. Nov. 24, 1980). Some of the changes included: reducing the fund from $4.1 billion for six years to $1.6 billion for five years; elimination of a federal cause of action for medical, property or income loss; and deletion of special medical causation provisions. Id. at S14,964.

Senator Robert T. Stafford of Vermont, who assisted Senator Jennings Randolph of West Virginia in drafting the compromise bill, said the compromise contained approximately 25% of what was in the original S. 1480. 38 CONG. Q. WEEKLY REP. 3435 (Nov. 29, 1980). Stafford stated huge concessions were made to overcome the objections of many Senate Republicans. Id.

52. 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980).

53. Senator Randolph was the chairman of the Committee on Environment and Public Works which reported the original S. 1480. 126 CONG. REC. S14,962 (daily ed. Nov. 24, 1980). As the committeeman in charge of Superfund in the Senate, his remarks and answers to questions are to be given the same weight as formal committee reports. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); 2 A. SUTHERLAND, STATUTORY CONSTRUCTION § 48.4 (4th ed. 1973). Committee reports are generally considered highly persuasive evidence of congressional intent. United States v. Five Gambling Devices, 346 U.S. 441 (1953); Hous. Auth. of City of Omaha, Neb. v. United States Hous. Auth., 468 F.2d 1 (8th Cir. 1972); 2 A. SUTHERLAND, STATUTORY CONSTRUCTION § 48.06 (4th ed. 1973).

54. 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980). Randolph further explained:

It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and liability of joint tortfeasors will be determined under common or previous statutory
proved the compromise bill, Senator Helms\textsuperscript{55} applauded the elimination of joint and several liability on the grounds that joint and several liability destroyed "any meaningful link between culpable conduct and financial responsibility."\textsuperscript{56} In attempting to clarify the standard of liability under the compromise, Senator Stafford\textsuperscript{57} explained that no new language was added to the compromise so as to avoid confusion and that the standard of liability to be employed would be the same as that in section 311 of the Clean Water Act.\textsuperscript{58}

The Senate consideration of H.R. 7020 resulted in a motion to strike all provisions after the enabling clause and to insert the language of S. 1480 in lieu thereof.\textsuperscript{59} The motion was granted, and H.R. 7020 was passed.\textsuperscript{60} The end result of this process was the elimination of reference to joint and several liability in H.R. 7020.

The House ultimately adopted the Senate version of Superfund, free of the provision imposing joint and several liability.\textsuperscript{61} In supporting the Senate amendments to H.R. 7020, Congressman Florio proposed that the issue of joint and several liability should be determined by section 311 of the Clean Water Act and traditional law.

\textit{Id.}

\textsuperscript{55} Since Senator Jesse Helms of North Carolina was a vigorous opponent of the original S. 1480 bill and was not responsible for the preparation or drafting of the compromise bill, his remarks are entitled to little weight. \textit{Ernst v. Hochfelder}, 425 U.S. 185, \textit{reh'g denied}, 425 U.S. 986 (1976); \textit{Mastro Plastics Corp. v. NLRB}, 350 U.S. 270, \textit{reh'g denied}, 351 U.S. 980 (1956).

\textsuperscript{56} 126 \textit{Cong. Rec.} S15,004 (daily ed. Nov. 24, 1980) (statement of Sen. Helms). According to Helms, the joint and several liability provision was especially pernicious "not only because of the exceedingly broad categories of persons subject to liability and the wide array of damages available, but also because it was coupled with an industry-based fund." \textit{Id.} Helms claimed that those companies that must contribute to the fund are often paying for conditions they did not cause.

\textsuperscript{57} Senator Stafford sponsored both the original and compromise version of S. 1480; therefore, his statements should be given substantial weight. \textit{Mastro Plastics Corp. v. NLRB}, 350 U.S. 270, \textit{reh'g denied}, 351 U.S. 980 (1956). As the ranking minority member on the Committee on Environment and Public Works, Senator Stafford was named as the successor to the position of chairman while Superfund was being debated in the Senate.

\textsuperscript{58} 126 \textit{Cong. Rec.} S15,008 (daily ed. Nov. 24, 1980).


\textsuperscript{60} 126 \textit{Cong. Rec.} S15,009 (daily ed. Nov. 24, 1980).

and evolving principles of common law. The House passed H.R. 7020, as amended by the Senate. On December 11, 1980, the President signed the Superfund bill.

The legislative history surrounding the issue of joint and several liability under Superfund is ambiguous. The original versions of H.R. 7020 and S. 1480 indicated a congressional concern that damages be apportioned whenever feasible. The eventual deletion of the joint and several liability provision may possibly have been the result of extensive lobbying efforts made by various chemical companies. When questioned about the deletion, Senator Randolph and Representative Florio stressed that this deletion was not determinative of the question of joint and several liability. Instead they maintained that the scope of liability under Superfund was to be determined by section 311 of the Federal Water Pollution Control Act and the traditional and evolving principles of common law. Therefore, the only conclusion that can be drawn from this legislative history is that the deletion of the joint and several liability provision should not be considered a clear congressional mandate and that section 311 of the Federal Water Pollution Control Act and the common law must be examined to determine the scope of liability under Superfund.

Section 311 of the Clean Water Act

Section 101(32) of Superfund expressly provides that the standard of liability employed by Superfund is the same as applied under section 311 of the Federal Water Pollution Control Act (Clean Water Act). Section 311(f) of the Clean Water Act

62. 126 Cong. Rec. H11,787 (daily ed. Dec. 3, 1980). As chairman of the Subcommittee on Transportation and Commerce, Florio was the committee member in charge of Superfund on the floor of the House, and accordingly his statements carry great weight. See supra note 53 and accompanying text.

In addition, Florio submitted two letters to be included as part of the record. One letter written by Alan H. Parker, the Assistant Attorney General, Office of Legislative Affairs, discussed the issues of strict and joint liability under Superfund. 126 Cong. Rec. H11,788 (daily ed. Dec. 3, 1980). Parker maintained that § 107(a)(2) of H.R. 7020 provided for a right to contribution and that such a right is "only of value to a defendant who has been held jointly and severally liable." Id. Parker stated that the Department of Justice believed that the common law imposes joint and several liability where the acts or omissions of two or more wrongdoers cause an indivisible injury. Id.

63. Id. at H11,802-11,803.


makes owners or operators of facilities or vessels that discharge oil or designated hazardous substances into navigable waters or adjoining shorelines liable for costs of cleanup and mitigation. Furthermore, the courts have not expressly ruled on the issue of joint and several liability under section 311. Therefore, section 311 of the Clean Water Act does not offer significant guidance on the issue of whether liability is joint or several under Superfund.

HISTORICAL DEVELOPMENT OF JOINT AND SEVERAL LIABILITY AT COMMON LAW

Because neither the legislative history nor section 311 of the Clean Water Act provide assistance in determining the scope of liability under Superfund, an examination of what the sponsors of Superfund called the "traditional and evolving principles of common law" is required. The concept of joint and several liability has been subject to much confusion primarily because various courts have defined and applied the term "joint tort" differently. Under

67. *Id.* Section 311 of the Clean Water Act established a fund, which is to be maintained at $35 million, from which the federal government can draw money to carry out cleanup operations. 33 U.S.C. § 1321(k) (1976). The federal government can seek reimbursement up to statutorily defined limits for money it expended in cleaning up or mitigating the release. 33 U.S.C. § 1321(f) (1976). The discharger, however, cannot be ordered to clean up the release; instead, the discharger is notified that failure to do so will subject him to liability for government expenditures. *The Superfund Concept, supra* note 9, at 33.

68. A legal memorandum concerning liability under § 311 of the Clean Water Act, 33 U.S.C. § 1321(f) (1976), suggested that the use of the disjunctive "or" clearly indicated that the statute contemplated several liability. 126 Cong. Rec. H11,789 (daily ed. Dec. 3, 1980) (statement of G.H. Patrick Bursley). But the memorandum also noted that "the word 'or' need not be read solely in the disjunctive sense, but clearly contemplates joint liability as well to achieve the remedial effect of the Act." *Id.* (emphasis in the original).

69. Only one case discusses joint and several liability under § 311 of the Clean Water Act. United States v. M/V Big Sam, 505 F. Supp. 1029 (E.D. La. 1981). In *M/V Big Sam*, the court stated that third party liability under § 311(g) was several. *Id.* at 1033. The court, however, intimated that liability for owners and operators under § 311(f) may be joint. *Id.* at 1033-34.

70. Section 311 of the Clean Water Act actually provides little assistance in determining liability under Superfund for two reasons. First, under the Clean Water Act only owners or operators are liable for oil spills. Under Superfund the number of liable parties may range from a minimum of one to a maximum of hundreds. Second, an oil spill is readily discoverable and generally is cleaned up shortly after discovery. A release of hazardous substances may not be discovered for decades, as in the Love Canal situation, and clean up efforts may take several years. During this delay many other parties may become involved, such as the successive owners of the land upon which the disposal site rests. As a result, the issue of liability under Superfund involves more parties and a much more complex fact situation.

the common law, a joint tort required that liability for the entire harm be imposed upon all tortfeasors who acted in concert. The early common law also required concert of action before defendants could be joined in a single action. Therefore, concert of action had to be established before joint and several liability would be assigned or before joinder of parties would be allowed. Consequently, the substantial theory of entire liability under joint torts and the procedural concept of joinder became associated.

The enactment of the Field Code in New York in 1848 and of later similar codes in a majority of states expanded the scope of joinder in both law and equity. As a result of this procedural reform, defendants who were necessary to the complete determination or settlement of issues involved in the controversy or who claimed an interest adverse to the plaintiff in the controversy could be joined. Even though concert of action was no longer required for joinder under the Field Code, the majority of courts re-

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72. LAW OF TORTS, supra note 71, at 291; Prosser, Joint Torts and Several Liability, 25 CALIF. L. REV. 413, 414 (1937) [hereinafter cited as Prosser]. Prosser noted that a joint tort required a joint enterprise. A joint enterprise exists where two or more persons provide mutual aid in effectuating a common purpose so that all commit an unlawful act thereby making each liable for the entire damage. LAW OF TORTS, supra note 71, at 291; Prosser, supra this note, at 414. Other commentators have stated that a joint tort at early common law necessitated the existence of concert of action or breach of a joint duty. HARPER & JAMES, supra note 71, at 692.

The theory of concert of action as expressed in the RESTATEMENT (SECOND) OF TORTS 876 (1977) provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
(a) does a tortious act in concert with the other or pursuant to a common design with him, or
(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

73. LAW OF TORTS, supra note 71, at 293; Prosser, supra note 72, at 414. The common law rule of joinder was strictly applied, but some common law courts allowed joinder where there was dual responsibility for a single act, e.g., the mutual liability of master and servant for the acts of the servant. Jackson, supra note 71, at 403. In addition, American courts devised a different rule for joinder in equity cases. See Kelley v. Boettcher, 85 F. 55 (8th Cir. 1898); Woodruff v. North Bloomfield Gravel Mining Co., 16 F. 25 (8th Cir. 1883).

74. Jackson, supra note 71, at 404.

75. LAW OF TORTS, supra note 71, at 294; Prosser, supra note 72, at 415.

76. Id.
fused to allow joinder unless there was concert of action. Thus, the courts only allowed joinder where each party was jointly and severally liable.

Later, courts gradually implemented the clear directive of the codes by allowing joinder in cases where the acts of independent multiple defendants combined to cause a single, indivisible injury which consequently rendered apportionment of damages impossible. The courts referred to these independent, concurrent actions as joint torts even though joint and several liability was not imposed. Although the courts liberalized their approach to joinder, the majority still required the existence of concert of action or a breach of a joint duty for the imposition of joint and several liability. These courts retained the requirement of concert of action partly due to confusion surrounding the relationship of the concept of joint tort to joinder before the enactment of the Field Code. The primary reason for retention of the concert of action requirement, however, is the failure to understand the rationale underlying joint and several liability.

Wigmore contended that a historical reason existed for imposing joint and several liability in cases involving single individual injury regardless of proof that defendants acted in concert. Wigmore  

77. Gallagher v. Kemmerer, 144 Pa. 509, 22 A. 970 (1891); Sun Oil Co. v. Robicheaux, 23 S.W.2d 713 (Tex. Comm'n App. 1930); Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S.E. 265 (1920). The courts failed to implement the liberal joinder provisions in the codes chiefly because of the retention of the common law theory that the same "cause of action" must affect all of the joined defendants. LAW OF TORTS, supra note 71, at 295; Prosser, supra note 72, at 416.

78. LAW OF TORTS, supra note 71, at 295; Prosser, supra note 72, at 416.

79. See supra notes 71-74 and accompanying text.


81. Prosser, supra note 72, at 420.


83. See infra notes 85-90 and accompanying text.

84. Wigmore, Joint-Tortfeasors and Severance of Damages; Making the Innocent Party Suffer Without Redress, 17 Tul. L.F. 458 (1923) [hereinafter cited as Wigmore].
Liability under Superfund

maintained that the historical purpose of the common law rule of joint and several liability for joint torts was to relieve the plaintiff of the impossible burden of proving the specific shares of harm caused by each defendant. Wigmore contended that each defendant should be liable for the entire harm unless he established a method for apportioning the damages among the wrongdoers. Thus, the burden of proving the specific percentage of harm caused by each defendant would be shifted from the plaintiff to the defendant.

Wigmore indicated that the requirement of concert of action for the application of joint and several liability only served to prevent deserving plaintiffs from recovering damages from wrongdoers. Because the courts ignored the historical reason justifying the application of joint and several liability to multiple defendants who acted concurrently to produce a single injury and opted to interpret the term "joint" to require concert of action, many wrongdoers had been allowed to go "scot free." Wigmore therefore concluded that the proper rule should be: "Whenever two or more persons by culpable acts, whether concerted or not, cause a single general harm, not obviously assignable in part to the respective wrongdoers, the injured party may recover from each for the whole."

**Trend Toward Applying Joint and Several Liability in Cases Involving Indivisible Harms**

Although many courts still require concert of action or a breach of a joint duty before imposing joint and several liability, independent tortfeasors who concurrently cause an indivisible injury are increasingly found to be jointly and severally liable. In expanding...
the scope of joint and several liability, most courts refer to Wig-
more's classical argument. The common law is thus evolving to-
ward a more liberal application of joint and several liability.

In the leading case of Landers v. East Texas Salt Water Dispo-
sal Co., the Supreme Court of Texas held that where the tortious
acts of multiple wrongdoers combine to produce an injury which
cannot be apportioned with reasonable certainty among the indi-
vidual wrongdoers, each tortfeasor is jointly and severally liable for
the entire harm. In Landers, two pipes, one carrying salt water
and the other a mix of salt water and oil, broke at about the same
time and flowed over the plaintiff's land and into his lake. The
spill damaged the lake. The pipes, however, were owned by two
separate companies. After determining that requiring the plaintiff
to bear the burden of dividing the damages according to each de-
fendant's contribution to the injury was unjust, the court found
that the defendants could be jointly and severally liable.

The Landers court explicitly reiterated Wigmore's conclusion
that the historical purpose behind the rule of joint and several lia-

ability was to relieve the plaintiff of the intolerable burden of prov-
ing the percentage of harm caused by each defendant regardless of
whether or not concert of action was present. The court rejected
decision by the Supreme Court of Texas in Landers v. East Texas Salt Water Disposal Co.,
151 Tex. 251, 248 S.W.2d 731 (1952), even though the courts in Oklahoma and Kansas had
previously done so. See Mosby v. Manhattan Oil Co., 52 F.2d 364 (8th Cir. 1931), cert.
denied, 284 U.S. 677 (1931); McDaniel v. City of Cherryvale, 91 Kan. 40, 136 P. 899 (1913);
Prairie Oil & Gas Co. v. Leskey, 173 Okla. 48, 46 P.2d 484 (1935); Kanola Corp. v. Palmer,
See infra notes 93-113 and accompanying text.
92. See, e.g., Velsicol Chem. Corp. v. Rowe, 543 S.W.2d 337, 342 (Tenn. 1976); Landers
93. 151 Tex. at 256, 248 S.W.2d at 734.
94. 151 Tex. at 256, 248 S.W.2d at 735. In Landers, the Texas Supreme Court expressly
overruled Sun Oil Co. v. Robicheaux, 23 S.W.2d 713 (Tex. Comm'n App. 1930). 151 Tex. at
256, 248 S.W.2d at 733. In Robicheaux, various oil companies had drained salt water into
the bayou, and as a result, plaintiff's rice crops were damaged when this polluted water was
used for irrigation. The Texas Commission of Appeals held that the oil companies could not
be held jointly and severally liable because there was no concerted action or unity of design
between them. 23 S.W.2d at 715. The Landers court acknowledged that the holding in
Robicheaux still represented the majority view. 151 Tex. at 255, 248 S.W.2d at 733.
95. 151 Tex. at 255, 248 S.W.2d at 733. The court drew the distinction between an injury
that is theoretically divisible but practically indivisible. Id. at 256, 248 S.W.2d at 734. In
nearly all cases, an injury may be theoretically apportioned although realistic apportion-
ment is impossible. To prevent defendants from escaping joint liability by presenting purely
theoretical apportionment of damages, the court held several liability only applies where the
injury can be "apportioned with reasonable certainty." Id.
the philosophy behind the majority position which provided that "it is better that the injured party lose all of his damages than that any of several wrongdoers should pay more of the damages than he individually and separately caused." 97

Finally, the Landers court noted that Texas courts had long since approved applying joint and several liability in collision cases where concert of action was absent. 98 Unlike the facts in Landers, collision cases involved simultaneous negligence. The Landers court, however, maintained that the plaintiff's burden of dividing the damages according to each defendant's contribution to the injury was just as onerous in cases where negligence was not simultaneous. 99 Therefore, the court concluded that no justifiable reason existed for allowing joint and several liability in the one type of case and not in the other. 100

Nearly twenty years later, the Sixth Circuit Court of Appeals in Michie v. Great Lakes Steel Division, National Steel Corp. 101 held that under Michigan law, multiple defendants charged with public nuisance for independent actions of polluting the air, could be held jointly and severally liable for the individual indivisible injuries. 102 In Michie, thirty-seven Canadian citizens filed suit against three corporations that operated seven plants in the United States immediately across the border from Canada. Claiming personal and property damages from the pollution carried on air currents to their homes, the plaintiffs argued that the defendants should be held jointly and severally liable despite the absence of concerted action. Applying the holding in Landers and the Michigan auto collision cases to this pollution case, 103 the Sixth Circuit held that joint and several liability could be assigned to the three corpora-

97. 151 Tex. at 256, 248 S.W.2d at 734.
99. 151 Tex. at 258, 248 S.W.2d at 734.
100. Id. The court reversed and remanded the case on the grounds that allegations that the two separate companies negligently permitted their respective pipelines to break on or about the same date were sufficient to assert a case of joint and several liability against the defendants. For further discussion of the Landers case, see Note, Recent Developments in Joint and Several Liability, 14 Baylor L. Rev. 421 (1962); Note, Liability of Independent Tort-Feasors, 5 Baylor L. Rev. 281 (1953).
101. 495 F.2d 213 (6th Cir. 1974).
102. Id. at 218.
103. Id. at 216.
The court noted that once the plaintiffs established a duty and a breach of that duty by each of the multiple defendants, the plaintiffs need only present enough evidence to create a presumption of indivisible injury. Plaintiff's successful establishment of this presumption was sufficient to shift the burden of proving the degree of responsibility of the parties to the wrongdoers.

Adopting the rule of the Landers and Michie cases, the Tennessee Supreme Court in Velsicol Chemical Corp. v. Rowe held that where several plants emitted pollutants into the air and water, so as to create an indivisible injury, each plant could be held jointly and severally liable without concert of action. In Velsicol, the plaintiffs originally sued Velsicol Chemical Corporation alone. Velsicol, however, filed a third party complaint against five other plants in the locality. In overruling a seventy-five year old precedent that was markedly similar to the facts in Velsicol, the court noted the increasing tendency in judicial decisions and among commentators to sanction holding defendants jointly and severally liable for tortious injuries that are "joint" in their legal or practical effect, although not joint in their commission.

In the past thirty years, courts have increasingly applied joint and several liability where tortfeasors have acted independently to cause an indivisible injury. This trend is largely due to the court's recognition of the injustice of placing the burden of apportionment

104. Id. at 218-19.
105. Id. at 216-18.
106. Id. The holding in Michie has changed prior notions of duties and risks in nuisance cases. Comment, Michie v. Great Lakes Steel Division, National Steel Corp.—The Emergence of Joint and Several Liability in a Common Law Environmental Action, 74 UTAH L. REV. 603, 610 (1974). Before the Michie decision, plaintiffs in nuisance actions had to set forth the particular duty of each defendant and prove that each defendant caused definite and traceable damages before the suit could go to the jury. Id.
107. 543 S.W.2d 337 (Tenn. 1976).
108. Id. at 343. The court stressed that the rule announced in the Landers and Michie cases is "more consonant with modern legal thought and pragmatic concepts of justice. . . ." Id.
109. In addition to charges of air and water pollution, plaintiffs further alleged that Velsicol dumped chemicals and other pollutants upon their properties. Id. at 338.
110. Id. at 343. The court overruled Swain v. Tennessee Copper Co., 111 Tenn. 430, 78 S.W. 93 (1903). The Swain court refused to hold joint tortfeasors jointly and severally liable where they acted independently to cause an indivisible injury primarily because contribution was not allowed among tortfeasors at that time, and thus, a tortfeasor whose actions caused only a minute portion of the injury would be held entirely liable. 543 S.W.2d at 341. The Velsicol court stated that this inequitable result was now precluded by the enactment in 1968 of the Tennessee Uniform Contribution Among Tortfeasors Act. Id. at 340.
111. 543 S.W.2d at 342.
of damages upon plaintiffs who have incurred indivisible inju-
ries.112 In addition, the courts recognize the increasing acceptance
of allowing contribution among joint tortfeasors.113

Developments in the Restatement

The changes made by the American Law Institute in the Re-
statement (Second) of Torts also support the trend toward apply-
ing joint and several liability to independent wrongdoers who cause
an indivisible injury. The first significant change was the addition
of section 433A and section 433B. Section 433A provides that dam-
ages arising out of two or more causes of injury cannot be apportioned
unless the harms are distinct or, a reasonable basis for de-
termining the contribution of each cause exists.114 Section 433A
recognizes that certain types of harms are inherently incapable of
any “logical, reasonable, or practical division.”115 In such instances,
joint and several liability is imposed.116 Section 433B(2) shifts the
burden of proof of apportioning damages to the defendants when
the tortious conduct of two or more wrongdoers has combined to
cause a harm incapable of apportionment.117 Such harms are not
within the scope of section 433B. However, comment e to section
433B implies that tortfeasors who cause a harm incapable of ap-
portionment are still jointly and severally liable.118

The most significant change appearing in the Second Restate-

112. See supra notes 85-90 and accompanying text.
113. See supra note 110 and infra note 144.
115. Id. at comment i.
116. Id. In illustration 15, two companies that negligently discharged oil into a stream
were jointly and severally liable to owners of the cattle which died after drinking the water
of the stream. Id.
117. RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965) at comment c. Pollution of a
stream by a number of factories is classified as a typical case. Id. The underlying assump-
tion that the harm caused by pollution may be divided is dubious at best.
118. Id. This implication is derived from the following statement: “Thus if a hundred
factories each contribute a small, but still uncertain, amount of pollution to a stream to
hold each of them liable for the entire damage because he cannot show the amount of his
contribution may perhaps be unjust.” Id. (emphasis supplied). Thus while recognizing there
might be a certain injustice in holding one defendant out of a class of a hundred jointly
liable, this statement indicates that under § 433B(2) a defendant who contributes an uncer-
tain amount to the injury thereby rendering apportionment of damages as to him impossible
is nonetheless jointly liable for the entire harm. Furthermore, if §§ 433A and 433B(2) are to
read as complimentary and consistent, there must be joint liability for indivisible injuries
under § 433B(2) because comment i to § 433A provides for joint liability for single injuries
“incapable of division on any logical or reasonable basis.” RESTATEMENT (SECOND) OF TORTS
§ 433A comment i (1965). See supra notes 114-16 and accompanying text.
ment was the revision of section 881. In the first Restatement of Torts, section 881 provided for several liability where multiple defendants independently created or maintained a nuisance by interfering with, *inter alia*, the air or flowing water on another's land.\(^{119}\) Section 881 clearly expressed the majority view that in pollution cases several liability was assignable to multiple tortfeasors who did not act in concert but caused an indivisible injury.\(^{120}\)

Nearly forty years later under the direction of the American Law Institute, section 881 was completely revised.\(^{121}\) Section 881 is no longer limited to nuisance actions. More importantly, the revised section 881 only imposes several liability upon multiple defendants acting independently in cases where there exist distinct harms or a single harm capable of division according to the contribution of each defendant.\(^{122}\) Since section 881 is thereby solely concerned with harms that are capable of apportionment, comment a of section 881 directs attention to section 875 of the Restatement (Second) of Torts for the rule regarding harms that are incapable of apportionment.\(^{123}\)

Section 875 of the Restatement (Second) of Torts assigns joint liability to each tortfeasor where the tortious conduct of multiple parties is the legal cause of a single and indivisible harm.\(^{124}\) Section

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119. **Restatement of the Law of Torts** § 881 (1939). Section 881 specifically provides:
Where two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering with his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm.

120. In Michie v. Great Lakes Steel Div., Nat'l Steel Corp., 495 F.2d 213, 217 (6th Cir. 1974), the court referred to § 881 of the first Restatement of the Law of Torts as the "old" rule and instead relied on the "newer" rule of § 433B of the Second Restatement to hold polluters jointly and severally liable. See supra notes 101-06 and accompanying text.

121. **Restatement (Second) of Torts** § 881 (1977). The revised § 881 provides:
If two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused.

122. Comment a to § 881 explains that § 881 is an application of § 433A, which draws a distinction between harms for which damages can be apportioned and harms for which apportionment is not possible. **Restatement (Second) of Torts** § 881 comment a (1977). See supra notes 112-14 and accompanying text.

123. **Restatement (Second) of Torts** § 881, comment a (1977). Comment a contains a misprint for it directs attention to § 675 for harms that are incapable of apportionment. However, § 675 only covers the existence of probable cause. Section 875 is the correct section. Professor Weschler, the director of the American Law Institute, was notified by telephone of this misprint on February 22, 1982.

124. **Restatement (Second) of Torts** § 875 (1977). Section 875 specifically provides:
875 of the second Restatement differs significantly from the original provision. First, section 875 of the first Restatement did not expressly recognize single, indivisible harms. Second and more important, section 875 of the first Restatement exempted from coverage those nuisances that came within the scope of section 881 of the first Restatement. Therefore, under the first Restatement, multiple defendants who acted independently in causing nuisances by polluting streams would be held severally liable regardless of whether the resulting harm was capable or incapable of division. This is so because such a nuisance was governed solely by section 881, which did not recognize that certain harms were incapable of apportionment. Under the Restatement (Second) of Torts, those defendants would be held jointly and severally liable if they acted in concert or if they acted concurrently to cause a harm that could not be apportioned.

Sections 433A, 433B, 875, 879 and 881, when read as a whole, establish that the American Law Institute has adopted the position of a growing number of courts; that is, multiple defendants who act independently to cause a single, indivisible injury are jointly and severally liable. The addition of section 433A indicates the Institute's recognition of harms that are incapable of apportionment and of the necessity of applying joint and several liability in such instances. The shifting of the burden of proof as to apportionment of damages to the defendant under section 433B corrects the past inequity of placing this burden upon a plaintiff who frequently is unable to bear the burden. Finally, the revision of sections 881, 875

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125. Section 875 of the first Restatement provides:

Except as stated in § 881, each of two or more persons whose tortious conduct is a legal cause of harm to another is liable to the other for the entire harm.

126. See supra note 125 and accompanying text.

127. Id.

128. Restatement (Second) of Torts § 876 (1977). Section 876 is a specific application of the rule in § 875 to situations involving concert of action. Id. at § 875 comment a.

129. Id. at § 879. Section 879 is a specific application of the rule in § 875 to situations involving the concurrent or consecutive causation of a single and indivisible harm. Id. at § 875 comment a. Section 879 of the Restatement (Second) of Torts provides:

If the tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the entire harm, irrespective of whether their conduct is concurrent or consecutive.

In comment a to § 879, it is noted that it is immaterial that one of the tortfeasors is primarily at fault for causing the harm. Id. at § 879, comment a.
and 879 eliminates the requirement of imposing several liability upon multiple defendants whose independent pollution of the environment creates an indivisible harm. The Restatement (Second) of Torts, as an indicator of evolving principles of common law, favors joint and several liability for independent polluters who cause an indivisible harm.

**Application of Joint and Several Liability to Situations Involving Hazardous Substances**

The primary purpose of Superfund is to provide emergency funds for the immediate clean up of hazardous substances at facilities that present an imminent danger to the public health and welfare and the environment. Liability for the release of hazardous substances, however, is placed upon owners and operators of disposal facilities, generators of hazardous substances, and transporters of hazardous substances. Because the fund is limited to $1.6 billion and the costs of the most limited restoration of inactive hazardous waste facilities range from $3 to $6 million, the assignment of joint and several liability is essential to the purpose of Superfund. Joint and several liability will significantly ease the government's burden of establishing liability. It also will allow the government to recover full damages without the impossible task of locating all the responsible parties. Furthermore, it will provide full reimbursement to the government even though many responsible parties may be insolvent.

The issue of joint and several liability for the costs of cleanup and damages associated with a release of hazardous substances arises in at least three contexts. The first context involves the

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131. See supra notes 7-8 and accompanying text. According to the EPA, the $1.6 billion fund will be utilized in cleaning up approximately 400 disposal sites nationwide. 115 Worst U.S. Dumpsites Targeted for Cleanup Under Superfund Program, 12 Env't Rep. (BNA) 808 (Oct. 30, 1980). During the next five years, the EPA expects to use the fund at 170 sites and to institute enforcement actions to force cleanup of the remaining 230 sites. Id. The EPA believes that an average of $4 million will be spent on each disposal site. Id. The assistant administrator for solid waste and emergency response of the EPA stated that $65 million had been allocated by the EPA for remedial actions at 59 sites and that the EPA has authorized 77 emergency response actions, which total $25 million. Government's Update on Carrying out Superfund Meets with Criticism at Hearing, [Current Developments] Env't Rep. (BNA) No. 14 at 469 (August 6, 1982).
132. Hazardous waste disposal companies, for instance, are increasingly filing for bankruptcy to avoid the potentially astronomical costs of cleaning up their disposal facilities. Papa & Cohen, The Bankruptcy Tactic, 12 Waste Age 76 (1981).
133. Rodburg, Generator Liability for Off-Site Disposal, HAZARDOUS WASTE LITIGATION:
liability between and within the classes of owner, operator, generator, and transporter. The second context covers successive liability. Because the discovery of releases of hazardous substances may occur long after the original disposal, successive parties may have carried out the role of generator, transporter, owner and operator. Thus, it must be determined if successor corporations who assumed these roles can be held jointly and severally liable. The third context arises where disposal facilities in the same vicinity may have released hazardous substances and it cannot be determined which facilities released the substances. Therefore, the court must decide whether to impose joint and several liability upon each facility.

**Joint and Several Liability Among Generators, Transporters, Owners and Operators**

Although the actions of the generator, transporter and owner or operator of the waste site are different as to nature and function, the combination of their actions creates an indivisible injury under Superfund, such as the pollution of land, surface water and/or groundwater. If a hazardous substance is released into the environment from an inactive site, each party under section 107 of Superfund is strictly liable for the costs of the cleanup and any damages resulting in injury, destruction, or loss of natural resources. In bringing suit against the generator, transporter and

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Litigation and Administration Practice Series 87, 163-65 (PLI 1981) [hereinafter cited as Rodburg].

134. Id. at 165.

135. Id. In a letter to Congressman Florio concerning joint and several liability under Superfund, Alan A. Parker, the Assistant Attorney General, Office of Legislative Affairs, wrote: "An indivisible harm is frequently the situation at hazardous waste sites where many parties have contributed to the contamination or other endangerment and there are no reliable records indicating who disposed of the hazardous wastes (or in what quantities)." 126 Cong. Rec. H11,788 (daily ed. Dec. 3, 1980). See supra notes 54-55 and accompanying text.


In a recent opinion, a district court has held that a city that owned a landfill upon which hazardous substances were illegally dumped could sue the generators for recovery of the cost of cleanup and damages under § 107(A)(4)(b) even though no Superfund monies were expended. City of Philadelphia v. Stepam Chem. Co., No. 81-0851 (E.D. Penn. Aug. 4, 1982). The court noted that had the federal or state government undertaken the cleanup of the landfill, both the city, as the owner and operator of the site, and the generators would be liable for the cost of removal or other remedial action. But since the city had shouldered the costs of the cleanup, the court justified its recovery of the costs and damages on the following basis:

... it is clear from the discussions which preceded the passage of [Superfund] that the statute is designed to achieve one key objective—to facilitate the prompt
owner or operator of the disposal facility, the government bears
the burden of establishing a release or threatened release.

Assuming joint and several liability is adopted by courts applying
Superfund, each defendant will be liable for the entire amount
of costs and damages, unless the defendant presents evidence as to
how damages may be practically apportioned. Possible methods for
apportionment include quantity of the wastes,137 degree of toxicity
of the wastes,138 or risk of harm associated with the wastes.139

The argument most frequently raised against the assignment of
joint and several liability under Superfund is the "one barrel" sce-
nario.140 Under this argument, a generator deposits one barrel of
hazardous substances at a disposal site that stores thousands of
barrels containing various hazardous substances. Many years later,
government officials discover that hazardous substances have
leaked from this disposal site, and contaminated nearby land, sur-
face water, and groundwater. The only solvent party that can be
located is the generator of the one barrel of hazardous waste. The
generator is then held jointly liable for the entire cost of cleaning
and damages, which may amount to millions of dollars.

Even assuming joint and several liability is imposed, the genera-
tor will not necessarily be held entirely liable. First, the generator
has the opportunity to apportion damages by submitting proof of
quantity, toxicity, or risk of the hazardous substances contained in
the barrel.141 If the generator succeeds in apportioning his contri-

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137. Rodburg, supra note 133, at 166. In one case, a chemical analysis of soil contami-
nated by the leakage from a nearby disposal site revealed the presence of chlorinated hydro-
the court examined the proof of wastes dumped by ten chemical and oil companies, it found
only one of the companies had dumped chlorinated hydrocarbons. That company along with
the operator of the disposal site were held jointly liable. Id. at 608.
138. Rodburg, supra note 133, at 166.
139. Id. at 166-67.
140. E.g., Hazardous and Toxic Waste Disposal: Joint Hearings on S. 1341 and S. 1480
Before the Subcomm. on Environmental Pollution and Resource Protection of the Senate
Comm. on Environmental and Public Works, 96th Cong., 1st Sess. 723 (1979) (statement of
Frank B. Friedman on behalf of the Chemical Manufacturers Association) [hereinafter cited as
Hazardous Waste Hearings].
141. See supra notes 135-37 and accompanying text.
bution to the total damage, he will be liable only for the damage caused by the one barrel. Second, only those who substantially contribute to the harm are held liable in law and equity even when the imposition of joint and several liability is possible.\textsuperscript{142} The generator of one barrel of hazardous substances with a relatively low toxicity, therefore, would not be held liable for the cost of cleanup where hundreds of barrels containing highly toxic chemicals also released their contents.\textsuperscript{143}

Increasing acceptance of rules allowing contribution supports the assignment of joint and several liability under Superfund. Rarely will only one responsible party be sued under Superfund because most jurisdictions recognize a right to contribution between tortfeasors.\textsuperscript{144} If only one party is named in a suit under Superfund, however, it will not have to bear the entire loss. The state's recognition of the right to contribution greatly diminishes the possibility of the inequitable result of one defendant being made to carry the entire burden of liability.\textsuperscript{145}

\textsuperscript{142} This is a test of significance, rather than of largeness or smallness, or quantum. McDowell v. Davis, 104 Ariz. 69, 448 P.2d 869 (1969). See \textit{Restatement (Second) of Torts} §§ 431, 433 (1965). In equity, the courts refer to the maxim that "the law does not concern itself about trifles." See Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979).

\textsuperscript{143} However, the danger presented by hazardous substances differs significantly from other types of pollutants because a relatively small release of a highly toxic chemical, such as dioxin, may cause substantial damage. Consequently, the generator of highly toxic chemicals contained in a barrel that leaked at a disposal site storing hundreds of other wastes may be liable for most of the damages. Thus, joint liability is justified where the leaking of the one barrel substantially contributed to the overall harm.


\textsuperscript{145} Note, \textit{Conscripting Industry Support}, supra note 37, at 547. However, the Supreme Court has recently held that absent statutory authority or "uniquely federal interests" federal courts cannot formulate a common law of contribution. Texas Indus., Inc. v. Radcliff Materials, 451 U.S. 630, 640 (1981). It has been suggested that statutory authority can be found in § 107(a)(4)(B) of Superfund. 2 \textit{Chemical & Radiation Waste Litigation Rep.} 540 (1981). But § 107(a)(4)(B) only provides that owners, operators, generators and transporters will be liable for all other necessary costs borne by persons other than the United States government or a state. 42 U.S.C. § 9607(A)(4)(B) (Supp. IV 1980). Section 107(a)(4)(B) neither expressly nor impliedly provides for contribution. Furthermore, contribution cannot be justified upon "uniquely federal interests" since contribution between the violators of Superfund does not "involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority." Texas Indus., Inc. v. Radcliff Materials, 451 U.S. at 642.
Joint and Several Liability Among Successive Parties

In the second context where successive parties may have carried out the role of generator, transporter, owner or operator, the issue of liability becomes more complicated. If the generator, transporter, owner or operator is a corporation, the question of successor corporate liability arises. The majority of jurisdictions adhere to the general rule that a corporation which buys the assets of another corporation does not succeed to the liabilities of the selling corporation. There are four traditional exceptions to the general rule of nonassumption: (1) the purchase agreement which is interpreted to expressly or impliedly include those liabilities; (2) the sale which constitutes a fraudulent attempt to escape liability; (3) the purchase which amounts to a de facto merger; and (4) the successor corporation which is basically a continuation of the predecessor corporation. In recent years, a few courts have created a new exception in which a successor corporation assumes strict liability for defective products that had been manufactured by its predecessor corporation.

In addition, indemnification, hold harmless or similar agreements or conveyances that transfer liability from a responsible party to another are invalid under Superfund. Insurance agreements, however, are expressly exempted from this prohibition. Thus Superfund arguably extends liability for coverage of a release back to insurance companies which had insured a disposal site in the past, but not at the time of the release. An insurance company that cancels its coverage of a disposal site on grounds of poor management or other practices which increase the possibility of environmental damage may not be able to avoid liability later.

148. Id. See also Annot., 49 A.L.R.3d 881, 884-87 (1973).
Although there is not much case law on successor corporate liability for pollution involving hazardous substances, the New Jersey courts have considered the problem. In *State of New Jersey, Department of Environmental Protection v. Ventron*, the court held a predecessor corporation and a successor corporation jointly and severally liable for the release of mercury from a processing plant onto the surrounding land and into a nearby creek. Although the predecessor corporation had operated the plant for over twice as long as the successor, the court refused to apportion the harm. However, the court held the parent corporations of the successor corporation severally liable apparently on the grounds that their responsibility for the operation of successor corporation could be divided by the number of years each exercised control over the successor.

One year later in *Department of Transportation v. PSC Resources, Inc.*, another New Jersey court held that a successor corporation could be held strictly liable for the environmental torts of a predecessor corporation, which had subsequently been dissolved. In *PSC Resources*, the successor corporation continued its predecessor’s practice of pumping polluted waste water into a lake owned by the Department of Transportation. The court recognized that the nature of the policy considerations of a product lia-

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153. Litigation Series, supra note 152, at 242.

154. Id.

155. Id. at 241-42. The *Ventron* court, however, did stress that the liability of the predecessor and successor corporations that owned the plant was direct and primary; whereas, the liability of parent corporations was partly direct and partly derivative. Id. at 241. The court took a novel approach to a state’s liability for releases of hazardous wastes. The court held that the New Jersey Spill Fund was the appropriate source of funds to remedy a hazardous situation “[w]here any element of expense [remedy] is not chargeable or collectible from any defendant or where the expenses are the result of an inappropriate State action or inaction.” Id. at 242-43. The court found that the state should have shut down the plant in 1968, when a study revealed high levels of mercury pollution in the plant’s effluent. Even when the state worked with some of the defendants during the early seventies, the effluent still contained an unsatisfactory level of mercury. Although the court recognized that the “state’s actions were less than forceful, less than prompt, and perhaps somewhat misleading, the defendants cannot bring a suit for damages against the state.” Id. at 263.


157. Id. at 1063.
bility action were adequately analogous to a pollution action, so as to warrant extension of the defective products exception to the general rule of successor corporate liability. The court held that a successor corporation was liable for the damages caused by any discharges of hazardous substances by its predecessor. Such liability is limited to cases where the successor corporation acquires all or substantially all the assets of the predecessor corporation for cash and continues essentially the same operation as the predecessor corporation.158

The New Jersey courts have recognized the necessity of holding predecessor and successor corporations jointly and severally liable for the costs of cleaning up hazardous substances. The justification for imposing joint and several liability is a combination of the rationale underlying products liability actions and the necessity of preserving the quality of the environment.159

158. Id. at 1061 (quoting Ramirez v. Amsted Indus., Inc., 171 N.J. Super. 261, 278, 408 A.2d 818, 827 (App. Div. 1979), aff'd, 86 N.J. 332, 431 A.2d 811 (1981)). As to the policy considerations, the court found that the refinery was in a better position than the public to protect itself and bear the costs of discharging pollutants. Id. at 1061. In addition, it is the responsibility of the refiner to improve the waste disposal process. Id. Finally, the court concluded that the new law will not allow polluters to escape liability since their misuse of resources has led to the “diminishing quantity and quality of our environment. . . .” Id. (quoting City of Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 177-78 (Law Div. 1976)).


Joint and Several Liability Among Disposal Facilities

In the third context, one or more disposal facilities located in close proximity to one another may have released hazardous substances. It also makes sense to apply joint and several liability in this case. Before joint and several liability may be imposed, however, the government must prove that each named party actually contributed to the release or threatened release. The mere possibility that disposed wastes may have been released is not a sufficient basis for assigning joint and several liability. An insurmountable barrier to the application of joint and several liability may yet arise where all of the disposal facilities in a vicinity contain the same hazardous substances released, but it is impossible to determine whether each facility actually contributed to the release.160


160. "[T]he complex task of determining what is on a site, in what quantities and linking that, through pathways to the environment, to the environmental contamination often involves very complicated geohydrological studies... the elements of proof are quite difficult there." Hearings on Hazardous Waste Before the House Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 127 (1980). Where several generators deposit their wastes at a common dumpsite, it may prove impossible to link contamination of the groundwater, for instance, with any particular company or to determine any company's proportionate contribution. Zener, Stakes High in Civil Suits for Waste Damages, 1 CHEMICAL & RADIATION WASTE LITIGATION REP. 432, 434 (1981).

Although disposal facilities in the same vicinity that contain the same hazardous substances released but there is no evidence that these facilities actually released the substances cannot be held jointly and severally liable, they may be held liable under the theory of market share liability. The problem of identifying which facilities actually released the hazardous substances is analogous to the difficulty of establishing causation in products liability cases involving fungible products. The elements of a cause of action in products liability include proof of defect, identification of the particular party responsible for the defect, and proof that the defect in the product caused the injury. 1 R. Hursh & H. Bailey, AMERICAN LAW OF PRODUCTS LIABILITY 2d §§ 1:7, 1:28, 1:41 (1980). A plaintiff's failure to identify the defendant as the manufacturer or seller of the defective product has traditionally proven fatal to recovery. See Keen v. Dominick's Finer Foods, Inc., 49 Ill. App. 3d 480, 364 N.E.2d 502 (1977); Annot., 51 A.L.R.3d 1344 (1973).

Courts developed various theories to shift the burden of identifying the manufacturer of a defective product to the defendants. The theory of concert of action was utilized under certain circumstances. See supra note 72. Under the theory of alternative liability, a plaintiff unable to identify which one of multiple defendants caused his injury may shift the burden of identification to the defendants so long as each defendant committed a tortious act and the injury incurred by the plaintiff was the result of the acts of one of the defendants. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1, 45 (1948); RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965). The theory of enterprise liability provided that the loss be borne by the enterprise or an industry, rather than distributed to each manufacturer in the industry on a basis of individual fault. Hall v. E.I. DuPont de Nemours & Co., 345 F. Supp. 353
CONCLUSION

Superfund was enacted to provide funds for the clean up of (E.D.N.Y. 1972). See also Note, Beyond Enterprise Liability in DES Cases—Sindell, 14 IND. L. REV. 695, 701 (1981).

Recently, the courts have been confronted with cases in which defective fungible products, such as asbestos and DES, produce an indivisible injury which does not become manifest until approximately fifteen to twenty-five years later, when the identification of the specific manufacturer is impossible through no fault of the plaintiff. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1094 (5th Cir. 1973); Sindell v. Abbott Laboratories, 26 Cal. 3d 58, 607 P.2d 924, 925, cert. denied, 449 U.S. 912 (1980). In Sindell, the California Supreme Court developed a new theory entitled market share liability. 607 P.2d at 937. Under market share liability, once a plaintiff injured by a fungible product joins the manufacturers of a substantial share of the defective product, the burden of identification is shifted to the defendants. Id. Each defendant is liable for the portion of the judgment that corresponds to its share of the market unless the defendants show that they could not have made the product. Id.

In Sindell, plaintiffs brought a class action against eleven drug companies for injuries sustained from consumption of DES by plaintiffs’ mothers during pregnancy. The court found the theories of alternative liability, concert of action and enterprise liability inapplicable. The court refused to apply alternative liability because all the drug companies that may have manufactured the DES ingested by the plaintiff’s mother may not have been joined, and the Summers rule requires joinder of all parties who did cause or could have caused the injury. Id. at 931. See supra note 165. The court rejected concert of action on three grounds: first, the theory was limited to cases where a few persons directly encouraged or engaged in a joint activity involving one tortious act; second, the plaintiff’s allegations failed to establish that a tacit understanding or mutual agreement to commit a tortious act existed between the defendants; and third, no evidence was presented that indicated that the defendants assisted or encouraged other drug companies to conduct inadequate tests on DES and to distribute inadequate warnings. Id. at 932-33. See supra note 166. Finally, the court declined to apply the enterprise liability theory since it would be unfair to impose liability upon drug companies that did not supply the DES merely because they adhered to the standards of the industry which were later found to be negligent. Id. at 935. See supra note 167.

Under market share liability, a manufacturer who controls a significant portion of the market may be held liable for a large percentage because it cannot be proven that another manufacturer actually produced the product. Id. at 937. The court explained that this result is justified because “each manufacturer’s liability would approximate its responsibility for the injuries caused by its own products.” Id. Furthermore, a defendant may be held liable for a greater percentage of the damage than its share of the appropriate market. Id.

A critical question left unanswered is what constitutes a “substantial” share of the market. The court refused to adopt 75-80% of the market as the measure of substantial. Id. As the dissent noted, the answer as to what amounts to substantial is “anyone’s guess.” Id. at 939 (Richardson, J., dissenting).

Four basic policy reasons underlie the market share theory of liability. First, adoption of the rules of causation and liability is mandated by our increasing complex, industrialized society which through advances in science and technology creates harmful fungible goods and through mass production and intricate marketing methods precludes the tracing of the product to any specific producer. Id. at 936. Second, as between an innocent plaintiff and negligent defendants, the defendants should be liable for the cost of the injury. Id. Third, defendants are better able to shoulder the costs of injury due to the manufacture of a defective product. Id. Fourth, since a manufacturer occupies the best position for discovering and


waste facilities that release or present a substantial threat of release of hazardous substances. The provision originally assigning joint and several liability to the owners and operators of disposal facilities, the generators of the hazardous substances, and the transporters of the hazardous substances was deleted from the final version of Superfund. The committee men responsible for Superfund in both the Senate and the House, as well as other sponsors, stressed that section 311 of the Clean Water Act and the traditional and evolving principles of common law would determine the scope of liability in the absence of the express provision of joint and several liability.

Since neither section 311 nor the case law thereunder addresses the issue of joint and several liability, the Clean Water Act fails to provide assistance in defining the scope of liability under Superfund. Under the common law, the traditional and majority position would restrict application of joint and several liability under Superfund to those extremely rare instances where the parties acted in concert. The evolving and increasingly accepted position, however, would impose joint and several liability under guarding against defects in its product, holding it liable for defects and failure to warn of harmful consequences will encourage product safety. \textit{Id}.

The manufacture of defective fungible products is clearly analogous to the improper disposal of hazardous wastes. Hazardous substances are fungible. Since the actual release of hazardous substances may have occurred several years ago, thereby allowing disbursement of the wastes over significant distances, it may be impossible to identify which disposal site in a potentially huge geographical area released the hazardous substances. Finally, as in many products liability cases, the standard of liability for a release of hazardous substance is strict.

The only significant difference between the manufacture of defective fungible products and the improper storage of hazardous substances is that products liability actions are for damages resulting from personal injury; whereas actions under Superfund are for recovery of cleanup costs associated with damage to the environment. This distinction loses significance when considering that releases of hazardous substances can cause irreparable damage to the environment and that the deterrent effect of Superfund will be defeated unless potentially liable parties are joined in the action.

The same policy reasons that underlie the application of market share liability to products liability actions also support application to Superfund actions. First, hazardous substances, such as dioxin, are the result of advances in technology and because of their fungible nature cannot be traced back to the disposal facility that released them. Second, as between the government and the disposal facilities that contributed to the harm, the facilities should bear the costs of cleanup and the damages. Third, disposal facilities as represented by owners, operators, generators, and transporters are better able to bear the costs of cleanup and the damages, because Superfund is limited to $1.6 billion, although the costs and monetary damages could easily exceed $2 to $3 billion. \textit{See supra} notes 7-8 and accompanying text. Finally, holding disposal facilities liable serves to deter future improper storage and may even cause responsible parties to clean up disposal facilities without threat of prosecution.
Superfund where the contamination caused by a release of hazardous substances constituted an indivisible injury. Under this trend, the defendants would be protected from being held liable for the entire harm if they established that the damages can be practically apportioned, that they did not substantially contribute to the harm, and that a right to contribution from other responsible parties exists under state law.

Joint and several liability is also necessary if the fund is to be preserved and the purpose of Superfund fulfilled. That purpose is to preserve the fund for emergency action and for abandoned disposal facilities where no solvent, responsible parties can be located. Assignment of joint and several liability also may deter future improper disposal of hazardous substances and may even encourage responsible parties to clean up inactive disposal facilities without resort to actual prosecution.

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