
Kathleen Paravola

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HAZARDOUS LIABILITY FOR SUCCESSOR OWNERS OF TOXIC WASTE SITES: NEW YORK V. SHORE REALTY CORP.

INTRODUCTION

Congress adopted the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA)¹ to stem the menace of abandoned hazardous waste sites.² CERCLA creates legal and administrative procedures for the prevention and cleanup of hazardous chemical releases, and provides a fund (the "Superfund") to finance cleanup costs.³ Congress passed CERCLA hastily in an eleventh-hour compromise, and the bill that became the law has virtually no legislative history.⁴ As a result, CERCLA contains many ambiguities and omissions.

CERCLA suffers its most significant ambiguity in its liability section. CERCLA authorizes the President to use Superfund resources to clean up hazardous waste sites and spills, and to sue "responsible parties" for reimbursement of the cleanup costs.⁵ Although the definition of "responsible parties" in section 9607(a) is reasonably coherent, the section is ambiguous

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5. 42 U.S.C. §§ 9604, 9606, 9607 (1982). Under CERCLA the President is empowered to exercise "response authority" to actual or threatened releases of hazardous substances. Id. The President has delegated this authority to several agencies, but primary responsibility lies with the Environmental Protection Agency (EPA). Exec. Order No. 12,316, 3 C.F.R. 168 (1982). The subsequent suit against responsible parties is known as a "response suit."
6. 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
about the standard of liability to be imposed upon targeted defendants.\textsuperscript{7} Most district courts have concluded that Congress intended for the provision to impose joint and several liability upon responsible parties.\textsuperscript{8} This standard

treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any 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;

(8) numerous district courts have coped with the problem of how to construe the scope of liability under CERCLA. See, e.g., Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984) (parties that work in concert to produce a single individual release or threatened release are jointly and severally liable under CERCLA for a private party's response costs, if applicable state law so provides); United States v. Conservation Chem. Co., 589 F. Supp. 59 (W.D. Mo. 1984) (joint and several liability applicable under CERCLA where the conduct of two or more persons combines to violate the statute); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984) (chemical company, its officers, and independent transporter jointly and severally liable for creation of alleged hazardous waste disposal site for manufactured chemicals); United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984) (Congress intended to impose joint and several liability under CERCLA, but under a moderate application which apportions liability); United States v. South Carolina Recycling & Disposal Inc., 21 Env't Rep. Cas. (BNA) 1577 (D.S.C. 1984) (four hazardous waste generators, two current property owners, site operator and a chemical company jointly and severally liable for hazardous waste disposal at disposal site); United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354 (D.N.M. 1984) (site owner jointly and severally liable for its lessee's disposal of hazardous wastes at the site); United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905 (C.D. Cal. 1984) (joint and several liability not mandatory under CERCLA, but supported persuasively by legislative history of Act and analogous statutory language); United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983) (joint and several liability may be applied to site owners and hazardous waste generators, unless the defendants establish reasonable basis for apportioning harm); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983) (issue of joint and several liability under CERCLA to be determined by developing federal common law; adopts Restatement (Second) of Torts approach, applying joint and several liability to single and indivisible harm).
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was recently adopted by the United States Court of Appeals for the Second Circuit in New York v. Shore Realty Corp. 9

In Shore Realty, the Second Circuit held that the owner of an abandoned waste site was jointly and severally liable for the release of hazardous substances into the environment. 10 This standard of liability creates a wide range of responsible parties under CERCLA. It imposes financial responsibility for massive cleanup costs upon parties that have not contributed to the pollution at a waste site. Joint and several liability enables governments to single out identifiable contributors to waste sites and to force them to fund entire cleanups, even if the defendant’s contribution to the waste site was modest.

This Note highlights the background of CERCLA and reviews the judicial response to its liability provisions. 11 This Note then analyzes the Shore Realty decision and discusses its impact on potentially liable parties. Finally, this Note shows that the Second Circuit’s construction of CERCLA’s liability standards destroys the ability of successor owners of waste sites to minimize their liability. The stiff liability standards set out in Shore Realty will interfere with private efforts to finance cleanups through contribution, settlement and insurance.

I. BACKGROUND

A. Legislative History of CERCLA

Congress enacted CERCLA after almost two years of debate. CERCLA recognizes the health and environmental risks of hazardous waste sites and supplants the inadequate statutory mechanisms formerly available to remedy such violations. 12 CERCLA is not principally a regulatory program. It does not create a federal hazardous waste bureaucracy; it instead creates civil liability for current or former owners of waste sites and authorizes a Superfund to finance the removal of hazardous wastes in the environment. 13

9. 759 F.2d 1032 (2d Cir. 1985).
10. Id. at 1037, 1043-44.
11. For a synopsis of recent court decisions regarding current CERCLA issues, see 15 THE LAW. BRIEF 16-19 (April 30, 1985).
12. See H.R. REP. No. 1016, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6120-25. The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6987 (1976), currently provides a “cradle-to-grave” regulatory scheme for the movement of hazardous wastes, but does not cover inactive or abandoned hazardous waste sites. In 1979, it was estimated that as many as 30,000-50,000 such sites existed, of which 1,200-2,000 presented serious public health risks. H.R. REP. No. 1016, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6120. Especially in light of the disaster at Love Canal, New York, Congress recognized the need for additional legislation given the inadequacies of the RCRA and other previously-enacted air and water pollution legislation. Id.
The cleanup of hazardous wastes takes place on several fronts. First, CERCLA mandates that owners of waste facilities report the release of wastes into the environment to the National Response Center. Second, CERCLA makes waste site owners and operators civilly liable under federal law for the release, or threatened release, of hazardous substances into the environment. A past or current owner of a waste site may be ordered to clean the site, or a government agency may enter the property to conduct the cleanup directly. In addition, if the United States or any state government incurs an expense to respond to the release, then it may sue a variety of responsible parties to recover the expenses. Finally, CERCLA authorizes the federal Environmental Protection Agency (EPA) to remove hazardous wastes from a waste site when the owner or operator of a site has not acted to remove the wastes. Through the Superfund, federal revenues are used to pay for waste cleanups. CERCLA also imposes liability on parties connected with the waste site for reimbursement, and authorizes the EPA to seek whatever injunctive relief is necessary to abate "imminent and substantial" danger to the public from an actual or threatened release.

The standard and scope of liability to be imposed on site owners for cleanup expenses is not settled in the statute or the legislative history. Section 9607

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**Section 9601(9)**

- **Facility** as:
  - (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or
  - (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed; or otherwise come to be located; but does not include any consumer product in consumer use or any vessel...

**Section 9602(b)**

Section 9602(b) presently provides that a reportable quantity of one pound, or the reportable quantities established for hazardous substances pursuant to § 1321(b)(4) of the Clean Water Act, will be deemed the quantity of release that requires notification under CERCLA.

**Section 9604(a)**

CERCLA defines "remove" or "removal" as:

[S]uch actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

**Section 9607(c)**

Section 9607(c) provides for reimbursement of costs incurred by the United States or a state government in response to a release of hazardous substances.

**Section 9604**

CERCLA authorizes the EPA to conduct removal actions necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

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14. Section 9601(9) defines "Facility" as:

15. The National Response Center (NRC) was established under the Clean Water Act, 33 U.S.C. § 1251 (1982). Section 9602(b) presently provides that a reportable quantity of one pound, or the reportable quantities established for hazardous substances pursuant to § 1321(b)(4) of the Clean Water Act, will be deemed the quantity of release that requires notification under CERCLA.

16. 42 U.S.C. § 9604(a)(1) (1982). CERCLA defines "remove" or "removal" as:

17. See supra note 5.

18. Id. § 9607(c)(3) (1982).


20. Id. § 9607(a)(4) (1982).

21. Id. § 9604.

22. Id. § 9606.
states without elaboration that responsible parties "shall be liable for" costs of removal of wastes and damages.\textsuperscript{23} The only reference to the standard or scope of liability found elsewhere in the statute is in section 9601(32), which provides that the standard of liability under CERCLA tracks the standard of liability under the Federal Water Pollution Act (the Clean Water Act).\textsuperscript{24} Finally, the statute provides only limited defenses to liability under section 9607(b). A defendant is not liable if a release of waste is caused by an act of God, an act of war, or a third party unrelated to the defendant; the "third party" defense is good only if the defendant can prove that "he exercised due care with respect to the hazardous substance" and that "he took precautions against foreseeable acts or omissions of such third parties."\textsuperscript{25}

The legislative history of CERCLA is also ambiguous on the standard and scope of liability. The final version of the act represents an eleventh-hour compromise between three bills. The act was assembled in the final days of the Ninety-sixth Congress primarily by Senate leaders and sponsors of its earlier versions.\textsuperscript{26} Although the original bills contained clauses that imposed a standard of strict liability and a scope of joint and several liability, Congress deleted these clauses from the final version.\textsuperscript{27} A key sponsor of the compromise, Senator Jennings Randolph, stated that the scope of liability for

\begin{itemize}
  
  \item \textsuperscript{23} Id. § 9607.
  \item \textsuperscript{24} See supra note 7.
  \item \textsuperscript{25} Section 9607(b)(3) provides that there shall be no liability for a person otherwise liable who can establish that the release of hazardous substances was caused solely by:
  \begin{itemize}
    \item (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .
  \end{itemize}
  
  \item \textsuperscript{26} 42 U.S.C. § 9607(b)(3) (1982).
  
  \item \textsuperscript{27} After considering H.R. 7020, the House adopted an amendment proposed by Representative Albert Gore that provided a formula for apportioning damages. 126 CONG. REC. 26,781 (1980). However, the Senate version deleted any such formula. Note, The Right to Contribution For Response Costs Under CERCLA, 60 NOTRE DAME LAW. 345, 348 (1985) [hereinafter cited as Note, Right to Contribution]. One partisan-minded commentator remarked that the controversial provision for joint and several liability was deleted as part of a final compromise to pass the act before the Reagan administration took office. Dore, The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund, 57 NOTRE DAME LAW. 260, 268 (1981).
\end{itemize}
responsible parties under the act would be governed by "traditional and evolving" common law principles. He also stated that the compromise retained a strict liability standard for cleanup costs against those connected with waste sites. This standard was drawn from reference to judicial construction of section 311 of the Clean Water Act. Representative James Florio made similar statements about liability under CERCLA when he introduced the original House bills. Conversely, Senator Jesse Helms stated that Congress had deleted the provision for joint and several liability because Congress opposed that standard; Congressional opponents of CERCLA believed that the courts would apportion liability unfairly under that standard. The confusion over how to reconcile the statutory language of CERCLA, the omission of express language on liability, and the statements on the floor of Congress has spawned much controversy and litigation.

B. Judicial Treatment of CERCLA's Liability Provision

1. The Range of Responsible Parties

Section 9607(a) defines four classes of persons who can be held liable in a response suit for the cleanup costs of a hazardous waste site. Defendants

28. In discussing the compromise bill, Senator Randolph stated:
   It is intended that issues of liability not resolved by this act, if any, shall be governed
   by traditional evolving principles of common law. An example is joint and several
   liability. Any reference to these terms has been deleted, and the liability of joint
   tortfeasors will be determined under common or previous statutory law.
126 CONG. REC. 30,932 (1980).
29. Id.
30. Id. See infra notes 40-51.
31. 126 CONG. REC. 31,965 (1980). See also Grad, supra note 4, at 30 (although strict
   liability was not mentioned in the statute, Congressman Florio assured the members that it was
   continued by reference to section 311 of the Clean Water Act).
32. 126 CONG. REC. 30,972 (1980). Senator Helms described the intent of the deletion as
   follows:
   Retention of joint and several liability in S. 1480 received intense and well-
   deserved criticism from a number of sources, since it could impose financial
   responsibility for massive costs and damages awards on persons who contributed
   only minimally (if at all) to a release or injury. Joint and several liability for costs
   and damages was especially pernicious in S. 1480, 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. Those
   contributing to the fund will frequently be paying for conditions they had no
   responsibility in creating or even contributing to. To adopt a joint and several
   liability scheme on top of this would have been grossly unfair.
   The drafters of the Stafford-Randolph substitute have recognized this unfairness,
   and the lack of wisdom in eliminating any meaningful link between culpable conduct
   and financial responsibility. Consequently, all references to joint and several liability
   in the bill have been deleted.
Id.
33. See supra note 8.
34. These classes include current owners and operators of facilities, past owners and
in CERCLA response suits have unsuccessfully sought to be dismissed on the ground that they did not fall within one of the four statutory classes of responsible parties. Recent district court decisions have rejected such claims and have broadly interpreted section 9607(a).

CERCLA liability has been imposed on a wide range of defendants. For example, a lessee of a hazardous waste site has been held liable as an "owner" because the lessee maintained control and exercised responsibility over the use of the property. The lessee stood in the shoes of the property owner for CERCLA purposes. Lessee liability can also be imputed to landlords; one court found a former site owner liable when his lessee disposed of hazardous wastes at the site. Another court found an officer of a chemical company liable as an "arranger for disposal," because the officer arranged with an independent contractor to transport hazardous wastes to a

operators at the time of disposal, arrangers of hazardous waste transportation and disposal, and transporters of hazardous wastes for disposal. 42 U.S.C. § 9607(a) (1982). For the full text of § 9607(a), see supra note 6.

In hazardous waste suits, the plaintiffs usually name all generators, transporters, and disposers of waste connected with a waste site as defendants. Each of these defendants will have different levels of involvement with the release of hazardous waste at a site. Nevertheless, the Superfund does not provide a method for allocating liability among these parties. For example, the statute does not provide explicitly for limited liability for generators who deposit some, but not all, of the waste at a site. Such parties may be held liable for all of the response costs and damages at that site. Note, Joint and Several Liability For Hazardous Waste Releases Under Superfund, 68 Va. L. Rev. 1157, 1162 (1982) [hereinafter cited as Note, Joint and Several Liability].

35. See supra note 8.

36. United States v. South Carolina Recycling & Disposal, Inc., 21 Env't Rep. Cas. (BNA) 1577, 1581 (D.S.C. 1984). In a response suit, one defendant, Columbia Organic Chemical Company (COCC), was held liable for response costs in the cleanup of a hazardous waste disposal site near Columbia, South Carolina. COCC had leased the site from the owner, and it subsequently sublet a portion of it. The court held that both lessees, along with the property owners, should be considered "owners" for the purposes of imposing liability under § 9607(a). Id. at 1581. The court also held the lessee liable as an "operator," an "arranger," and a "transporter," because it was involved in the hazardous waste disposal business. Id. at 1581-84. The fact that COCC sublet a portion of the site did not reduce its liability.

37. United States v. Cauffman, 21 Env't Rep. Cas. (BNA) 2167 (C.D. Cal. 1984). At the time of the suit, the defendants did not own the site, and the wastes on the site were disposed of by the owner-defendant's lessee. The court held that §§ 9607(a)(1) and (2) imposed strict liability on current and previous owners of hazardous waste facilities. Id. The defendants accordingly fit within the statutory classifications of responsible persons. The court believed that there was nothing in the statute that required the government to allege or prove proximate causation. Id.

But see Cadillac Fairview/California Inc. v. Dow Chem. Co., 21 Env't Rep. Cas. (BNA) 1108 (C.D. Cal. 1984). In Cadillac Fairview/California, owners of a waste site sought declaratory judgment that a party who owned the site before the plaintiff, and knew of but neglected the presence of hazardous wastes, was liable to the plaintiff under CERCLA. The court held that under CERCLA, the liability of prior owners is expressly limited by the words "ownership at the time of disposal" in § 9607(a)(2). Therefore, a defendant who did not own the site at the time of disposal could not be liable. Id. at 1113.
disposal site. Finally, a waste generator was found liable under CERCLA even though it had transferred legal ownership of hazardous material to a disposal company at the time of pick-up for disposal.

2. The Standard and Scope of Liability

The only express reference in CERCLA to a standard of liability is found in section 9601(32), which provides that liability under CERCLA shall be assessed under the same standard as liability under the Clean Water Act. Because courts have uniformly imposed strict liability under the Clean Water Act, the district courts have unanimously concluded that Congress intended to impose a strict liability standard under CERCLA.

38. United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 579 F. Supp. 823 (W.D. Mo. 1984). In NEPACCO, the government sued a chemical company, its officers, and an independent contractor connected with the company's waste disposal for damages and response costs under CERCLA. The court held that the company was a "person" under CERCLA, and that it could be held liable for contracting to transport and dispose of the hazardous wastes. Id. at 847. The company's officers argued that they could not be held personally liable for the corporation's acts, and that they neither owned nor possessed the hazardous wastes to which their corporation had ownership rights. The court still found the officers liable as "arrangers," because they had knowledge and supervision of the disposals. Id. The court's findings were based on a liberal interpretation of the term "persons." The court construed the term to include both employees and corporations. Id. at 848. Furthermore, the court held the officers liable as owners and operators because they were major stockholders in the closely held corporation, and because they jointly owned and operated the plant. Id.

39. United States v. Wade, 577 F. Supp. 1326 (D.C. Pa. 1983). The defendants in Wade argued that the government could not establish a causal relationship between the defendants' wastes and the government's cleanup costs. The court rejected the defendants' arguments, holding that the statute should be liberally construed and should not be read to require that the government "fingerprint" wastes for individual violators. Id. at 1332. Rather, the court held that the government need only prove that the defendants' wastes were dumped at the site. Id.


CERCLA's strict liability standard is subject to limited affirmative defenses, as set out in 42 U.S.C. § 9607(b) (1982). Section 9607(b) states, in pertinent part:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom
Because the district courts impose strict liability under CERCLA, some courts have openly questioned whether it is fair to make a few identifiable parties liable for an expensive cleanup. The standard approach that district courts take to this problem is a straightforward, mechanical application of joint and several liability. A few courts have suggested an alternative: that joint and several liability would be withdrawn if it would cause undue hardship on the responsible parties, and that damages should be apportioned among the parties.

The standard approach is epitomized by United States v. Chem-Dyne.\footnote{42} In this case, the District Court for the Southern District of Ohio held that the scope of liability under CERCLA should be derived by reference to federal common law.\footnote{43} The court stated that Congress deleted the joint and several liability provision in CERCLA to avoid creating a mandatory legislative standard in inappropriate circumstances.\footnote{44} Accordingly, the court determined that CERCLA authorized application of joint and several liability against responsible parties for cleanup costs.\footnote{45} The court adopted the Restatement (Second) of Torts approach, which imposes joint and several liability where two or more persons cause a single and indivisible harm.\footnote{46} The court concluded that liability is not joint and several only where there exists a reasonable basis for division founded on contribution.\footnote{47} The majority of district courts have adopted the Chem-Dyne/Restatement approach.\footnote{48}

By contrast, in United States v. A & F Materials Co.,\footnote{49} another district court stated that damages should be apportioned among responsible parties, although it reserved the power to impose joint and several liability on

were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant . . . .

\textit{Id.}

\footnote{42} 572 F. Supp. 802 (S.D. Ohio 1983).

\footnote{43} "[T]he delineation of a uniform federal rule of decision is consistent with the legislative history and policies of CERCLA . . . ." \textit{Id.}

\footnote{44} \textit{Id.} at 810.

\footnote{45} \textit{Id.} The court noted the similarities between the liability provisions of the Federal Water Pollution Control Act (FWPCA), which provides for the application of joint and several liability, and CERCLA. Nevertheless, the court stated: "While the complementary policies and comparable language of FWPCA and CERCLA are persuasive points, a blanket adoption of the joint and several liability standard of § 1321 would be inconsistent with the legislative history of CERCLA." \textit{Id.}

\footnote{46} \textit{Id.} See \textit{Restatement (Second) of Torts} § 875 (1979).

\footnote{47} 572 F. Supp. at 810.


\footnote{49} 578 F. Supp. 1249 (S.D. Ill. 1984).
defendants who were unable to prove their level of contribution. CERCLA’s legislative history indicated to the court that Congress believed too rigid an application of joint and several liability would impose liability on remote responsible parties, regardless of their actual role in creating the waste site. The court concluded that its compromise approach was consistent with Congressional intent.

II. THE SHORE REALTY DECISION

In New York v. Shore Realty Corp., the defendant bought a hazardous waste disposal site in Glenwood Landing, New York, to use for a condominium development. The defendant knew that the present tenants operated an illegal hazardous waste storage facility on the site. The site contained approximately 700,000 gallons of hazardous chemicals, most of which were located in five large tanks. Before Shore Realty consummated its purchase, it commissioned an environmental study of the site. Shore Realty’s environmental consultant, WTM Management Corporation (WTM), reported that the waste facilities on the site were dilapidated. WTM’s report also noted that there had been several hazardous waste spills at the site, including a significant one in 1978. Although the current tenant had attempted to clean up the spills, the report revealed that there was still groundwater contamination. WTM concluded that if the current tenant ceased its disposal operation and left the material on the site, the new owners would be left with a “potential time bomb.”

In spite of WTM’s report, Shore Realty took title to the site in October of 1983, and evicted the waste disposal tenant in January of 1984. In the four months before its eviction, the tenant added nearly 90,000 gallons of

50. Id. at 1256. The court adopted Representative Albert Gore’s amendment to the original House bill, H.R. 7020, 96th Cong., 2d Sess., 126 CONG. REC. 26,781 (1980). The Gore amendment states that damages should be apportioned according to:
   (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
   (ii) the amount of the hazardous waste involved;
   (iii) the degree of toxicity of the hazardous waste involved;
   (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
   (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
   (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

Id.


52. 759 F.2d 1032 (2d Cir. 1985).

53. Id. at 1037.

54. Id. at 1038.

55. Id. at 1038-39.
hazardous chemicals to the tanks. A state inspection conducted in January of 1984, two days before Shore Realty evicted the tenant, revealed that the drums of chemicals were deteriorating and leaking. The tenant did not clean up the site before it vacated, and the site's condition was admittedly as bad or worse than when WTM conducted its report. Subsequently, Shore Realty did nothing to remove the hundreds of thousands of gallons of hazardous wastes in the deteriorated and leaking tanks.66

The State of New York brought suit against Shore Realty and Donald LeoGrande, its sole officer and shareholder, in the District Court of the Eastern District of New York.57 The state sought an injunction—to order Shore Realty to clean the site—and damages under CERCLA for its response costs.58 The complaint also alleged pendant state law nuisance claims. On a motion for summary judgment, the district court held Shore Realty liable for the state's response costs and awarded the state injunctive relief both under CERCLA and on a finding that the site constituted a public nuisance under state law.59 On appeal, the Court of Appeals for the Second Circuit remanded the case for a clearer holding.60 On remand, the district court concluded that CERCLA did not authorize injunctive relief, and the court based a new injunction solely on state public nuisance law.61 The district court sustained a verdict for response costs under CERCLA.

The court of appeals affirmed the district court's second decision, holding Shore Realty and LeoGrande liable for the state's response costs under CERCLA.62 The court also denied the state injunctive relief against Shore Realty under CERCLA, but upheld the district court's issuance of a permanent injunction based on New York public nuisance law.63

The court of appeals found Shore Realty liable for response costs under CERCLA as a current landowner, under section 9607(a)(1).64 Shore Realty

56. Id. at 1039.
57. See 15 Env't Rep. (BNA) 1154 (1985) (discussing New York v. Shore Realty Corp., No. 84-7925 (E.D.N.Y. Oct. 15, 1984) (oral opinion)). In an earlier published ruling, the district court for the Eastern District of New York held that the state need not sue all defendants to collect full damages. New York v. Shore Realty Corp., 21 Env't Rep. Cas. (BNA) 1430, 1431 (E.D.N.Y. 1984). Shore Realty had moved to dismiss the state's complaint for failure to join an indispensable party under to FED. R. Civ. P. 12(b)(7). Id. at 1430. Shore Realty and LeoGrande claimed that the state had to join over one hundred generators and former owners in the suit. 15 Env't Rep. (BNA) at 1155. For a complete discussion of the district court's decision, see infra text accompanying notes 84-104.
58. The state incurred response costs when it assessed the conditions of the site and supervised the removal of the drums of hazardous wastes. 759 F.2d at 1043.
59. 15 Env't Rep. (BNA) at 1155.
60. For an account of the remanded decision, see 759 F.2d at 1037.
61. Id.
62. Id. at 1043.
63. Id. at 1049-51.
64. Id. at 1044. Section 9607(a)(1) provides "the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility" is liable under CERCLA. 42 U.S.C. § 9607(a)(1) (1982).
had argued that section 9607(a)(1) was not intended to include all owners, but only those who under section 9607(a)(2) owned the property "at the time of disposal." After examining CERCLA and its legislative history, the court found that Congress intended section 9607(a)(1) to hold liable all current landowners and operators; section 9607(a)(2) applied only to past owners and operators "at the time of disposal." The court concluded that Shore Realty was liable under section 9607(a)(1) as a current owner. The

65. Section 9607(a)(2) provides that "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 . . . is liable under CERCLA. 42 U.S.C. § 9607(a)(2) (1982).

66. 759 F.2d at 1044. The court also stated that a site's inclusion on the National Priority List (NPL) was not a necessary condition for the state to recover response costs, and that the state could sue responsible parties for remedial and removal costs, if such efforts were consistent with the National Contingency Plan (NCP). Id. at 1045-46.

The NCP is created in § 9605(8)(B), which provides in part:

[T]he [EPA] shall list as part of the plan national priorities among the known releases or threatened releases throughout the United States and shall revise the list no less often than annually . . . . To the extent practicable, at least four hundred of the highest priority facilities shall be designated individually and shall be referred to as the 'top priority among known response targets', and, to the extent practicable, shall include among the one hundred highest priority facilities at least one such facility from each State which shall be the facility designated by the State as presenting the greatest danger to public health or welfare or the environment . . . . Other priority facilities or incidents may be listed singly or grouped for response priority purposes . . . .

. . . .

Following publication of the revised national contingency plan, the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions of the plan.


Section 9605 provides that the EPA shall revise the NCP to accommodate the removal of oil and hazardous substances discovered to pose an immediate threat to human health. The NCP sets priorities for the federal response to releases of hazardous substances, pollutants, and contaminants. 42 U.S.C. § 9605 (1982).

Shore Realty argued that, because the site was not listed on the NPL, the state's action was inconsistent with the NCP and that Shore Realty was not liable under § 9607(a). 759 F.2d at 1045. Shore Realty based its argument upon the language in § 9607(a)(4), which provides that responsible parties shall be liable for "[a]ll costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan . . . ." 42 U.S.C. § 9607(a)(4)(A) (1982). The court concluded, to the contrary, that this clause referred only to the authority of courts to award a state damages from the Superfund. Whether a state can get money from the Superfund had, for the court, no relevance to the issue of the defendants' liability in this case.

The court also relied on CERCLA's legislative history to support this conclusion. It reviewed the changes made in CERCLA's final compromise version and found that no legislator mentioned that NPL listing would be a requirement for removal actions under the NCP. Id. at 1047. Finally, the court stated that to limit the scope of the NPL listing was consistent with CERCLA's purposes. It made sense for the federal government to limit to the NPL listed sites only those long-term remedial efforts that were federally funded, because the states supposedly had more flexibility acting on their own. Id.
court reasoned that if Shore Realty's construction of the section were adopted, it would create a loophole in liability under CERCLA: it would allow current owners of abandoned waste facilities to avoid liability, as long as the waste facility did not operate under their ownership. This would defeat the policy behind CERCLA when the waste dumpers or producers cannot be located or are judgment-proof.67

The court of appeals also addressed the interplay between CERCLA and state law. The court held that the state was entitled to an award for cleanup costs under CERCLA; it reasoned that Congress did not intend to leave cleanup under CERCLA "solely in the hands of the federal government."68 Rather, the state or political subdivision could contract with the EPA to take action on a cost-sharing basis.69 In contrast to the award of costs, the court did not extend the injunctive relief available under CERCLA to the state. The court stated that CERCLA's statutory scheme and legislative history reflected Congress's intent not to authorize such relief.70

III. Analysis

The Shore Realty decision is consistent with recent district court decisions regarding the liability of waste site owners under CERCLA. The court broadly construed the statutory definition of a responsible party and affirmed widely-held judicial findings that Congress intended to impose joint and several liability under CERCLA. The court nevertheless failed to cope with the issue of whether courts should impose joint and several liability under

67. 759 F.2d at 1045. The court found that Congress intended responsible parties to be strictly liable under CERCLA, even though Congress deleted an explicit provision for strict liability from the compromise version of the bill. Id. at 1044.

The court also noted that, regardless of the standard of liability under CERCLA, Shore Realty had a contractual relationship with the prior owners and that causality was therefore not a relevant issue. Id. at 1048 n.23.

68. Id. at 1041. Section 9604(c)(3) provides that, "The [EPA] shall grant the State a credit against the share of the costs for which it is responsible under this paragraph for any documented direct out-of-pocket non-Federal funds expended or obligated by the State . . . ." 42 U.S.C. § 9604(C)(3) (1982). New York has established its own mini-Superfund, which provides that the state may take remedial action but that the fund may not be used for costs covered by CERCLA. N.Y. ENVTL. CONSERV. LAW §§ 27-1301 to 27-1321 (McKinney 1984).

69. 759 F.2d at 1041.

70. Id. at 1049. The court first focused on § 9606, which expressly authorizes the EPA to seek injunctive relief to abate "an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a) (1982).

The court reasoned that a construction of § 9607 that gave the states the authority to seek injunctions would make the language of § 9606 superfluous. 759 F.2d at 1049. The court also found that only the EPA had the power to seek injunctions under CERCLA. Id. at 1049-50. Therefore, the court was not willing to grant to the state such power. Finally, although a discussion of the court's holding about state public nuisance law is beyond the scope of this article, by awarding the state its response costs under CERCLA while simultaneously granting the state injunctive relief under state public nuisance law, the court in effect gave to the state the powers granted to the EPA under CERCLA.
CERCLA, as set out in Chem-Dyne,\textsuperscript{71} or whether CERCLA liability should be apportioned.

\textbf{A. Responsible Parties}

In holding Shore Realty liable for response costs, the Second Circuit set a liability standard under CERCLA that in theory should facilitate the financing of waste cleanups. The court’s broad definition of responsible parties is consistent with the decisions of most other district courts.\textsuperscript{72} The court reasoned that a narrower definition, one that excluded successor owners of waste sites from liability, would too often place the only solvent parties connected with a waste site beyond the reach of CERCLA.\textsuperscript{73}

The court’s construction of CERCLA places a duty on potential purchasers of sites or facilities holding hazardous wastes to take measures to contain and remove the wastes. The burden is on such purchasers, under the limited affirmative defense provided by section 9607(b)(3), to prove that they exercised due care and took precautions against foreseeable third-party acts or omissions.\textsuperscript{74} On the facts, the court was correct to conclude that Shore Realty was not entitled to avail itself of the defense because it failed to take adequate precautions against the third-party acts.\textsuperscript{75} However, the court went further than CERCLA requires by holding that Shore Realty was liable for the whole cleanup, rather than merely the cleanup of waste that escaped after Shore Realty purchased the property.\textsuperscript{76}

The court’s broad application of joint and several liability severely limits the main defense available to site owners under CERCLA. The court held that Shore Realty could not assert the “third-party” acts defense to protect itself from liability for acts performed by third parties against previous site owners. By this line of reasoning, third-party acts performed against previous owners are not within the scope of the defense. Thus, any defendant could be held liable for all response costs under section 9607(a), even defendants who acted in good faith to remedy the acts or omissions of irresponsible third parties, and who guarded against future third-party misconduct. This conclusion is not supported by the language of section 9607(b)(3), which does not refer to a time period for third-party acts or omissions.\textsuperscript{77}

\textsuperscript{71} See supra notes 42-48 and accompanying text.
\textsuperscript{72} See supra notes 36-39 and accompanying text.
\textsuperscript{73} 759 F.2d at 1045. The court cited legislative history that supported the conclusion that persons who dump or store hazardous wastes often are unidentifiable, missing or judgment-proof.
\textsuperscript{74} See Angelo, The Expanding Scope of Liability for Environmental Damage and Its Impact on Business Transactions, 8 CORP. L. REV. 101 (1985) (discussion of protective measures available to potential purchasers or site owners).
\textsuperscript{75} 759 F.2d at 1039, 1045. Shore Realty’s argument that it took adequate precautions is weak in view of its total inaction.
\textsuperscript{76} 759 F.2d at 1048.
\textsuperscript{77} See supra note 25.
The court possibly reasoned that its construction of 9607(b)(3) supported Congress's expectation that successor owners of waste sites, like Shore Realty, would be liable for cleanup costs. However, the court's narrow construction of the section impinges on another goal of CERCLA: to encourage private parties to take responsibility for the cleanup of a site. The court implied that a party can be held liable for the entire cleanup of a hazardous waste site based solely on its acquisition of the site. To protect themselves from CERCLA liability, parties will conduct environmental studies of sites prior to purchasing real estate. If such investigations reveal environmental problems, they will refrain from purchasing the site rather than undertake an expensive cleanup and risk incalculable CERCLA liability. Because the courts have placed excessive liability on successor owners of waste sites, no one will undertake to improve those sites voluntarily, and the government will bear the entire expense of cleaning waste from abandoned property.

B. Standard and Scope of Liability

To find strict liability under CERCLA, the Shore Realty court relied on section 9601(32) and the language of unpassed versions of CERCLA. The court stated that the section 9601(32) reference to the standard of liability under the Clean Water Act, read along with the other versions of CERCLA, supported the conclusion that Congress intended to impose strict liability under CERCLA. But, as one commentator has critically noted, the cases that establish liability under the Clean Water Act involved parties "intimately involved in the challenged pollution activity." In contrast, some defendants under CERCLA may not have contributed to the waste dump at all. After an examination of CERCLA's legislative history, the commentator proposed that strict liability should be confined to those "who engaged in substantial and purposeful hazardous waste disposal activity for commercial profit..." The Shore Realty court also held Donald LeoGrande jointly and severally liable with Shore Realty under both CERCLA and New York public nuisance law. The court did not discuss the basis of this conclusion in its opinion.

78. See Rodburg, supra note 13, at 234.
79. 759 F.2d at 1042. This conclusion is consistent with previous district court decisions, see supra note 42, as well as with CERCLA's legislative history.
80. See Dore, supra note 27, at 275-77.
81. Id. at 276. This commentator concluded that many "responsible parties" may be only remotely connected to the waste found on a site: "Automatic application of strict liability to parties whose conduct was substantially unrelated to the present danger posed by the hazardous waste release or who did not obtain commercial benefit from their conduct, does not appear to be compelled by the environmental concerns which gave rise to Superfund." Id.
In this case, Shore Realty was not involved directly with the dumping and storing of the hazardous wastes on the site, but it did purchase the site for commercial use in full awareness of the presence of the waste. In any event, the court correctly applied a strict liability standard.
82. 759 F.2d at 1037.
Consequently, the decision creates binding precedent for imposing joint and several liability under CERCLA, but does not provide judicial standards for the lower courts to follow. Instead, lower courts will have to look to the district court's reasoning.83 Unfortunately, the district court did not determine what standard of liability should apply to the defendants at that "early stage of the litigation."84 The district court stated that joinder of other potentially responsible parties was not required, and that other courts which had considered the issue had almost unanimously held that Congress intended that courts impose joint and several liability on a case-by-case basis.85

In dicta, the district court discussed the significance of the absence of an express provision for joint and several liability from the final version of CERCLA. The district court observed that, according to ordinary canons of statutory construction, the decision to remove language from the final version of a bill should be viewed as legislative intent to exclude a construction of the statute that reflects the object of the deleted language.86 However, the district court relied on previous decisions that addressed the absence of an express provision. The court concluded that Congress deleted the provision only to forestall the use of joint and several liability in inappropriate situations, not to proscribe it completely.87

In *Shore Realty*, the district court relied on the floor debates and statements of Senators Stafford and Randolph. The court found that the statements expressed Congress's intent to leave liability under CERCLA claims open to the common law.88 In support of its reading of CERCLA's history, the court noted that the only statements opposing its interpretation were those of Senator Helms.89 The court's blunt dismissal of Helms's statements is not justified.90 The final bill was a compromise from which Congress deleted the provision regarding joint and several liability to gain waiving members' approval and to secure the bill's passage.91 Therefore, Senator Helms's statements are entitled to more weight than the district court gave them. Congress's decision to drop a provision for joint and several liability arguably

84. Id. at 1432.
85. Id.
86. Id. at 1431.
87. Id. The courts that have reached this conclusion have invariably applied joint and several liability. But see United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1356, 1357 (D.N.M. 1984) (court denied government's motion for joint and several liability because of existence of genuine issues as to divisibility of harm and existence of a reasonable basis for apportioning damages).
88. 21 Env't Rep. Cas. (BNA) at 1431-32.
89. Id. at 1431 n.6.
91. Id. See also Dore, supra note 27, at 268 (controversial provisions of CERCLA were eliminated to speed passage of waste bill before the Reagan administration took office).
demonstrates Congress's intent not to impose such liability under CERCLA.\footnote{Price, supra note 90, at 345-46. On the matter of whether \$ 9607 was intended to adopt joint and several liability, one commentator stated: "Superfund does not expressly address this issue. Indeed, it is clear from the legislative history that Congress did not intend to address it, but to allow it to be resolved by the courts according to common law principles." Hall, The Problem of Unending Liability for Hazardous Wastes Management, 38 Bus. Law. 593, 603 (1983).}

Furthermore, the district court's interpretation of CERCLA's legislative history ignores the common law setting that underlay the debate to impose joint and several liability. Senator Randolph stated that liability issues not resolved by the Act, such as joint and several liability, were to be governed according to "traditional and evolving principles of common law."\footnote{126 Cong. Rec. 30,932 (1980).} Under common law, liability for pollution damages was traditionally apportioned among those who demonstrably contributed to the pollution.\footnote{See Price, supra note 90, at 352.} \footnote{RESTATEMENT (SECOND) OF TORTS \$ 875 (1979).} Where the polluter's acts were indivisible, the courts applied the common law principle of joint and several liability described in the Restatement (Second) of Torts.\footnote{Price, supra note 90, at 352; Note, Is Joint and Several Liability the Answer, supra note 3, at 139. But see Note, Joint and Several Liability Under CERCLA—United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983), 57 TEMP. L.Q. 885, 902-04 (1984) (discussing reform of traditional common law rules in some jurisdictions). The cases in these reform jurisdictions hold that pollution liability should not be apportioned, because it is impractical to divide the harm. The burden of apportionment should shift to the defendant, because it is often difficult for the plaintiff to prove the proportion of damages caused by each polluter. Apportionment need not be exact, though; a rough guess based on the volume of each polluter's contribution is adequate. See Price, supra note 90, at 352-53. In many Superfund cases, the government has sufficient information to apportion liability on the basis of each party's percentage volume contribution of waste. Id. at 353.}

However, the traditional common law rule in environmental cases is that pollution by its nature is divisible.\footnote{United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983). See supra notes 42-47 and accompanying text.} The Chem-Dyne decision, which was cited by the district court in Shore Realty to support its imposition of joint and several liability under CERCLA, failed to recognize this common law rule.\footnote{In Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), the United States Supreme Court held that federal courts must apply the law of the state, except in matters governed by the federal Constitution or by acts of Congress. Id. at 78. The Chem-Dyne court stated that it was not compelled to apply state law to apportion liability because the case was based on federal law. 572 F. Supp. at 808. Consequently, the court concluded that a uniform federal law should be created to govern the scope of liability under CERCLA. Id. at 809.} Senator Randolph's reference to traditional common law principles arguably demonstrated Congress's intent to apportion liability under CERCLA.\footnote{The remarks of Senator Randolph about joint and several liability do not suggest whether federal or state common law principles should apply. State law doctrines that apportion pollution damages arguably apply to CERCLA cases, especially in view of the deletion of the}
The *Shore Realty* district court failed to support its election of the *Chem-Dyne*/Restatement approach to joint and several liability,\(^{100}\) against the modified approach of apportionment set forth in *United States v. A & F Materials Co.*, *Inc.*\(^{101}\) The district court refused to impose joint and several liability on summary judgment, although it raised the problem briefly in dicta. Unfortunately, the district court cited both *Chem-Dyne* and *A & F Materials* interchangeably. The court cited *Chem-Dyne* to support its holding that *Shore Realty* ran no risk of multiple liability because the court could assess each defendant's liability to avoid that result.\(^{102}\) Contrary to the district court's interpretation of *Chem-Dyne*, however, the *Chem-Dyne* court imposed joint and several liability rigidly and did not leave room for apportionment of damages.\(^{103}\) Therefore, under the *Chem-Dyne* approach, *Shore Realty* could be held to multiple liability if the harm were indivisible. The district court also cited *A & F Materials* to support its conclusion that all responsible parties need not be joined in an action under CERCLA. Unfortunately, the court did not distinguish the *A & F Materials* approach to joint and several liability from the more rigid *Chem-Dyne* approach.\(^{104}\)

The Second Circuit's decision in *Shore Realty* failed to clarify the district court's ambiguous dicta about joint and several liability. Accordingly, the *Shore Realty* court does not resolve whether joint and several liability should be applied in all CERCLA cases. *Shore Realty* knew of the existence of the hazardous waste at the site prior to its purchase and subsequently failed to explicit federal provision for joint and several liability. On the other hand, the application of state law may result in a non-uniform application of the federal CERCLA statute because of differences among state nuisance laws. See Note, *Joint and Several Liability*, *supra* note 34, at 1166-73.

The *Chem-Dyne* court stated that a uniform federal rule is consistent with the legislative history and policies of CERCLA. 572 F. Supp. at 809. But one federal court found that some amount of uniformity could be achieved under a rule of apportionment. See *United States v. A & F Materials Co.*, 578 F. Supp. 1249 (S.D. Ill. 1984). The court stated:

> [T]he legislative history of CERCLA does not contain evidence of Congressional intent as to the content of the federal common law of liability . . . . Under the Restatement approach, any defendant who could not prove its contribution would be jointly and severally liable. This result must be avoided because both Houses of Congress were concerned about the issue of fairness, and joint and several liability is extremely harsh and unfair if it is imposed on a defendant who contributed only a small amount of waste to a site.

*Id.* at 1256. It would also be unfair to impose joint and several liability on successor owners of waste sites that were not involved in the disposal of hazardous wastes.

\(^{100}\) See *supra* notes 42-47 and accompanying text. The *Chem-Dyne* approach imposes rigid joint and several liability when the harm is indivisible.

\(^{101}\) 578 F. Supp. 1249 (S.D. Ill. 1984). The *A & F Materials* decision imposes joint and several liability but allows apportionment based upon set criteria. See *supra* text accompanying notes 49-51.

\(^{102}\) 21 Env't Rep. Cas. (BNA) at 1432.

\(^{103}\) See *supra* text accompanying note 46.

\(^{104}\) 21 Env't Rep. Cas. (BNA) at 1432.
take adequate precautions against the resultant releases.\textsuperscript{105} The easy facts of this case deprived the court of the opportunity and necessity to discuss the limitation of liability in closer cases, such as when the site owner acts in good faith or is unaware of the presence of hazardous wastes.\textsuperscript{106} Nevertheless, Shore Realty's liability should have been apportioned under the \textit{A & F Materials} approach, since Shore Realty was not responsible for the presence of the wastes on the site. Its liability could have been limited to the extent that its negligent treatment of the wastes led to further releases.\textsuperscript{107}

\textbf{IV. IMPACT}

The \textit{Shore Realty} decision illustrates how the courts must balance the CERCLA interest of holding some responsible party liable for release of toxic wastes, and the inequity of imposing joint and several liability on a successor owner of a waste site. The court of appeals held Shore Realty jointly and severally liable for the release of all wastes on the site.\textsuperscript{108} The court's judgment was influenced by the defendant's awareness, prior to its purchase, of the waste problem on the site and the defendant's failure to treat or secure the wastes. The decision leaves open a possible limit to liability for site owners who are unaware of the presence of hazardous wastes at sites prior to their purchase.\textsuperscript{109}

Under the \textit{Shore Realty} decision,\textsuperscript{110} a new owner of a waste site cannot avoid liability merely by asserting lack of knowledge of the presence of hazardous wastes. \textit{Shore Realty} imposes on potential purchasers of real

\textsuperscript{105} See supra text accompanying notes 53-56.

\textsuperscript{106} It is not clear from the facts whether Shore Realty acted in bad faith in this case. Apparently, Shore Realty knew of the condition of the site when it acquired title. This leaves the problem of Shore Realty's intent: was Shore Realty acting in bad faith, attempting to acquire cheap land at the risk of liability for the environmental problems, or was Shore Realty operating on an honest assumption that it had no responsibility for the environmental conditions at the site? Regardless of Shore Realty's intentions, it is not equitable to hold land purchasers liable for the entire cleanup of conditions they did not create, without any indication of bad faith conduct to justify such liability. Had Shore Realty refused to purchase the land, they could not have been held liable for the cleanup costs. To hold Shore Realty liable for the entire cleanup of the site because it went ahead with the purchase is unjust.

\textsuperscript{107} See supra notes 49-50 and accompanying text.

\textsuperscript{108} See supra text accompanying notes 64-67.

\textsuperscript{109} If the court's holding in \textit{Shore Realty} is combined with the court's holding in United States v. South Carolina Recycling & Disposal, Inc., 21 Env't Rep. Cas. (BNA) 1577 (D.S.D. 1984), a lessee of a site may be responsible for cleaning up hazardous wastes, even though the lessee may not have been directly involved with the disposal or release of the waste. In \textit{South Carolina Recycling}, the lessee was also an operator/arranger, and transporter of hazardous wastes, and the court's conclusion that it was liable as an "owner" may have been influenced by such factors. See supra note 36 and accompanying text.

\textsuperscript{110} See supra text accompanying note 66. The court stated that liability was not avoided merely because the site owner purchased the waste site after the dumping of hazardous waste had ceased. 759 F.2d at 1045.
estate a duty to conduct environmental investigations of suspect sites. If hazardous wastes are found, the purchasers must exercise due care and take adequate precautions to treat and secure the wastes. Arguably, such obligations and duties are consistent with CERCLA's purpose of providing an incentive for voluntary cleanups. However, when coupled with the imposition of joint and several liability, the effect on potentially liable parties is harsher than Congress anticipated or intended. Parties with deep pockets will be singled out in CERCLA actions, and the cost of environmental cleanups will not be spread among the industry as Congress intended. Successor owners of waste sites, and even parties who disposed of some

111. See Angelo, supra note 74, at 117-20 (suggested questions for potential site purchasers to ask of sellers to uncover the existence and extent of hazardous waste problems).

112. Mr. Lee M. Thomas, EPA Administrator, spoke before the Senate Judiciary Committee on Administrative Law and Government Relations and stated that "strict, joint and several liability... has been an important factor in EPA's success in getting private parties to undertake cleanup actions voluntarily at Superfund sites." 16 Envt'l Rep. (BNA) 474 (1985).

113. See Note, Joint and Several Liability, supra note 34, at 1184-85, which supports the argument that joint and several liability is the best approach to achieve the goals and purposes of CERCLA. The author suggests four possible approaches to the allocation of liability under CERCLA: 1) impose liability only upon those defendants shown to have caused harm; 2) follow the common law rule, imposing joint and several liability for indivisible harm; 3) apportion the total costs of abatement and cleanup among defendants by a prescribed formula, based on estimated contributions or market share; 4) apply joint and several liability to all defendants in all cases. The author concludes that the fourth approach, the application of joint and several liability in all cases, would best serve Congress's intent to facilitate the recovery of cleanup costs under CERCLA. The author rejected apportionment of liability, because of the difficulties with developing an appropriate formula and with proving causation. The author stated that a rule of apportionment would "most likely lead to uneven application of the rule, thereby reducing the ability of the potential defendants to predict their future liability and lessening the incentive impact of the rule." Id. at 1192.

This argument against apportionment can be challenged on four grounds. First, it is questionable whether joint and several liability provides the strongest incentives for voluntary observance of CERCLA. See infra notes 118-37 and accompanying text. Second, the author inaccurately implies that only a federal standard of joint and several liability avoids choice of law difficulties and discourages forum shopping. However, a federal rule that apportioned liability would also avoid these difficulties. See supra note 99. Third, the author states that the insurance industry will not insure against liability without a uniform federal rule. Contrary to this claim, insurance has in fact become virtually unavailable since the application of joint and several liability. See infra notes 130-37 and accompanying text. Finally, the author states that the joint and several liability standard provides needed uniformity in the CERCLA area. Uniformity promotes negotiations between the EPA and potential responsible parties, because those parties can more accurately assess what their liability will be in a CERCLA suit. Again, a federal rule that ordered apportionment of damages would serve this purpose. Moreover, potentially responsible parties can better assess their liability if they know it will be apportioned based on designated factors, as opposed to the uncertainty engendered by joint and several liability.

114. See Price, supra note 90, at 341.

115. See Note, Is Joint and Several Liability the Answer, supra note 3, at 119. See also Grad, supra note 4, at 12 (citing S. REP. No. 848, 96th Cong., 2d Sess. 72 (1980), for the proposition that it is more equitable to fund CERCLA primarily from fees paid by industry).
hazardous wastes legally, are exposed to sole liability for the cleanup of the entire site. Coupled with recent developments in the fields of contribution, EPA settlement policy, and pollution insurance law, some potentially liable parties face inordinate financial risks.

A. Contribution Rights

Courts generally have found a right to contribution among liable parties under CERCLA. However, current Superfund reauthorization proposals have included an amendment to CERCLA that prohibits contribution suits until after a judgment is rendered. Furthermore, the current EPA policy on settlements under CERCLA provides that if parties settle with the government under a judicially-approved settlement agreement, they will be protected from later third-party suits by non-settling contributors.

These prospective limitations on contribution drastically affect liability under CERCLA. Parties susceptible to CERCLA liability must weigh the risks of “sitting back,” and waiting to be sued, against the costs of settling a CERCLA claim to preserve the right to seek contribution against co-contributors in the future. Potentially liable parties may agree to share in response costs in order to avoid an uncertain CERCLA action in the future that could potentially impose greater liability.

These considerations make judicial efforts to temper the harshness of joint and several liability with a right of contribution less appealing than it appears. If contribution is prohibited until after judgment, responsible parties will have to incur the costs of subsequent litigation with no assurance of success.

B. Settlement

Voluntary settlement and cleanup efforts are a vital source of funds to finance the cleanup of the environment. Recently the EPA published an interim CERCLA settlement policy to respond to suggestions from potentially responsible parties (PRPs) that past settlement policies fostered litigation and discouraged voluntary cleanup actions. The policy recognizes private party negotiations as an essential component in the national cleanup effort.

116. See Angelo, supra note 74, at 107.
117. See infra notes 118-37 and accompanying text.
119. See Note, Right to Contribution, supra note 27, at 367 (contribution actions belong in a subsequent, separate trial to avoid delay in the primary suit).
121. Id. at 5035.
The policy adopts the view that joint and several liability will spur successful settlement negotiations. However, the lack of finality under EPA policy for parties who seek to settle inhibits such negotiations.

Administrative practice by the EPA under CERCLA highlights the agency's disinclination to free responsible parties from liability. The EPA policy recognizes that some parties should be released from contribution by settlement in "appropriate situations." The policy leaves the final issue of release and contribution to the courts. The EPA advises courts to devise a rule that discharges good faith settlers from all liability for contribution to other tortfeasors. Until the courts adopt such a rule, however, the EPA proposes to release only a limited number of parties from contribution after settlement.

The EPA also intends to release few past or present site owners from liability under CERCLA. The EPA's policy states that such releases will be granted based upon the Agency's confidence in the negotiated remedy. Any such release must include a reopener clause which preserves the government's right to seek additional cleanup actions and costs.

122. See also United States v. Chem-Dyne, 572 F. Supp. 802 (S.D. Ohio 1983) (one of the first cases holding responsible parties jointly and severally liable under CERCLA). Chem-Dyne was ultimately settled in response to the government's cleanup suit, involving 158 parties and a $19 million settlement. According to F. Henry Habicht II, assistant attorney general for the EPA's Land and Natural Resource Division, the parties to the settlement agreement "drew the outlines of that agreement almost immediately after Judge Rubin decided that the standard of joint and several liability could be applied in Superfund cases." 16 Env't Rep. 267 (1985).

123. See infra notes 124-28 and accompanying text. See also Kowalski, Why Can't You Just Settle These Superfund Cases Once and For All? 15 THE LAW. BRIEF 20-26 (April 30, 1985) (critical discussion of the EPA's settlement policy and suggested revisions to provide finality in settlement agreements).


125. Id. at 5039. Such a federal rule would follow § 4 of the Uniform Contribution Among Tortfeasors Act. By providing that good faith settlers are discharged from all liability for contribution to any other tortfeasor, the Tortfeasors Act eliminates the need for contribution protection. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4, 12 U.L.A. 56 (1975). See also Note, Right to Contribution, supra note 27, at 361-63 (complete discussion of the Uniform Act).


VI. Contribution Protection

Explicit contribution protection clauses are generally not appropriate unless liability can be clearly allocated, so that the risk of reapportionment by a judge in any future action would be minimal.

Inclusion should depend on case-by-case consideration of the law which is likely to be applied.

The Agency will be more willing to consider contribution protection in settlements that provide substantially all the costs of cleanup.

Id. at 5039.

127. Id.

128. Id. at 5039-40. The EPA can also address future problems at sites, by enforcing a
release must also preserve the government's authority to seek contribution from settling parties to finance the correction of presently unknown or undetected conditions at the waste site.\textsuperscript{129}

In view of the limitations in the EPA's settlement policy, PRPs who negotiate a settlement and participate in a private cleanup action may still be liable for future cleanup costs under section 9607. Furthermore, the EPA's caution in granting releases, because of uncertainty in a site's condition, may hold parties susceptible to liability five or ten years in the future. Many PRPs are in this position today. Although the interim settlement policy represents the government's effort to encourage and facilitate settlements, the concessions granted to PRPs are too limited and inadequate to provide sufficient finality. If voluntary settlements are to become more appealing to PRPs as a way to avoid the risk of joint and several liability, the government needs to develop stronger release and contribution protection provisions. Such provisions would protect PRPs that negotiate in good faith from future liability and would promote voluntary remedies for the cleanup of hazardous wastes.

C. Insurance

The liability standards upheld in \textit{Shore Realty} have significantly impacted the ability of PRPs to insure against environmental risks. In support of the

\begin{itemize}
\item Releases from Liability
\item A release or covenant may be given only to the PRP providing the consideration for the release.
\item The release or covenant must not cover any claims other than those involved in the case.
\item The release must not address any criminal matter.
\item Releases for partial cleanups that do not extend to the entire site must be limited to the work actually completed.
\item Federal claims for natural resource damages should not be released without the approval of Federal trustees.
\item Responsible parties must release any related claims against the United States, including the Hazardous Substances Response Fund.
\item Where the cleanup is to be performed by the PRPs, the release or covenant should normally become effective only upon the completion of the cleanup (or phase of cleanup) in a manner satisfactory to EPA.
\item Release clauses should be drafted as covenants not to sue, rather than releases from liability, where this form may be necessary to protect the legal rights of the Federal Government.
\end{itemize}

\textit{Id.} at 5040.

\textsuperscript{129} \textit{Id.} The EPA will assume the response costs in future cases that do not pose an imminent and substantial risk to human health, if remedial actions by the PRPs were adequately maintained. \textit{Id.} at 5044.
PRPs' position, several state courts have recently held that the release of hazardous wastes constitutes an “accident,” as required under the definition of an “occurrence” under a Comprehensive General Liability (CGL) policy. Such decisions remove the release of waste from pollution exclusion clauses, which exclude coverage of gradual and nonsudden pollution damage. Consequently, parties with CGL policies may seek some relief from cleanup liability through insurance coverage.

Such relief will be short-lived under CERCLA. The insurance industry has responded to the rulings of the state courts by writing new pollution exclusion clauses that deny coverage for both accidental and gradual pollution. The industry argues that the court decisions upset “the risk predictors that were the keystones of designing and pricing” the insurance coverage. As current CGL policies expire, PRPs will no longer be able to renew them. Instead, companies will have to purchase separate environmental impairment liability (EIL) insurance. Such policies are more limited and costly than CGLs and are issued on a claims-made basis rather than an occurrence basis.


131. Richard P. Kropp, vice president of Shand, Morahan and Co., Inc., one of the major environmental impairment liability (EIL) underwriters, stated that “reinsurers don’t want pollution risks because they fear the U.S. Courts.” Finlayson, EIL Market Crumbles Further as Shand, Morahan Pulls Out, Bus. Ins., Jan. 28, 1985, at 2. EIL experts argue that many courts have taken an overly broad interpretation of coverage in pollution cases. Id. According to Leslie Cheek, vice president for Federal Affairs, Crum & Foster, the collapse of the pollution insurance market resulted from court rulings that made it virtually impossible for underwriters to determine with any certainty their future liability under a policy. 16 Env’t Rep. (BNA) 1667 (1985). See also Atkeson, Superfund and the Pollution Exclusion, Bus. Ins., Nov. 5, 1984, at 26 (CGL policies leave underwriters with large environmental exposure).

132. 16 Env’t Rep. (BNA) 2124 (1985) (Americana Insurance Ass’n President T. Lawrence Jones speaking at a Senate panel hearing on insurance issues under CERCLA).

133. “Claims-made” policies provide coverage for claims that arise and are made during the annual policy period. Insurers are only responsible for those claims that are first filed during the policy period. “Occurrence” policies cover damages that result from incidents that occur while the policy is in effect, regardless of when the claim arising from the incident is made. Therefore, under an “occurrence” policy, insurers may be liable for any losses which occurred
EIL insurance market is small because of the insurance industry's inability to assess liability risks with any accuracy. Also, the insurance industry intends to withhold further EIL insurance until joint and several liability is abolished under CERCLA. It is predicted that if Congress does not amend the current standards of liability under CERCLA, the hazardous waste industry will become uninsurable. Such a result would have a disastrous effect on PRPs: they would have to bear the burden of liability without the security of insurance coverage. This result cannot be squared with the government's desire to ensure that PRPs are financially responsible.

Conclusion

The presence of hazardous wastes in the environment poses a danger to human health. Congress placed the burden on the chemical industry to finance the long and expensive cleanup warranted by years of neglect. Although the decision to place the financial burden on industry is defensible, the Shore Realty court's construction of CERCLA's liability provisions does not equitably distribute the cleanup costs among responsible parties. The
court’s application of joint and several liability casts complete responsibility on remote parties, including successor owners of waste sites who have made reasonable efforts to inspect and clean their property of wastes. Moreover, the mechanisms that responsible parties can use to minimize their liability—contribution, settlement, and insurance—cannot overcome the burden of joint and several liability.

The statutory language of CERCLA, as well as the legislative history, leaves open a fairer means of distributing risk and liability among responsible parties. Damages should be apportioned among parties with some view to fault. This was the approach taken by the district court in United States v. A & F Materials. In most instances, environmental surveys can help assess relative liability. When certain responsible parties are not available, their share of the damages can be carried by the available defendants. An apportionment scheme, if applied to jointly and severally liable parties, will not defeat the legislative purposes behind CERCLA. The government still need not bring an action against every potentially responsible party before cleanup measures are initiated. Such a policy would ensure that suits are brought against those whose involvement is substantial, instead of those whose contribution is insignificant.

Finally, the apportionment of liability will enable the insurance industry to provide the coverage necessary to finance waste cleanups. Apportionment of liability according to the criteria in A & F Materials will not diminish the incentive of responsible parties to voluntarily engage in cleanup actions or settlements, if adequate settlement policies are developed to insure finality. Parties will remain jointly and severally liable, and the cooperation of responsible parties with governmental agencies can be factored into the apportioning scheme to provide the necessary incentive to participate voluntarily in the cleanup.

Kathleen Paravola