

Right of Contribution Under CERCLA: The Case for Federal Common Law

Barbara J. Gulino

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Barbara J. Gulino, *Right of Contribution Under CERCLA: The Case for Federal Common Law*, 71 Cornell L. Rev. 668 (1986)
Available at: <http://scholarship.law.cornell.edu/clr/vol71/iss3/6>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

A RIGHT OF CONTRIBUTION UNDER CERCLA: THE CASE FOR FEDERAL COMMON LAW

INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)¹ provides for the abatement and clean up of hazardous waste releases by imposing strict liability on parties responsible for these releases. In addition, CERCLA creates a trust fund to finance cleanups when the government cannot locate responsible parties. Although early drafts of CERCLA contained express provisions imposing joint and several liability and allowing contribution among defendants, CERCLA's sponsors deleted these provisions as part of a compromise measure to ensure the bill's passage. Despite the deletion of the joint and several liability provision, courts have applied a joint and several liability standard to multi-defendant CERCLA cases by looking to federal common law principles.

This Note analyzes whether, in light of judicial creation and imposition of a federal common law rule of joint and several liability, a right of contribution among defendants should also be available under CERCLA. Contribution among defendants is an important component of a joint and several liability scheme because it ensures that responsible parties other than those actually held jointly and severally liable share the burden of liability. Section I of this Note discusses the statute and the history of joint and several liability and contribution under CERCLA. Section II considers and rejects the argument that notwithstanding the deletion of the contribution provision, Congress created a right of contribution under CERCLA either expressly or by clear implication. Section III analyzes whether courts should fill the gaps in CERCLA's liability provisions with federal common law. This Note argues that despite judicial hostility toward creating special federal common law, the gaps in CERCLA's liability provisions and the strong federal policy of abating hazardous waste releases require the courts to fill the gaps in CERCLA's liability allocation scheme with a federal common law right of contribution. This Note also concludes that CERCLA's legislative history and statutory scheme indicate that Congress empowered federal courts to fashion a federal common law right of contribution.

¹ 42 U.S.C. §§ 9601-9657 (1982).

1

AN OVERVIEW OF LIABILITY UNDER CERCLA

A. The Statute

CERCLA provides for emergency response, liability for the costs of cleanup, and compensation in the event of a release of a hazardous substance.² CERCLA also provides for the cleanup of inactive and abandoned hazardous waste disposal sites.³ The Act bestows broad authority on the President to take remedial and abatement action when the actual or threatened release of a hazardous substance presents an imminent and substantial threat to public health or welfare.⁴ CERCLA also establishes a Hazardous Substances Response Fund (the "Superfund")⁵ of \$1.6 billion raised through general revenues and a tax on the oil and chemical industries.⁶ The Superfund reimburses government or private parties for the costs of hazardous waste site cleanup when the government cannot locate the responsible parties or the responsible parties fail to begin their own cleanup actions.⁷

Under CERCLA, persons responsible for the release or threatened release of hazardous wastes are strictly liable⁸ for

² *Id.* §§ 9604, 9606 & 9607.

³ *Id.* "Response" under CERCLA includes actions such as storage, confinement, dredging or excavations, and repair or replacement of leaking containers. *Id.* § 9601(23)-(25).

⁴ *Id.* § 9604.

⁵ *Id.* § 9631(a), (c).

⁶ Taxes on oil and certain chemicals constitute 87.5% of the \$1.6 billion Superfund. 26 U.S.C. §§ 4611(a)-(b), 4661(a)-(b) (1982). General revenues make up the remaining 12.5%. 42 U.S.C. § 9631(b).

CERCLA's taxing mechanism, which finances the Superfund, expired on September 30, 1985. 26 U.S.C. § 411(d). Despite several attempts, Congress did not pass a reauthorization bill during the 1984 session. In the 1985 session, however, the Senate has passed a \$7.5 billion, five-year reauthorization bill, S. 51, 99th Cong., 1st Sess., 131 CONG. REC. S12034 (daily ed. Sept. 24, 1985). The bill would raise \$5.4 billion from a new tax on manufacturers and raw material producers with sales of more than \$5 million a year. 16 ENV'T REP. CURRENT DEV. (BNA) 892 (Sept. 20, 1985).

The House has not yet passed a \$10 billion, five-year reauthorization bill, H.R. 2817. On October 23, 1985, the House Ways and Means Committee approved the bill which includes a waste-end tax on disposal facilities and an excise tax on manufacturers and importers. 16 ENV'T REP. CURRENT DEV. (BNA) 1075 (Oct. 25, 1985). If H.R. 2817 does not reach the House floor by Thanksgiving, the House-Senate conference committee probably will not consider it before Christmas, and reauthorization will be delayed until 1986. 16 ENV'T REP. CURRENT DEV. (BNA) 1251 (Nov. 15, 1985).

⁷ 42 U.S.C. § 9612(a) (1982).

⁸ CERCLA's liability is defined as strict by reference to § 311 of the Federal Water Pollution Control Act (FWPCA), codified at 33 U.S.C. § 1321(c) (1982), a provision for recovery of cleanup costs for spills into navigable waters. 42 U.S.C. § 9601(32). Courts have interpreted § 311 as imposing a strict liability standard. *United States v. Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir. 1978); *United States v. Marathon Pipe Line Co.*, 589 F.2d 1305 (7th Cir. 1978). By referring to § 311, CERCLA's drafters intended "liability" to trigger a strict liability standard. *See* 126 CONG. REC. 30,932 (1980) (statement by Sen.

cleanup costs and damage to natural resources.⁹ The strict liability provisions embrace four categories of parties: (1) persons presently owning or operating a polluting facility, (2) persons owning or operating a polluting facility at the time of disposal, (3) persons arranging for disposal, treatment, or transport of wastes (including waste generators), and (4) persons accepting wastes for transport to disposal or treatment facilities.¹⁰ A defendant faced with a CERCLA claim may escape liability only if he proves that an act of God, an act

Randolph: "We have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act [FWPCA] . . . I understand this to be a standard of strict liability . . . As under section 311, due care or the absence of negligence with respect to a release or threatened release of a hazardous substance does not constitute a defense under this act." See also 126 CONG. REC. 31,966 (1980) (letter from Assistant Attorney General Alan A. Parker to Rep. Florio and remarks of Rep. Florio).

Finally, every district court addressing the issue has held that CERCLA's liability section imposes strict liability. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983); *United States v. Price*, 577 F. Supp. 1103, 1113-14 (D.N.J. 1983). See also *United States v. Stringfellow*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,385, 20,386-87 (C.D. Cal. Apr. 5, 1984) (only § 107(a), and not § 106(a), permits joint and several liability); *United States v. South Carolina Recycling & Disposal, Inc.*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,272, 20,274 (D.S.C. Feb. 23, 1984) (CERCLA § 107(a) holds defendants strictly liable); *United States v. Conservation Chem. Co.*, 589 F. Supp. 59, 62 (W.D. Mo. 1984) (citing *United States v. Price* for proposition that "past off-site generators should be held to a standard of strict liability"); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 843-44 (W.D. Mo. 1984) (standard of strict liability applies equally to §§ 106(a), 104, and 107(a) of CERCLA); *United States v. A&F Materials Co.*, 578 F. Supp. 1249, 1254-55 (S.D. Ill. 1984) (strict liability is intended standard under CERCLA; Congress did not preclude imposition of joint and several liability).

⁹ 42 U.S.C. § 9607(a)(4)(A), (B) & (C) (1982).

The Environmental Protection Agency's (EPA) interpretation of CERCLA gives that agency two enforcement options. Comment, *CERCLA Litigation Update: The Emerging Law of Generator Liability*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,224, 10,225 (1984). The EPA may seek either monetary relief in cost recovery actions authorized by § 107, 42 U.S.C. § 9607 (1982), or may seek injunctive relief in abatement actions authorized by § 106, 42 U.S.C. § 9606 (1982). Comment, *supra*, at 10,225. States and any other party incurring cleanup costs may also seek reimbursement. 42 U.S.C. § 9607(a)(4)(A), (B).

¹⁰ 42 U.S.C. § 9607(a) (1982). Subsection (a) of § 9607 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

of war, or an act of a third party caused the damage.¹¹

B. Joint and Several Liability

Although CERCLA holds responsible parties strictly liable, the statute fails to prescribe a method for allocating that liability when multiple parties bear responsibility for a hazardous release. CERCLA's drafters originally provided for joint and several liability coupled with a right of contribution, but omitted both provisions from the final bill in order to appease opponents of the legislation who viewed the provisions as "grossly unfair."¹² In enforcement actions to date, the executive branch has repeatedly called for joint and several liability under CERCLA,¹³ while the chemical industry has argued for apportioned liability.¹⁴ The government has consistently prevailed in the district courts.¹⁵ Thus, the judiciary has applied joint and several liability to CERCLA cases, notwithstanding Congress's deliberate deletion of such a provision; it has not, however, decided whether CERCLA permits contribution among jointly and severally liable defendants. An examination of the legislative history of CERCLA's liability provisions and of the district court decisions on joint and several liability lays the groundwork for analyzing the contribution question.

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.

Id. § 9607(a).

¹¹ *Id.* § 9607(b). The definition of third party excludes agents, employees, and those individuals in a direct or indirect contractual relationship with the defendant. *Id.* § 9607(b)(3). Also, the defendant must show that he exercised due care and took precautions against any foreseeable third party acts. *Id.*

¹² See *infra* notes 19-21 and accompanying text.

¹³ See *infra* note 25 and accompanying text.

¹⁴ Apportioned liability in this context means that the government would bear the burden of proving the contribution of each defendant and would pay any share of the costs it could not allocate. RESTATEMENT (SECOND) OF TORTS § 433B (1965). In contrast, if liability is joint and several, both the burden of proof of allocation and the risk that not all costs can be allocated fall on the defendants (assuming the government can identify responsible parties that are financially solvent). RESTATEMENT (SECOND) OF TORTS §§ 433A, 875, 881 (1979); Comment, *supra* note 9, at 10,231. For text of §§ 433A, 875, and 881, see *infra* note 34.

¹⁵ See *infra* notes 25-36 and accompanying text (reviewing trial court treatment). No appellate court has directly confronted the question. *But see* New York v. Shore Realty Corp., 759 F.2d 1032, 1042 n.13 (2d Cir. 1985) (dicta suggesting application of joint and several liability to CERCLA claim).

1. *Legislative History*

CERCLA resulted from a compromise measure drafted in the Senate at the end of the ninety-sixth Congress.¹⁶ The Act developed primarily from two bills, H.R. 7020 and S. 1480,¹⁷ which explicitly provided for the imposition of strict liability on a joint and several basis and for contribution.¹⁸ To ensure passage of hazardous waste legislation before the end of the 1980 session, the bills' sponsors produced a compromise¹⁹ that deleted provisions imposing joint and several liability and a right of contribution.²⁰ The deletions satisfied the bills' opponents by eliminating the harsh result of holding each defendant potentially liable for the entire cleanup cost if other defendants were insolvent.²¹

The floor debates constitute the only legislative history addressing the compromise bill as a whole. Portions of the commentary suggest that the elimination of the joint and several liability language did not necessarily intend to preclude courts from impos-

¹⁶ For a thorough examination of CERCLA's legislative history, see Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982). For a compilation of bills, hearings, and debates on CERCLA, see ENVTL. L. INST., SUPERFUND: A LEGISLATIVE HISTORY (1982).

¹⁷ H.R. 7020, 96th Cong., 2d Sess., 126 CONG. REC. 7490 (1980), reprinted in 3 ENVTL. L. INST., *supra* note 16, at 163 (1982); S. 1480, 96th Cong., 1st Sess., 125 CONG. REC. 17,988 (1979). A third bill, H.R. 85, was also proposed but was not the focus of attention in the final floor debates pertaining to the compromise. H.R. 85, 96th Cong., 1st Sess. (1979).

¹⁸ H.R. 7020, *supra* note 17, § 307(a); S. 1480, *supra* note 17, § 4(f).

¹⁹ According to Senator Stafford, the compromise proposal was a "combination of the best of the three other bills, and an elimination of the worst, or at least the most controversial. Frankly, it eliminate[d] 75 percent of what we were seeking in S. 1480. But knowing of the urgent need for legislation, we were willing to do that." 126 CONG. REC. 30,935 (1980).

For statements by opponents of the liability section, see H.R. REP. NO. 1016, 96th Cong., 2d Sess. 65-66 (1980) (remarks of Rep. Dannemeyer), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6119, 6141-42; 126 CONG. REC. 30,972 (1980) (remarks of Sen. Helms calling imposition of joint and several liability coupled with industry-financed fund "grossly unfair").

The compromise also deleted a federal cause of action for medical expenses and personal loss, reduced the size of the Superfund, and altered industry and government contributions to the Superfund. See 126 CONG. REC. 30,935 (1980) (remarks of Sen. Stafford).

²⁰ S. 1480, 96th Cong., 2d Sess. § 4(f), 126 CONG. REC. 30,909 (1980). The section stipulated that "[i]n any action brought under this section or section 6(c) [imposing joint and several liability for damages and removal costs] of this Act, a person held jointly and severally liable with one or more other persons is entitled to seek contribution from such persons to the extent of the proportionate liability of such persons." *Id.*

²¹ Objecting to the joint and several liability provision in S. 1480, Senator Helms said it "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." 126 CONG. REC. 30,972 (1980).

ing joint and several liability on multiple defendants. For example, Senator Randolph, sponsor of the compromise proposal, stated:

It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tortfeasors will be determined under common or previous statutory law.²²

Representative Florio, House sponsor of the compromise bill, emphasized the use of federal common law:

[T]his bill refers to section 311 of the [Federal Water Pollution Control Act] and to traditional and evolving principles of common law in determining the liability of such joint tortfeasors. To insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area.²³

On the other hand, Senator Helms, an opponent of the legislation, stated that the compromise bill clearly foreclosed joint and several liability. According to Helms, eliminating the joint and several liability provision limited defendants' liability to only "those costs and damages that [the government] can prove were caused by the defendant's conduct."²⁴ Thus, the legislative history does not definitively indicate whether, by deleting joint and several liability from CERCLA, Congress actually intended to foreclose its application to cases arising under that statute.

2. District Court Decisions

The absence of a specific provision allocating liability among multiple tortfeasors, and the resulting disagreement among members of Congress over the proper interpretation of the compromise draft, have left the responsibility for allocating liability in a CERCLA

²² 126 CONG. REC. 30,932 (1980) (remarks of Sen. Randolph).

²³ 126 CONG. REC. 31,965 (1980) (remarks of Rep. Florio). Representative Florio's remarks indicate that Senator Randolph's reference to "previous statutory law," *supra* note 22, means § 311 of the FWPCA. The court in *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 844-45 (W.D. Mo. 1984), interpreted the phrase "previous statutory law" to refer to § 311 of the Federal Water Pollution Control Act (FWPCA).

Courts have interpreted § 311 of the FWPCA as imposing strict liability, *see supra* note 18, and as allowing the imposition of joint and several liability in situations involving multiple defendants. *United States v. M/V Big Sam*, 681 F.2d 432, 439 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); *Complaint of Berkley Curtis Bay Co.*, 557 F. Supp. 335, 339 (S.D.N.Y. 1983). The *Curtis Bay* court also noted that a defendant that pays for more of its fair share of damages is entitled to contribution from other defendants. *Id.*

²⁴ 126 CONG. REC. 30,972 (1980) (remarks of Sen. Helms).

enforcement action to the courts. District courts confronting liability allocation in CERCLA section 107 cost recovery actions have uniformly imposed joint and several liability if the defendants have caused an indivisible harm.²⁵ The courts have examined CERCLA's legislative history and concluded that by deleting the joint and several language, Congress intended the courts to apply flexible common law principles of liability allocation to CERCLA rather than a rigid, legislative mandate that joint and several liability apply in every case.²⁶ The courts have further reasoned that federal com-

²⁵ United States v. Stringfellow, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,385 (C.D. Cal. Apr. 5, 1984); United States v. South Carolina Recycling & Disposal, Inc., 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,272 (D.S.C. Feb. 23, 1984); United States v. Conservation Chem. Co., 589 F. Supp. 59 (W.D. Mo. 1984); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984); United States v. A&F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983); United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983). In each of these cases the court imposed the joint and several liability standard advocated by the government. For a discussion of the liability allocation rule chosen by the courts, see *infra* notes 31-36 and accompanying text.

Several courts have extended the joint and several liability standard they found in § 107 of CERCLA to abatement actions under § 106. See *supra* note 19. Price, 577 F. Supp. at 1113; *Conservation Chem.*, 14 ENVTL. L. REP. at 20,209; *Northeastern Pharmaceutical*, 579 F. Supp. at 844-45. One recent decision, *United States v. Stringfellow*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 20,385, 20,387 (C.D. Cal. Apr. 5, 1984), has not followed the other decisions. *Stringfellow* held that § 106 provides equitable remedies distinct from the legal remedies of § 107 and that, as a result, § 106(a) does not impose joint and several liability to abate hazardous substance pollution. According to the court, applying joint and several liability to § 106 actions would give the EPA an alternative way to collect damages which would be inappropriate for an equitable remedy. *Id.*

²⁶ *E.g.*, *United States v. Conservation Chem. Co.*, 589 F. Supp. 59, 62-63 (W.D. Mo. 1984). These courts have followed the reasoning of *Chem-Dyne Corp.*, 572 F. Supp. at 802. See *Conservation Chem.*, 589 F. Supp. at 62-63 (quoting *Chem-Dyne*). In *Chem-Dyne* the court examined CERCLA's legislative history to determine congressional intent with regard to the liability allocation issue. The court looked to the commentary of Congressmen Stafford, Randolph, and Florio (sponsors of the bill), see *supra* notes 22-23 and accompanying text, and explained that although the remarks of a single legislator do not control, the statements of the legislation's sponsors deserve substantial consideration when interpreting the statute. *Chem-Dyne Corp.*, 572 F. Supp. at 807 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979)). Assessing the commentary, the court concluded that "a reading of the entire legislative history in context reveals that the scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases." *Id.* at 808. The court continued, "[T]he term was omitted in order to have the scope of liability determined under common law principles." *Id.*

Critics of the *Chem-Dyne* decision argue that the court gave the floor statements of sponsors Randolph, Stafford, and Florio more weight than they deserved. Price, *Dividing the Costs of Hazardous Waste Site Cleanups Under Superfund: Is Joint and Several Liability Appropriate?*, 52 UMKC L. REV. 339, 354-55 (1984). These critics argue that because the bill's sponsors could not secure passage of the bill without deleting joint and several liability terms, their statements were not entitled to the substantial consideration the *Chem-Dyne* court accorded them. *Id.* at 355. These critics further contend that the remarks of CERCLA opponents, such as Senator Helms, should receive greater weight than those of the bill's supporters because, as opponents, their "position represents the filter through which the final bill had to flow in order to pass." *Id.* at 346.

mon law should provide the liability allocation rule because the hazardous waste problem and CERCLA's corrective program have national scope and significance and thus implicate uniquely federal interests.²⁷

The district courts have identified two uniquely federal interests. First, they have concluded that the improper disposal or release of hazardous wastes is a complex, national problem.²⁸ Hazardous substances dumped at a waste site typically originate in several states, and pollution of land and groundwater often crosses state boundaries.²⁹ Second, the courts have reasoned that because general revenues and excise taxes finance the Superfund, the United States's ability to protect its financial interest in the trust fund is directly related to the scope of liability under CERCLA.³⁰

Federal courts seeking to develop a common law of liability allocation have looked to the *Restatement (Second) of Torts*³¹ or to the Federal Water Pollution Control Act (FWPCA).³² Section 875 of the *Restatement* imposes joint and several liability when two or more tortfeasors cause a single and indivisible harm.³³ Sections 433A and 881 of the *Restatement* apportion liability when tortfeasors acting in-

²⁷ *Chem-Dyne Corp.*, 572 F. Supp. at 808-09; *Wade*, 577 F. Supp. at 1337-38; *South Carolina Recycling*, 14 ENVTL. L. REP. (ENVTL. L. INST.) at 20,275-76; *A&F Materials*, 578 F. Supp. at 1255; *Conservation Chem.*, 14 ENVTL. L. REP. (ENVTL. L. INST.) at 20,209; *Stringfellow*, 14 ENVTL. L. REP. (ENVTL. L. INST.) at 20,386-87. *But see Northeastern Pharmaceutical*, 579 F. Supp. at 843-45 (refraining from deciding whether federal or state law applied to liability allocation question because both yielded same result in case).

The district courts justified formulating federal common law by resting on the rule that federal courts may create federal common law to protect uniquely federal interests. *E.g.*, *Chem-Dyne Corp.*, 572 F. Supp. at 808-09. *See also Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 640-42 (1981) (federal courts may fashion federal common law to further uniquely federal interests); *Northwest Airlines v. Transport Workers*, 451 U.S. 77, 95 (1981) (same). *See also infra* note 99 and accompanying text (discussing fourth type of case in which federal courts may generate federal common law).

²⁸ *E.g.*, *Wade*, 577 F. Supp. at 1338; *Chem-Dyne Corp.*, 572 F. Supp. at 808.

²⁹ *Chem-Dyne Corp.*, 572 F. Supp. at 808. The uniquely federal interest implicated by interstate hazardous waste pollution resembles the strong federal concern over interstate water pollution discussed in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*). *See infra* notes 104-19 and accompanying text (discussing filling CERCLA's gaps with federal common law right of contribution based on *Milwaukee I* rationale).

³⁰ *Chem-Dyne Corp.*, 572 F. Supp. at 808; *Stringfellow*, 14 ENVTL. L. REP. (ENVTL. L. INST.) at 20,387; *see also A&F Materials*, 578 F. Supp. at 1255 (recognizing federal government's interest in preserving stability of Superfund). Some district courts cited *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943), and held that the United States's financial interest in the trust fund is a right, obligation, and responsibility that justifies the development of special federal common law. *See infra* note 99 and accompanying text.

³¹ RESTATEMENT (SECOND) OF TORTS §§ 433A, 875, 881 (1976).

³² 33 U.S.C. § 1321 (Supp. 1983).

³³ RESTATEMENT (SECOND) OF TORTS § 875 (1976). The *Restatement* recognizes a right of contribution among tortfeasors held jointly and severally liable. Under § 886A two or more tortfeasors liable to the same person for the same harm have a right of contribution among themselves. *Id.* § 886A.

dependently cause distinct harms or a single harm involving some reasonable basis for division according to each tortfeasor's activity.³⁴ Alternatively, courts have interpreted section 311 of the FWPCA as allowing joint and several liability and have applied that liability standard to CERCLA.³⁵ According to the courts, the defendant bears the burden of proving that an injury is divisible and consequently that liability is apportionable.³⁶

II

THE POSSIBILITY THAT CONGRESS CREATED A FEDERAL RIGHT OF CONTRIBUTION AMONG CERCLA DEFENDANTS

In *Texas Industries, Inc. v. Radcliff Materials, Inc.*³⁷ and *Northwest Airlines, Inc. v. Transport Workers Union*,³⁸ the Supreme Court held that "a right to contribution may arise [under federal law] in either of two ways: first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, second, through the power of federal courts to fashion a federal common law of contribution."³⁹ The possibility exists that despite the deletion of a specific provision granting a right of contribution, Congress still expressly or impliedly created a statutory right of contribution for CERCLA defendants.

³⁴ Section 433A states in part:

Damages for harm are to be apportioned among two or more causes where

- (a) there are distinct harms, or
- (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

Id. § 433A.

Section 881 states:

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.

Id. § 881.

No right of contribution is available for tortfeasors who are liable only for the portion of the harm that they caused. *Id.* § 886A.

³⁵ *M/V Big Sam*, 681 F.2d at 438-39; *United States v. Bear Marine Servs.*, 509 F. Supp. 710, 718-19 (E.D. La. 1980); see also *Northeastern Pharmaceutical*, 579 F. Supp. at 844-45 (joint and several liability existed on FWPCA and state common law grounds).

³⁶ E.g., *Chem-Dyne Corp.*, 572 F. Supp. at 810 (relying on § 433B of *Restatement (Second) of Torts* for burden of proof rule).

³⁷ 451 U.S. 630 (1981).

³⁸ 451 U.S. 77 (1981).

³⁹ *Texas Indus.*, 451 U.S. at 638 (citing *Northwest Airlines*, 451 U.S. at 90-91).

A. Express Creation of a Statutory Right of Contribution

Section 107(e)(2) of CERCLA,⁴⁰ pertaining to cost recovery actions, arguably suggests that Congress expressly adopted a right of contribution under CERCLA. Section 107(e)(2) provides, "Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person."⁴¹ The Justice Department has argued that section 107(e)(2) creates a right of contribution among parties liable under section 107.⁴²

The district court in *Wehner v. Syntex Agribusiness, Inc.*⁴³ has agreed with the Justice Department's position. The court interpreted the deletion of the Gore Amendment,⁴⁴ which provided for a right of contribution, and Congress's substitution of § 107(e)(2), as showing Representative Gore's intention that the right of contribution be embodied in § 107(e)(2).⁴⁵

The conclusions of both the Justice Department and the *Wehner* court are incorrect. Section 107(e)(2) is a savings clause preserving any cause of action that a liable party has against any person.⁴⁶ As a savings clause, section 107(e)(2) cannot create a right of contribution. Indeed, it may only preserve a right of contribution created elsewhere.

The *Wehner* court's argument—that the Gore Amendment's right of contribution is embodied in section 107(e)(2)—is also flawed. The rejection of the Gore Amendment indicates only that the House did not favor an express right of contribution. The addition of a savings clause, § 107(e)(2), does not establish a right of contribution. Moreover, Senate bill S. 1480, which contained the contribution provision, also contained language similar to that in section 107(e)(2).⁴⁷ Congress's deliberate deletion of an explicit contribution provision suggests that it did not intend section 107 to provide a right of contribution. Had Congress wanted a *statutory*

⁴⁰ 42 U.S.C. § 9607(e)(2) (1982).

⁴¹ *Id.*

⁴² The Department has maintained that "[t]his provision . . . confirms that a defendant held liable for response costs has the right to seek contribution from any other person responsible for a release or threat of release of a hazardous substance." 126 CONG. REC. 31,966 (1980) (statement submitted on Department's behalf by Rep. Florio).

⁴³ 613 F. Supp. 1563 (E.D. Mo. 1985).

⁴⁴ 126 CONG. REC. 26,785 (1980).

⁴⁵ 613 F. Supp. at 1565.

⁴⁶ See *Price*, 577 F. Supp. at 343 (arguing that § 107(e)(2) preserves existing claims and right of contribution if found elsewhere in statute).

⁴⁷ S. 1480, *supra* note 17, § 4(n)(5).

right of contribution, it presumably would have kept the contribution provision rather than inconspicuously tucked a contribution right into section 107(e)(2).

Alternatively, some have argued that section 107(a)(4)(B)⁴⁸ authorizes potentially liable persons who pursue their own cleanup operation to recover cleanup costs from other responsible parties. In *City of Philadelphia v. Stepan Chemical Co.*⁴⁹ a district court held that because the subsection deems CERCLA defendants liable for "any other . . . costs of response incurred by any other person,"⁵⁰ Philadelphia could recover cleanup costs from other responsible parties, despite the city's ownership of the waste site and potential liability to federal or state governments if those authorities had commenced cleanup.⁵¹ The court construed section 107(a) to establish three categories of "persons" entitled to recover cleanup costs from responsible parties: the federal government, the state governments, and "any other person."⁵² According to the court, because CERCLA's definition of "person" includes federal and state governments, the term "any other person" refers to persons other than federal or state governments rather than persons other than those made responsible under the act.⁵³ Thus, the court in effect found a right of contribution by viewing section 107(a)(4)(B) to give "a private party the right to recover response costs from responsible third parties."⁵⁴

Finding a right of contribution in section 107(a)(4)(B), however, overextends the intended impact of the section. Section 107(a)(4)(B) may allow persons who lack responsibility for illegal waste dumping, but who nonetheless are potentially liable as site owners or operators, to recover cleanup costs from parties responsible for the dumping. The section does not, however, authorize contribution among parties held liable for cleanup costs. The original Senate bill⁵⁵ contained language similar to section 107(a)(4)(B), in addition to a separate provision for contribution. Congress's deletion of the contribution provision counters any suggestion that it intended a contribution right in the text of subsection (B). Thus, neither section 107(e)(2) nor section 107(a)(4)(B) expressly creates a right of contribution.

⁴⁸ 42 U.S.C. § 9607(a)(4)(B) (1982). For complete text of § 107(a)(4), see *supra* note 10.

⁴⁹ 544 F. Supp. 1135 (E.D. Pa. 1982).

⁵⁰ *Id.* at 1142 (citing 42 U.S.C. § 9607(a)(4)(B) (1982)).

⁵¹ *Id.* at 1143.

⁵² *Id.* at 1142 (citing 42 U.S.C. § 9607(a) (1982)).

⁵³ *Id.* (citing 42 U.S.C. § 9601(21) (1982)).

⁵⁴ *Id.* at 1143.

⁵⁵ S. 1480, *supra* note 17.

B. Implied Creation of a Statutory Right of Contribution

Federal courts may create remedies for a federal statute by inferring the remedies from the statutory scheme.⁵⁶ Such cases are rare.⁵⁷ The Supreme Court's marked reluctance to infer a private cause of action under federal regulatory statutes⁵⁸ stems from separation of powers concerns. The Court is hesitant to intrude upon the legislature's domain by enlarging the remedial provisions of a statute beyond the scope Congress adopted.⁵⁹ Nevertheless, in *Northwest Airlines* and *Texas Industries* the Supreme Court identified specific factors indicative of congressional intent to create a statutory right of contribution.⁶⁰ These factors are the statutory language, the legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies.⁶¹ The deter-

⁵⁶ See generally Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963) (discussing implied causes of action in federal statutes not explicitly providing such relief).

⁵⁷ See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (inferring private cause of action under § 14(a) of Securities Exchange Act of 1934). Securities legislation has been the largest source of implied rights of action. See Note, *supra* note 56, at 286 (citing cases); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (inferring injunctive remedy from Rivers and Harbors Act of 1899 where Act provided only for penalties).

⁵⁸ See *United States v. Texas Indus.*, 451 U.S. 630 (1981) (no implied private cause of action for contribution under Sherman and Clayton Acts); *California v. Sierra Club*, 451 U.S. 287 (1981) (no implied private cause of action to enforce § 10 of Rivers and Harbors Appropriation Act of 1899); *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77 (1981) (no implied private cause of action for contribution under Title VII and Equal Pay Act); *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981) (no implied private cause of action for back wages under Davis-Bacon Act); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (no implied private cause of action for damages under § 17(a) of Securities Exchange Act of 1934); *Cort v. Ash*, 422 U.S. 66 (1975) (no implied stockholder's derivative action under Federal Election Campaign Act).

⁵⁹ *Northwest Airlines*, 451 U.S. at 97 ("The authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt").

⁶⁰ *Id.* at 91; *Texas Indus.*, 451 U.S. at 639.

⁶¹ *Northwest Airlines*, 451 U.S. at 91; *Texas Indus.*, 451 U.S. at 639. The Court derived the four factors for ascertaining congressional intent from a line of cases beginning with *Cort v. Ash*, 422 U.S. 66 (1975).

In *Texas Industries* the Court mentioned an additional factor originally found in *Cort*, the identity of the class for whose benefit the statute was enacted. 451 U.S. at 639. The court did not deem this factor helpful for finding a right of contribution because the plaintiffs, antitrust wrongdoers, did not belong to the class for whose benefit Congress enacted the Sherman and Clayton Acts; instead they belonged to the class whose activities Congress intended to regulate. When applied to CERCLA defendants, this additional factor also does not appear to support inferring a right of contribution. Because CERCLA defendants, like antitrust defendants, belong to the class whose activities Congress wants to regulate, one doubts that Congress would intend to mitigate the liability of the wrongdoers. However, although CERCLA defendants are members of the regulated class, liability under CERCLA, unlike liability under the Sherman and Clayton Acts, is strict, and therefore defendants may be nonculpable, nonnegligent parties. In

mination of whether CERCLA implicitly creates a right of contribution requires an analysis of these four factors.

Because CERCLA's provisions make no reference to contribution,⁶² the first factor, statutory language⁶³ cannot serve as a basis for inferring a contribution cause of action. Nor does the second factor, the legislative history of CERCLA,⁶⁴ suggest that Congress intended to create a statutory, as opposed to a common law, right of contribution. Rather, congressional commentary on the final compromise bill indicates an intent to abdicate the formulation of liability to the courts: "issues of liability not resolved by [the] act, if any, shall be governed by traditional and evolving principles of common law."⁶⁵ If the Senate had intended to create a statutory right of contribution, it would likely have retained language similar to that which it used in the original bill.⁶⁶

One commentator has argued that the drafters of CERCLA may have omitted sections to reach a compromise while hoping that the courts would infer the omitted provisions.⁶⁷ In support of this theory, the commentator notes that despite the congressional omission of statutory language imposing strict liability, courts have interpreted the statute as imposing strict liability.⁶⁸ This argument fails for two reasons. First, the legislative history of the deletion of strict liability language differs from the history surrounding the deletion of the contribution provision. Although Congress deleted specific strict liability language from CERCLA, it added language that adopts section 311 of the FWPCA as the liability standard for the statute.⁶⁹ Courts have consistently construed section 311 as imposing a strict liability standard.⁷⁰ Congress was aware of the effect of

such a nonpunitive regulatory situation, Congress does not intend to punish past conduct but would rather regulate present and future conduct. To allow contribution as a way of spreading the cost of liability would not conflict with this regulatory intent.

⁶² See *supra* note 20 and accompanying text.

⁶³ For a critical discussion of the arguments that § 107(e)(2) and § 107(a)(4)(B) authorize a right to contribution, see *supra* notes 40-55 and accompanying text.

⁶⁴ See *supra* notes 16-24 and accompanying text.

⁶⁵ 126 CONG. REC. 30,932 (1980) (statement by Sen. Randolph) (see *supra* text accompanying note 22).

⁶⁶ S 1480, *supra* note 20, § 4(f); see also *supra* text immediately following note 47 (arguing that deletion of explicit contribution provision indicates no congressional intent to create statutory right of contribution).

⁶⁷ Note, *The Role of Injunctive Relief and Settlements in Superfund Enforcement*, 68 CORNELL L. REV. 706, 722 n.113 (1983).

⁶⁸ *Id.* For further discussion of the courts' imposition of strict liability under CERCLA, see Faron & Feldman, *Superfund Liability Outline*, 3 CHEM. & RADIATION WASTE LITIG. REP. 133, 149-51 (1982). See also cases collected *supra* note 8 (district court decisions imposing strict liability).

⁶⁹ 42 U.S.C. § 9601(32). The courts have consistently interpreted § 311 to impose strict liability. See *supra* note 8.

⁷⁰ See *supra* note 8.

adopting section 311: "We have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act [FWPCA]. . . ." ⁷¹ In contrast, the congressional commentary on contribution suggests that rather than creating a statutory right of contribution, Congress intended that federal courts remain free to determine when joint and several liability and contribution should apply. ⁷²

Second, the very need for a compromise measure indicates that the majority of Congress did not want CERCLA to include joint and several liability and contribution provisions of broad application. ⁷³ Congress intended that common law principles govern the contribution issue.

Thus, the first two factors, statutory language and legislative history, fail to show congressional intent to create a statutory right of contribution. The Court in *Texas Industries* indicated that if the statutory language and legislative history do not evince the requisite congressional intent, then the implication inquiry should cease. ⁷⁴ This Note nonetheless briefly considers the remaining factors.

The third factor, the purpose and structure of CERCLA, is consistent with a right of contribution. CERCLA has two purposes: promoting rapid cleanup of hazardous waste sites and encouraging careful handling of hazardous wastes. ⁷⁵ Because contribution would allow potentially liable parties to recover from other liable parties, it would encourage parties to pursue voluntary remedial work and

⁷¹ 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph).

⁷² See *supra* note 65 and accompanying text. The statement by Senator Randolph addresses "issues of liability not resolved by this act" and gives as an example joint and several liability and states that the "liability of joint tortfeasors will be determined under common or previous statutory law." 126 CONG. REC. 30,932 (1980). Because contribution is also an issue of liability of joint tortfeasors not resolved by CERCLA, Senator Randolph's comment seems to refer to the deletion of the contribution provision as well as the joint and several liability provision. Consequently the comment suggests that as with joint and several liability, the courts must decide whether a right of contribution exists under CERCLA.

In two recent cases the Supreme Court cautioned that federal common law does not provide an automatic right of contribution. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981) and *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 96 (1981). In these cases, the Court refused to infer a federal statutory right or to create a federal common law right of contribution under the Sherman Act, the Equal Pay Act, and Title VII. The Court has however, approved a nonstatutory federal right of contribution among joint tortfeasors in admiralty cases. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). Therefore, if CERCLA defendants have a federal common law right of contribution, this right must find support in one of several recognized instances where federal courts possess the power to develop special federal common law. See *infra* notes 94-103 and accompanying text.

⁷³ See *supra* notes 16-24 and accompanying text.

⁷⁴ *Texas Industries*, 451 U.S. at 639.

⁷⁵ H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 17, 22, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6119; S. REP. No. 848, 96th Cong., 2d Sess. 12 (1980).

other forms of settlement, in furtherance of CERCLA's cleanup goal.⁷⁶ A right of contribution would also address CERCLA's second goal, encouraging careful hazardous waste management, by spreading cleanup costs among all responsible parties. The prospect of liability for contribution to other responsible parties would deter careless handling of wastes by waste generators, transporters, and operators of waste facilities.⁷⁷ Without a CERCLA rule of contribution, these other parties might escape liability unless the government is able to locate and sue them, a difficult and unlikely undertaking.⁷⁸

Opponents of contribution under CERCLA counter that contribution would impede the prompt cleanup goal by discouraging settlement. They maintain that contribution would give responsible parties incentive to litigate and attempt a successful defense of the action rather than agree to a settlement.⁷⁹ The prospect of litigation would involve little risk for responsible parties because in the event of liability, the responsible parties could still recover contribution from settling parties. Additionally, parties who settle would not receive repose because they would still remain liable to other responsible parties for contribution.⁸⁰ The opponents' arguments do not apply, however, to a contribution rule prohibiting contribution claims against persons who settle in good faith and reducing a plaintiff's claim against other tortfeasors by the amount the settling party

⁷⁶ For detailed treatment of Superfund settlement agreements, see Note, *supra* note 67; Rikleen, *Negotiating Superfund Settlement Agreements*, 10 B.C. ENVTL. AFF. L. REV. 697 (1982-83). In a typical Superfund settlement agreement, generators propose their own remedial action to clean up a site. The EPA then consents to the settlement by giving an administrative order, or a court consents by giving a judicial consent decree. Note, *supra* note 67, at 719; Rikleen, *supra*, at 706. For a discussion of the advantages of settlement to both sides see *id.* at 703-05. *Stepan Chemical*, 544 F. Supp. at 1135, exemplifies how contribution would encourage voluntary cleanup. In *Stepan Chemical* the city of Philadelphia apparently pursued the cleanup on the assumption that it could recover the costs of cleanup from the responsible parties.

⁷⁷ In the antitrust context one court has taken the position that because most large businesses are risk-averse, the very possibility of imposition of sole liability has a greater deterrent effect than the imposition of a proportionate share of the liability. *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 901 (5th Cir. 1979). This argument does not directly apply to CERCLA defendants because the defendants can vary greatly in size and the cost of hazardous waste site cleanup is potentially immense.

⁷⁸ Most of the CERCLA § 107 suits that the EPA has brought have involved only a small number of the known potentially responsible parties. For example, in *United States v. Chem-Dyne Corp.*, C-1-82-840 (S.D. Ohio filed Aug. 26, 1982), the government sued about 40 companies. About 150 companies, however, escaped suit by agreeing to settle with the EPA.

⁷⁹ Supplemental Memorandum of Certain Settling Third-Party Defendants (filed Feb. 16, 1984), *United States v. Chem-Dyne Corp.*, No. C-1-82-840 (S.D. Ohio filed Aug. 26, 1982).

⁸⁰ *Id.*

paid in settlement.⁸¹ This contribution rule encourages settlement because a plaintiff knows how much of his claim he is risking by settling with one party and the settler gains protection from the contribution claims of other liable parties.⁸²

CERCLA's statutory structure also comports with a right of contribution. The creation of the Superfund indicates an intent to spread the costs of hazardous waste cleanup across the chemical industry rather than to impose costs on a few responsible parties.⁸³ A right of contribution conforms with this intent by spreading cleanup costs among all responsible parties. Moreover, contribution is consistent with the underlying regulatory and remedial character of CERCLA. One might argue that contribution mitigates the liability of wrongdoing defendants by broadly distributing the judgment burden among responsible parties. CERCLA defendants, however,

⁸¹ The National Conference of Commissioners on Uniform State Laws, drafter of the Uniform Contribution Among Tortfeasors Act, has recognized the settlement incentive provided by a contribution rule that bars contribution claims against persons who settle in good faith, and has fashioned such a rule in § 4 of the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955). Section 4 provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

- (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
- (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4, 12 U.L.A. 98 (1975).

⁸² In proposing the revised § 4 of the Uniform Act in 1955, the drafters explained that the original 1939 Uniform Act had discouraged settlements because it required a plaintiff to reduce his claim against other nonsettling joint tortfeasors by the pro-rata share of the released tortfeasor. 12 U.L.A. 99 (1975). According to the drafters, plaintiffs often refused to accept any release containing a provision reducing damages to the extent of the pro-rata share of the released tortfeasor because the plaintiff would receive no indication of the pro-rata share size until after the judgment against the other tortfeasors. The 1939 provision also did not prevent collusion between a plaintiff and a released tortfeasor against an unreleased tortfeasor. *Id.*

The 1955 revision of the act cures these problems by barring contribution claims against persons who settle in good faith and by reducing a plaintiff's claim against other jointly liable defendants by the settlement amounts. The contribution rule in § 4 thereby provides to settlers the repose that induces settlement. The requirement that the release or covenant be given in good faith gives a court the opportunity to determine whether collusion exists. If it does, the settling party is not discharged from the contribution claims of other parties. *Id.* In the *Chem-Dyne* case the United States argued that the court should adopt § 4 of the Uniform Act as federal common law. Response of the United States to Motion to Dismiss at 14 (filed Mar. 14, 1984), *United States v. Chem-Dyne Corp.*, No. C-I-82-840 (S.D. Ohio filed Aug. 26, 1982).

⁸³ Response of the United States to Motion to Dismiss at 10 (filed Mar. 14, 1984), *United States v. Chem-Dyne Corp.*, No. C-I-82-840 (S.D. Ohio filed Aug. 26, 1982).

often include nonnegligent parties held strictly liable.⁸⁴ Therefore, the concern that contribution would ameliorate the liability of culpable parties does not arise.⁸⁵

The fourth factor, the likelihood that Congress intended to supersede or supplement state law, also favors the recognition of a right of contribution under CERCLA. Contribution among jointly and severally liable parties is not exclusively relegated to state law; it exists in federal statutory and common law.⁸⁶ Because CERCLA liability is federal in nature, federal law should govern the extent of liability under the statute and a defendants' ability to seek contribution.

Uniformity interests also support a federal contribution rule. Although thirty-nine states have contribution statutes or allow contribution by judicial decision, the timing of the contribution claim varies. Some states allow contribution claims only after judgment and payment of a plaintiff's claim.⁸⁷ Other states permit contribution claims before judgment.⁸⁸ The effect of a settlement agreement on the contribution claims of nonsettling parties also varies by state.⁸⁹ A uniform federal rule, however, barring contribution claims against parties who settle in good faith and requiring a plaintiff to reduce his claim against nonsettling parties by the amounts paid in settlement, is preferable because it would promote settlement and cleanup.⁹⁰ Section 4 of the Uniform Contribution Among Tortfeasors Act could serve as a source for this federal rule.

Supplementing state contribution schemes with a uniform federal rule would conform with the CERCLA goal of closing the gap in federal and state environmental statutes by providing a single system for the cleanup of inactive hazardous waste sites.⁹¹ The Love

⁸⁴ 42 U.S.C. § 9607(a) (1982). For a discussion of parties subject to liability under CERCLA, see *supra* note 10 and accompanying text.

⁸⁵ For a discussion of the argument that contribution mitigates the burden of culpable defendants, see *infra* note 140.

⁸⁶ In the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a (1982), Congress fashioned three express provisions for contribution: 15 U.S.C. §§ 77k(f), 78i(e), and 78r(b). Contribution also occurs as part of the special federal common law created in admiralty cases. *E.g.*, *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974).

⁸⁷ An example of a post-judgment contribution rule is § 4 of the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, *supra* note 81.

⁸⁸ See, *e.g.*, OHIO REV. CODE ANN. § 2307.31 (1978) (example of prejudgment contribution rule).

⁸⁹ See UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1955) (barring contribution claims against parties who settle in good faith); see also *supra* notes 81-82 and accompanying text (discussing § 4 of Uniform Act).

⁹⁰ See *supra* notes 76-82 and accompanying text.

⁹¹ See S. REP. NO. 848, 96th Cong., 2d Sess. 10-11 (1980); 126 CONG. REC. H9459-60 (daily ed. Sept. 23, 1980). For further discussion of RCRA and the gap CERCLA filled, see *infra* note 114.

Canal incident⁹² in Niagara Falls, New York, demonstrated the gross inadequacy of then existing state and federal legislative schemes. During the Love Canal incident, imprecise division of administrative authority obstructed the ability of state and local officials to react to the improper waste disposal. The EPA and other federal agencies, unsure of their jurisdictional and financial powers, also failed to respond adequately.⁹³ Because CERCLA purports to address these inadequacies, Congress clearly intended it to supplement existing state laws for hazardous waste cleanup, rather than relegate hazardous waste cleanup solely to state law.

Despite the favorable outcome of the third and fourth factors, the implication analysis reveals no implied cause of action for contribution under CERCLA. The critical first two factors, statutory language and legislative history, fail to show congressional intent to create the statutory right.

III

FEDERAL COMMON LAW RIGHT OF CONTRIBUTION AMONG CERCLA DEFENDANTS

Although CERCLA neither explicitly nor implicitly provides for a right of contribution, courts could still apply contribution to CERCLA cases by looking to federal common law. Federal courts lack the power to create a "federal general common law,"⁹⁴ but they can generate special federal common law in certain areas. Commentators⁹⁵ have divided Supreme Court decisions creating special federal common law into four categories: (1) filling statutory interstices,⁹⁶ (2) inferring remedies from federal statutes,⁹⁷ (3) con-

⁹² See generally S. EPSTEIN, L. BROWN & C. POPE, *HAZARDOUS WASTE IN AMERICA* (1982) (discussing details of Love Canal incident and public outcry as to danger of hazardous waste); *Report of the New York Office of Public Health, Love Canal: Public Health Time Bomb* (1978) (same).

⁹³ See Tripp, *Liability Issues in Litigation Under the Comprehensive Environmental Response, Compensation and Liability Act*, 52 UMKC L. REV. 364, 365-66 (1984).

⁹⁴ See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

⁹⁵ C. WRIGHT, *HANDBOOK ON THE LAW OF FEDERAL COURTS* § 60 (3d ed. 1976); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 756-832 (2d ed. 1973); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957). See also Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967) (primarily discussing decisions that infer remedies from statutes or create law in areas of federal interest).

⁹⁶ See *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972) ("It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits . . ."); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) (although frequently no specific federal legislation governs particular transaction to which United States is party, this silence provides no ra-

struing a jurisdictional grant or a legislative history as an authorization to fashion federal common law,⁹⁸ and (4) spontaneously generating law in areas of special federal interest.⁹⁹

The district courts have created a federal common law rule of joint and several liability on the grounds that both hazardous waste pollution and CERCLA's corrective scheme involve uniquely federal interests.¹⁰⁰ These decisions fall into the fourth category, areas of special federal interest. The courts, however, cannot invoke the same approach when attempting to fashion a common law right of contribution under CERCLA. As the Court in *Texas Industries* pointed out, an action for contribution among private parties does not trigger federal concerns reaching the high threshold of "uniquely federal interests" . . . that oblige courts to formulate federal common law."¹⁰¹ The federal government is not a party to a contribution cause of action under CERCLA. Further, the uniquely federal interest that courts invoked to impose joint and several liability, the United States's ability to protect its financial interest in the Superfund,¹⁰² would be satisfied once courts impose joint and several liability. Thus, whether CERCLA defendants have a right of contribution among themselves is of no direct consequence to the United States and does not implicate a "uniquely federal interest" necessary to generate federal common law.

The courts, however, can justify creating a federal common law right of contribution under CERCLA. First, federal courts could choose to create a uniform contribution rule to fill the gaps that Congress left in CERCLA's liability provisions.¹⁰³ Second, federal courts could interpret CERCLA's legislative history and statutory scheme as authorizing them to create a federal common law rule.

tionale for limiting reach of federal laws). See generally Mishkin, *supra* note 95, at 799-800 ("[E]ffective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of federal common law or 'judicial legislation,' rules . . . necessary to fill in interstitially . . .").

⁹⁷ See cases collected *supra* note 57.

⁹⁸ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (concluding that congressional intent to give federal courts substantive lawmaking power existed in § 301 of Labor Management Relations Act of 1947, which granted federal courts jurisdiction over union contract violation suits).

⁹⁹ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-27 (1964) (federal law governs legal disputes affecting international relations); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) (absent congressional legislation, federal common law governs federal government's disbursement of funds); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (federal common law determines whether to apportion water of interstate stream).

¹⁰⁰ See *supra* notes 25-30 and accompanying text.

¹⁰¹ *Texas Industries*, 451 U.S. at 642.

¹⁰² See *supra* note 30 and accompanying text.

¹⁰³ For a detailed explanation of the gaps, see *supra* notes 16-24 and accompanying text.

A. Gap Filling

In *Illinois v. City of Milwaukee (Milwaukee I)*¹⁰⁴ the Supreme Court discussed gap filling in the context of federal water pollution statutes. In *Milwaukee I*, the Court recognized a federal common law of nuisance in certain waters.¹⁰⁵ Illinois brought suit against the city of Milwaukee to abate a public nuisance caused by the city's disposal of sewage into Lake Michigan. Even though the statute did not prescribe the remedy that Illinois sought, the Court maintained that "the remedies which Congress provides are not necessarily the only federal remedies available."¹⁰⁶ According to the Court, federal courts could create federal common law to abate nuisances in interstate waters.¹⁰⁷

The Court based its decision on the competence of and need for the federal courts to fill gaps Congress left in the FWPCA and other federal water pollution statutes. The Court emphasized the strong federal concern for abating water pollution, a policy evidenced by the FWPCA and other federal statutes.¹⁰⁸ In addition, the Court noted its past practice of fashioning federal common law in areas in which an overriding federal interest triggered a need for a uniform rule of decision or in which the controversy touched basic interests of federalism.¹⁰⁹ The Court, however, cautioned that "new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance," although no preemption had yet occurred.¹¹⁰ Thus, in *Milwaukee I*, the Court applied federal

¹⁰⁴ 406 U.S. 91 (1972). Cf. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*) (subsequent to *Milwaukee I*, Congress filled gaps of FWPCA by amendment).

¹⁰⁵ The *Milwaukee II* Court summarized the background of the dispute:

Illinois' claim was first brought to this Court when Illinois sought leave to file a complaint under our original jurisdiction. [In *Milwaukee I*] we declined to exercise original jurisdiction because the dispute was not between two States, and Illinois had available an action in federal district court. The Court reasoned that federal law applied to the dispute . . . concerning pollution of interstate waters [and that] Illinois could [therefore] appeal to federal common law to abate a public nuisance in interstate or navigable waters.

Milwaukee II, 451 U.S. at 309-10. *Milwaukee II* arose from Illinois's action brought in federal district court.

¹⁰⁶ *Milwaukee I*, 406 U.S. at 103 (citing *Lincoln Mills*, 353 U.S. at 457).

¹⁰⁷ *Id.* at 103-04.

¹⁰⁸ *Id.* at 101-02.

¹⁰⁹ *Id.* at 105 n.6 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1963)).

¹¹⁰ *Id.* at 107.

In *Milwaukee II* the Court again faced the nuisance issue but found a statutory preemption of federal common law. In the nine year interval between *Milwaukee I* and *Milwaukee II*, Congress passed the FWPCA Amendments of 1972, Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (1982)), which established a permit system regulating discharges of pollutants into national waters. In holding that the amendments had preempted federal common law, the Court relied on Congress's view of the amendments as "total[ly]

common law to a controversy that exposed a gap in a federal regulatory scheme and implicated a strong federal policy.

The Court's filling of statutory gaps by generating federal common law in *Milwaukee I* supports the creation of a federal common law right of contribution under CERCLA's liability provisions. First, significant gaps exist in the provisions of CERCLA's liability scheme. With the Resource Conservation and Recovery Act (RCRA)¹¹¹ Congress first attempted to combat the hazardous waste disposal problem by authorizing the EPA to regulate generators, transporters, and disposers of hazardous waste, and to establish future standards for chemical waste disposal.¹¹² Although prospectively comprehensive, RCRA failed to address past disposal operations and to provide for cleanup of present health-threatening waste sites.¹¹³ Responding to RCRA's deficiencies, CERCLA addresses the cleanup of inactive hazardous waste sites.¹¹⁴ CERCLA's liability scheme, however, fails to specify how to allocate liability among multiple responsible parties.¹¹⁵ Second, CERCLA cases implicate a strong federal interest. RCRA and CERCLA together stand for the strong federal policy of abatement of toxic waste hazards similar to the federal interest in abatement of water pollution that the *Milwaukee I* Court held sufficient to generate a federal common law of nuisance.¹¹⁶

restructuring" and "complete[ly] rewriting" existing water pollution legislation. 451 U.S. at 317. The Court stated Congress had "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Id.* The Court also narrowly read the Act's savings clauses and concluded that these clauses did not preserve the federal common law remedy recognized in *Milwaukee I*. *Id.* at 327-29.

¹¹¹ 42 U.S.C. §§ 6901-6987 (1982). For a detailed discussion of RCRA's regulatory framework, see Harrington, *The Right to a Decent Burial: Hazardous Waste and Its Regulation in Wisconsin*, 66 MARQ. L. REV. 223, 225-42 (1983).

¹¹² See Remarks of Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, before the American Bar Association Annual Meeting at 3 (Aug. 9, 1982) ("RCRA's primary thrust is prospective regulation of existing sites.").

¹¹³ See 126 CONG. REC. H26,359 (daily ed. Sept. 19, 1980) (statement of Rep. Brown); see also *infra* note 114 (discussing prospectivity of RCRA's regulations).

¹¹⁴ Because RCRA regulates primarily prospective hazardous waste disposal, the problem of releases from inactive or abandoned hazardous waste sites remained unaddressed. In *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), the court stated that "[a]pparently, Congress' major purpose in passing RCRA was to control the manner of disposing of hazardous wastes as opposed to cleaning up the results of past disposal." *Northeastern Pharmaceutical*, 579 F. Supp. at 834. In CERCLA Congress addressed the past disposal site problem by providing for cleanup, liability, and compensation with regard to releases of hazardous wastes at inactive disposal sites. See S. REP. NO. 848, 96th Cong., 2d Sess. 10-11 (1980); 126 CONG. REC. H9459-60 (daily ed. Sept. 23, 1980).

¹¹⁵ See *supra* text preceding note 12.

¹¹⁶ In *Milwaukee I* the Court concluded that federal water pollution statutes and aquatic life protection statutes represent a strong federal policy of abatement of water pollution. *Milwaukee I*, 406 U.S. at 101-02. The threat of hazardous waste pollution is

The existence of the gap in CERCLA's liability scheme and the presence of a strong federal interest give federal courts a sufficient basis to fashion a federal common law of contribution. Most courts have applied joint and several liability to CERCLA cases.¹¹⁷ Filling the liability allocation gap with contribution thus makes sense because joint and several liability and contribution are companion rights.¹¹⁸ Indeed, fairness dictates that when a court holds parties jointly and severally liable for a hazardous waste release, one party should not bear the entire burden of the judgment while the other parties escape liability.¹¹⁹

B. Congressional Authorization

A second basis for federal courts to fashion a federal common law rule of contribution under CERCLA is congressional authorization.¹²⁰ Recently, in *Colorado v. ASARCO, Inc.*¹²¹ the Federal District Court for Colorado held that CERCLA's legislative history revealed congressional intent to empower federal courts to develop a federal common law contribution rule.¹²² After examining the congress-

no less serious than the threat of water pollution. Moreover, as with water pollution, Congress has responded to hazardous waste pollution with regulatory statutes (RCRA and CERCLA) indicating a strong federal policy of abatement. To illustrate the magnitude of the problem, the United States produces more than 57 million metric tons of hazardous waste annually, 90% of which is improperly disposed of. See S. REP. NO. 848, 96th Cong., 2d Sess. 3 (1980).

¹¹⁷ See *supra* notes 25-30 and accompanying text.

¹¹⁸ The Senate bill that ultimately became CERCLA, S. 1480, provided for joint and several liability and contribution. See *supra* note 18 and accompanying text. When Congress deleted the joint and several liability provision, it simultaneously deleted the contribution provision. See *supra* note 20 and accompanying text (discussing deletion); see also 126 CONG. REC. 30,935-36 (1980) (remarks of Sen. Stafford) (same); 126 CONG. REC. 30,932 (1980) (remarks of Sen. Randolph) (same).

¹¹⁹ The majority of states and the *Restatement (Second) of Torts* allow parties held jointly and severally liable to seek contribution. *Northwest Airlines*, 451 U.S. at 87 n.17. See also *supra* note 33 and accompanying text (discussing *Restatement's* joint and several liability and contribution rules).

¹²⁰ See Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1522-23 (1969); see also *supra* note 98 and accompanying text (discussing Supreme Court's holding in *Lincoln Mills* that by its jurisdictional grant in Labor Management Relations Act of 1947, Congress authorized federal courts to develop substantive law).

¹²¹ 608 F. Supp. 1484 (D.C. Colo. 1985).

¹²² *Id.* at 1489-90.

In *ASARCO*, Colorado brought an action to recover response costs and damages under CERCLA § 107 against three defendants, ASARCO, Inc., Resurrection Mining Co., and Res-ASARCO Joint Venture. *Id.* at 1485. The three defendants filed third-party complaints seeking contribution from 15 other responsible parties, allegedly co-owners of the hazardous release site. *Id.* The court denied Colorado's motion to dismiss the third party complaint, *id.* at 1493, and held that the congressional commentaries of Senator Randolph and Representative Florio evidenced congressional authorization for the development of a federal common law of contribution. *Id.* at 1489. The court adopted as federal common law the contribution rule of the *Restatement (Second) of Torts*, which allows for contribution among jointly and severally liable tortfeasors

sional commentaries of Senator Randolph and Representative Florio,¹²³ the court concluded that contribution is a liability issue unaddressed by CERCLA which courts should resolve by applying common law principles.¹²⁴ Although the result in *ASARCO* is correct, the court's analysis is incomplete. The *ASARCO* court failed to discuss certain factors considered by the Supreme Court in *Texas Industries* as relevant to determining whether congressional authorization exists.

The Court in *Texas Industries*¹²⁵ discussed three factors relevant to determining whether Congress intended to authorize courts to formulate a common law right of contribution: the language of the statute, its legislative history, and the overall regulatory scheme. These three factors are the same criteria the Court used to discern an implied statutory right of contribution.¹²⁶ Although the factors are the same, the focus of the inquiry is different. In a congressional authorization analysis, courts inquire whether the factors indicate that Congress authorized federal courts to develop common law.¹²⁷ In an implication analysis, courts ask whether the factors show that Congress impliedly created a statutory right.¹²⁸

A comparison of CERCLA with the Sherman Act will illustrate the focus of the congressional authorization analysis. The Court in *Texas Industries* applied the three authorization factors to a Sherman Act case and found no indication that Congress authorized federal courts to create a right of contribution. As with CERCLA, the Sherman Act's statutory language provided no support for a congressional intent to empower courts to formulate a contribution rule because it contained no reference to contribution. The Court determined that the Sherman Act's legislative history, although indicating a congressional intent to give courts power to define substantive violations, failed to indicate an intent to empower courts to formulate remedies or the kind of relief sought through contribution.¹²⁹ The Court also concluded that the scope and detail of the antitrust statu-

and conforms with the CERCLA goal of expeditious hazardous waste site cleanup. *Id.* at 1490-91.

¹²³ See *supra* notes 22-23 and accompanying text.

¹²⁴ 608 F. Supp. at 1489.

¹²⁵ 451 U.S. at 645 (analyzing three factors, but fixing no relative weight to any).

¹²⁶ See *supra* note 61 and accompanying text.

¹²⁷ 451 U.S. at 645.

¹²⁸ See *supra* notes 60-61 and accompanying text.

¹²⁹ 451 U.S. at 643-44. The Court distinguished the lawmaking powers conferred in defining violations and the ability to fashion relief. *Id.* at 644. The Court also pointed out that when the Sherman Act was adopted, the common law did not provide a right of contribution among tortfeasors and that this omission raised a "permissible, though not mandatory, inference . . . that Congress relied on court's continuing to apply principles in effect at the time of enactment." *Id.* at n.17.

tory scheme and its existence for ninety years without a contribution amendment indicated that Congress did not authorize courts to formulate a right of contribution.¹³⁰

CERCLA's legislative history differs from that of the Sherman Act and indicates that Congress authorized federal courts to create a common law right of contribution under CERCLA. First, CERCLA's legislative history expressly indicates that common law principles are to determine "issues of liability not resolved by [the] act."¹³¹ Thus, in contrast to the deliberations preceding the Sherman Act, CERCLA's legislative history indicates an intent to give courts the power to formulate rules allocating liability, including rules of contribution and joint and several liability. Furthermore, because thirty-nine states and the District of Columbia allowed contribution among tortfeasors at the time of CERCLA's enactment,¹³² the inference that Congress could not have contemplated a contribution rule when it referred to common law principles of liability does not arise as it did with the Sherman Act.¹³³ Finally, unlike the legislative history of the antitrust laws, which does not mention contribution,¹³⁴ CERCLA's legislative history shows that the drafters consistently treated contribution as a companion right to joint and several liability.¹³⁵ When Congress simultaneously deleted joint and several liability and contribution, it explicitly suggested that courts should determine both issues of liability through evolving common law principles.

In addition, differences between the statutory scheme of CERCLA and the Sherman Act support the argument that Congress empowered courts to fashion a federal common law rule of contribution under CERCLA. First, unlike the antitrust laws, CERCLA is a remedial rather than punitive legislative scheme.¹³⁶ CER-

¹³⁰ *Id.* at 645. The Court invoked the presumption that Congress deliberately omits a remedy from a statute "when [it] has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Id.*

¹³¹ See *supra* note 22 and accompanying text.

¹³² *Northwest Airlines*, 451 U.S. at 87 n.17.

¹³³ See *supra* note 129.

¹³⁴ *Texas Industries*, 451 U.S. at 630.

¹³⁵ See *supra* notes 18-20, 118 and accompanying text.

¹³⁶ CERCLA enforcement actions under § 107 impose liability for costs of cleanup and for damages to natural resources. 42 U.S.C. § 9607(a). In addition, the Act sets liability limits for responsible parties, unless a release resulted from wilful misconduct, in which case courts may impose full costs. *Id.* § 9607(c). Although these provisions indicate that liability under CERCLA primarily seeks to compensate injured parties, the Act allows assessment of punitive damages if responsible parties fail to comply with orders (under § 9604 or § 9606) to clean up or take remedial action. *Id.* § 9607(c)(3). Note, however, that these punitive measures do not apply immediately upon a violation of the statute (as with the treble damages provision of Sherman Act), but only after responsible parties refuse to comply with administrative orders. Therefore, CERCLA serves a predominantly remedial, rather than punitive, legislative purpose.

CLA imposes strict liability on nonculpable, nonnegligent¹³⁷ parties who have a statutorily-imposed responsibility to clean up waste sites. In contrast, the antitrust laws impose fault-based liability; defendant wrongdoers seek contribution to mitigate the consequences of their wrongdoing.¹³⁸ Because CERCLA is remedial in nature,¹³⁹ contribution would not mitigate the punishment of wrongdoers.¹⁴⁰ In addition, contribution follows from the statute's overall remedial purpose, expediting cleanup by distributing liability among all responsible parties.

Second, the gaps in CERCLA's liability scheme support the conclusion that Congress authorized courts to fashion liability rules, including a contribution rule. Because CERCLA's statutory scheme contains gaps in its liability provisions, the *Texas Industries* presumption that Congress has deliberately omitted a remedy when it has enacted a comprehensive legislative scheme does not apply.¹⁴¹ The combination of an incomplete statutory scheme with a legislative history indicating congressional intent that federal courts use common law to fill the gaps provides a strong basis for inferring congressional authorization for the courts to fashion a common law rule of contribution.

CONCLUSION

The absence of an express contribution provision in CERCLA should not preclude federal courts from fashioning a common law contribution rule for defendants held jointly and severally liable. Without a CERCLA contribution rule, responsible parties not sued by the government would escape liability, and the burden of cleanup costs would fall on only some responsible parties. Federal courts should base a creation of a common law right of contribution among CERCLA defendants on the competence of federal courts to fill the

¹³⁷ See *supra* note 84 and accompanying text. The most common nonculpable responsible party in a CERCLA suit is a nonnegligent (i.e., someone not shown to be negligent) offsite generator. This term refers to a waste generator who arranged to have hazardous substances disposed of at sites from which there later were releases or threatened releases. Comment, *supra* note 9, at 10,226.

¹³⁸ *Texas Industries*, 451 U.S. at 635.

¹³⁹ CERCLA does not punish for a defendant's initial violation, but the act does provide punitive measures for failure to comply with cleanup/remedial action orders. See *supra* note 136 and accompanying text.

¹⁴⁰ 451 U.S. at 639. The Court explained that contribution might not comport with a punitive purpose. "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers . . . [and indicates] that Congress was [not] concerned with softening the blow on joint wrongdoers." *Id.* With a primarily remedial, compensatory statute such as CERCLA, Congress would remain less concerned that contribution ameliorated the liability of responsible parties. See *supra* note 61.

¹⁴¹ 451 U.S. at 645. See *supra* note 130 and accompanying text.

gaps in CERCLA with federal common law. The presence of an incomplete statutory scheme and a strong federal interest in abating hazardous waste spills buttress the argument for gap filling by federal courts. Courts may also find a separate ground for fashioning federal common law in CERCLA's legislative history and statutory scheme which suggest that Congress authorized federal courts to fill the statute's liability gaps with common law principles.

Barbara J. Gulino