Environmental Law - Third Circuit Ruling May Foreclose Imposition of Joint and Several Liability on Summary Judgment under CERCLA

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I. INTRODUCTION

During the 1970s, as the general public became aware of the increasing numbers of hazardous waste sites throughout the United States, concern spread over the grave health and environmental threats posed by these sites. In response to these problems, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980. Congress enacted CERCLA primarily to

1. See Scot C. Stirling, Reasonable Expectations of Insurance Coverage and the Problem of Environmental Liabilities, 22 ARIZ. ST. L.J. 395, 395 n.5 (1990) (noting that estimated costs for clean-up of approximately 1,200 to 2,000 hazardous waste sites throughout United States in 1979 was between $26.2 billion and $44.1 billion); William W. Balcke, Note, Superfund Settlements: The Failed Promise of the 1986 Amendments, 74 VA. L. REV. 123, 124 (1988) (noting that estimated number of hazardous waste sites in United States ranges from 1,500 to 10,000 and that estimated clean up costs range between $10 billion and $100 billion).

Three environmental disasters in the late 1970s focused the American public's attention on the potential dangers of hazardous waste disposal. Molly A. Meegan, Note, Municipal Liability for Household Hazardous Waste: An Analysis of the Superfund Statute and Its Policy Implications, 79 GEO. L.J. 1783, 1784 n.13 (1991). The first of these incidents, the Love Canal incident, involved the building of a residential neighborhood over a site in which chemical wastes had been dumped and where sludge, fly ash and municipal wastes had been processed. Id. In the late 1970s extremely dangerous levels of hazardous chemicals were detected in the homes. Id. Area residents suffered abnormal rates of birth defects, miscarriages, epilepsy and liver problems. Id. In the second incident, the Valley of the Drums incident, environmental officials discovered 20,000 barrels of toxic chemicals abandoned in a field in Kentucky. 126 CONG. REC. 30,931 (1980) (statement of Sen. Randolph). Finally, in the Kepone incident, a chemical plant in Virginia dumped wastes into the James River and destroyed a $2 million per year seafood harvest. Meegan, Note, supra, at 1784-85 n.13.

ensure that these contaminated sites would be made safe and that parties responsible for the environmental harm would bear the costs of remedying that harm. Under CERCLA, courts have traditionally imposed joint and several liability on responsible parties where wastes have commingled, allowing a defendant to escape joint and several liability only where the defendant could prove that the environmental harm attributable to its wastes was divisible from that attributable to other defendants. Prior to United States v. Alcan Aluminum Corp. (Alcan), courts had uniformly held that defendants had not proven divisibility and were thus jointly and severally liable at multi-generator sites containing commingled wastes.


3. See 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph) (noting that purposes of CERCLA are to expedite clean-up and to assure that those responsible for chemical harms bear costs of clean-up); see also Colloquy, Developments in the Law - Toxic Waste Litigation: Liability Issues in CERCLA Cleanup Actions, 99 HARV. L. REV. 1511, 1514 n.7 (1986) (noting that objectives of CERCLA are to ensure that those responsible for environmental harm bear costs of remediation and to assure that costs of unsafe disposal are internalized by industry) (citing S. REP. NO. 848, 96TH CONG., 2D SESS. 12-15, 31-34 (1980)).


Although courts have traditionally imposed joint and several liability, CERCLA does not mandate such a result. See United States v. Alcan Aluminum Corp., 964 F.2d 252, 268 (3d Cir.) (noting that CERCLA contains no express provisions for joint and several liability in cases involving multiple defendants), reh'g denied, 1992 U.S. LEXIS 17371 (July 27, 1992). The Third Circuit noted, however, that Congress intended for courts to use federal common-law principles to determine whether joint and several liability is appropriate on a case-by-case basis. Id. Courts have traditionally looked to the Restatement (Second) of Torts (Restatement) for guidance on joint and several liability. E.g., United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983). The Restatement provides that "[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." RESTATMENT (SECOND) OF TORTS § 875 (1977).


6. See, e.g., United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989) (holding defendants jointly and severally liable on summary judgment be-
In *Alcan*, the United States Court of Appeals for the Third Circuit held that in cases involving multi-generator hazardous waste sites containing commingled wastes, a court must conduct extensive fact finding and must grant each defendant an opportunity to demonstrate divisibility of harm before imposing joint and several liability. The Third Circuit stated that the district court failed to afford Alcan such an opportunity by granting summary judgment to the government. Thus, the Third Circuit reversed the district court's grant of summary judgment for the government and remanded the case to allow Alcan Aluminum Corporation (Alcan) an opportunity to demonstrate that the damages it caused were divisible from those caused by other generators at the site.

The Third Circuit's decision in *Alcan* marked the first time that a United States circuit court of appeals reversed a district court's holding that defendants were jointly and severally liable at a site containing commingled wastes. At the very least, this decision interjects uncertainty.

cause wastes had commingled and defendants had not presented sufficient evidence of divisibility), *cert. denied*, 494 U.S. 1057 (1990); O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989) (holding defendants jointly and severally liable because defendants had not proven divisibility of harm), *cert. denied*, 483 U.S. 1071 (1990); Monsanto, 858 F.2d at 171 n.22, 172 (holding defendants jointly and severally liable on summary judgment because they had not presented any evidence of divisibility). The views of these courts are consistent with the Restatement, which provides that:

(1) 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.

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

RESTATEMENT (SECOND) OF TORTS § 433A (1977). The Restatement also provides that "[i]f 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. For a discussion of R.W. Meyer, O'Neil and Monsanto, see infra notes 34-52 and accompanying text.

7. *Alcan*, 964 F.2d at 269. For a complete discussion of the Third Circuit's reasoning in *Alcan*, see infra notes 73-107 and accompanying text.

8. See *Alcan*, 964 F.2d at 269 (noting that divisibility issue is intensely factual in nature).

9. *Id.* at 270.

10. Compare *Alcan*, 964 F.2d at 269 (noting that district court erred in granting summary judgment for government because of "intensely factual nature of the divisibility issue") with R.W. Meyer, 889 F.2d at 1506-07 (affirming district court's grant of summary judgment holding defendants jointly and severally liable because district court's finding that harm was indivisible was not clearly erroneous) and O'Neil, 883 F.2d at 182 (affirming district court's holding that defendant was jointly and severally liable because defendant could not demonstrate divisibility of harm due to commingling of wastes) and Monsanto, 858 F.2d at 171 (affirming district court's grant of summary judgment holding defendants jointly and severally liable because harm appeared indivisible due to commin-
into the scope of liability under CERCLA and may significantly weaken
the EPA's bargaining power in CERCLA cases. At the most, this
decision may result in the demise of joint and several liability under
CERCLA.12

II. BACKGROUND
A. Statutory Background

CERCLA, as amended by the Superfund Amendments and
Reauthorization Act of 1986 (SARA)13, was enacted to establish a com-
prehensive statute for controlling the many serious problems associated
with abandoned hazardous waste sites.14 CERCLA authorizes the En-
vironmental Protection Agency (EPA) to commence “removal and other
remedial actions” to abate any actual or threatened releases of hazard-
ous substances posing a potential threat to the public health or the envi-
ronment.15 Upon determining that a hazardous waste site may pose a

11. For further discussion of the possible implications of this decision, see infra notes 108-29 and accompanying text.

12. See Third Circuit Ruling Said to Strike Blow at CERCLA's Joint, Several Liability Scheme, 7 Toxics L. REP. 17 (BNA), No. 1, at 17 (June 3, 1992) (noting that Alcan may spell “the beginning of the end of joint and several liability under superfund”). For further discussion of the possible implications of this decision, see infra notes 108-29 and accompanying text.

13. Pub. L. No. 99-499, 100 Stat. 1615 (amending scattered sections of CERCLA, 42 U.S.C. §§ 9601-9675 (1988)). SARA made several reforms to CERCLA, addressing issues such as clean-up standards, federal-state relations, litigation procedures and settlement guidelines. For a further discussion of SARA, see infra note 31 and accompanying text.


15. CERCLA, 42 U.S.C. § 9604(a) (1988). CERCLA provides, in pertinent part:

(1) Whenever (A) any hazardous substance is released or there is a
substantial threat of such a release into the environment, or (B) there is
a release or substantial threat of release into the environment of any
pollutant or contaminant which may present an imminent and substan-
tial danger to the public health or welfare, the President is authorized
to act . . . to remove or arrange for the removal of, and provide for
remedial action relating to such hazardous substance, pollutant, or con-
taminant at any time . . . or take any other response measure consistent
with the national contingency plan which the President deems neces-
sary to protect the public health or welfare or the environment.

Id. § 9604(a)(1).

The Executive Office delegated most of its authority under CERCLA to the
also delegated its authority to the EPA under the Superfund Amendments
threat, the EPA may either: (1) require the potentially responsible parties (PRPs)\textsuperscript{16} to clean the site themselves and bear the costs\textsuperscript{17} or (2)

\textsuperscript{16} CERCLA, 42 U.S.C. § 9607(a) (1988). CERCLA broadly defines a “responsible party” as:

(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.\textsuperscript{Id.}

Responsible parties are liable for “all costs of removal or remedial action.”\textsuperscript{Id.} § 9607(a)(4)(A). The potential liability of these “responsible parties” under CERCLA is extremely broad and often results in millions of dollars being assessed. See Barry S. Neuman, \textit{No Way Out? The Plight of the Superfund NonSettlor}, 20 ENVTL. L. REP. 10,295, n.6 (July 1990) (noting that costs of Superfund clean-ups average between $20-$30 million); Stirling, supra note 1, at 396 n.7 (noting that costs of Superfund clean-ups average more than $10 million and could reach as high as $30-$50 million under SARA).

In order to state a prima facie case against PRPs under § 9607(a), the government must establish that the defendants are (i) persons (ii) responsible for (iii) the disposal of (iv) a hazardous substance (v) from a facility (vi) from which there is a release or threatened release of the substance into the environment (vii) because of which the claimant takes necessary response actions. Barr, supra note 2, at 939-40. When the government cleans up a site, the money to fund the clean-up comes from the Hazardous Substances Superfund (Superfund). 26 U.S.C. § 9507 (1988); see Teufel, Note, supra note 2, at 584 (noting that Superfund was established to provide resources necessary to respond immediately to releases of hazardous substances). The Superfund contains $13 billion, which the government uses to pay for its response costs incurred. CERCLA, 42 U.S.C. § 9611 (1988). Although the amount of money in the Superfund seems infinite, given the costs associated with cleanup and the large number of Superfund sites, it is crucial that the government be able to replenish the fund by recouping its costs from the PRPs. See United States v. American Cyanamid Co., 786 F. Supp. 152, 157 (D.R.I. 1992) (noting that there are presently 1,200 Superfund sites and about 100 are added each year); see also Colloquy, supra note 3, at 1516 (stating that promptly replenishing Superfund facilitates government’s efforts to clean hazardous waste sites as quickly as possible).

\textsuperscript{17} CERCLA, 42 U.S.C. § 9606(a) (1988). In order for the government to institute this type of action, however, there must be an “imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility.”\textsuperscript{Id.}

Section 9606 authorizes the government to seek an injunction in a United States district court for the district in which the threat occurs or to issue administrative orders against PRPs under § 9607.\textsuperscript{Id.}
clean the site itself, and recover its costs by instituting a cost recovery suit after clean-up. 18

CERCLA was drafted hastily in the waning hours of the 96th Congress. 19 Although CERCLA has been criticized as being poorly drafted and riddled with inconsistencies, 20 it has proven to be an effective tool for the government in its effort to clean hazardous waste sites throughout the country. 21 Federal courts have traditionally interpreted CERCLA broadly, construing the statute in favor of the government. 22

18. CERCLA, 42 U.S.C. § 9607(a) (1988). A primary goal of CERCLA, however, is to induce PRPs to settle with the EPA, thereby expediting recovery of clean-up costs. See Neuman, supra note 16, at 10295 (noting that CERCLA's success depends on ability of government to reach settlements with private parties and that central purpose of CERCLA is to encourage settlements); Anne D. Weber, Note, Misery Loves Company: Spreading the Costs of CERCLA Cleanup, 42 VAND. L. REV. 1469, 1482 (1989) (noting that SARA encourages PRPs to settle: (1) by allowing settling PRPs to avoid joint and several liability; (2) by allocating response costs among PRPs; (3) by allowing for partial settlements; and (4) by granting covenants not to sue). The strongest incentive to settle, however, lies in the courts' imposition of strict, joint and several liability on summary judgment under CERCLA. See, e.g., United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989) (noting that liability under CERCLA is strict, joint and several), cert. denied, 494 U.S. 1057 (1990); United States v. Monsanto Co., 858 F.2d 160, 167, 171-72 (4th Cir. 1988) (same), cert. denied, 490 U.S. 1106 (1989). For further discussion of these cases, see infra notes 41-52 and accompanying text.

A party who settles will probably not be held accountable for a grossly disproportionate share of costs. See Weber, supra, at 1484 (stating that SARA authorizes EPA to allocate responsibility among settling generators based on volume of wastes at site). If a party does not settle, however, a court may hold that party jointly and severally liable for a disproportionate share of the costs. See United States v. Alcan Aluminum Corp., 755 F. Supp. 531 (N.D.N.Y. 1991) (noting that government settled with 82 out of 83 defendants and holding non-settling defendant liable for balance of response costs without regard to proportionate share of fault), rev’d in part and remanded, 990 F.2d 711 (2d Cir. 1993).

19. See Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980, 8 COLUM. J. ENVTL. L. 1, 1 (1982) (noting that CERCLA was hurriedly enacted by lame-dick session of 96th Congress); Teufel, Note, supra note 2, at 579 (stating that CERCLA was compromise bill hastily promulgated during last days of Carter Administration).

20. See Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) (“It is not surprising, that as a hastily conceived and briefly debated piece of legislation, CERCLA failed to address many important issues . . . .”), cert. denied, 488 U.S. 1029 (1989); see also Barr, supra note 2, at 923 (noting that CERCLA has been criticized as sloppily drafted, hastily drawn up and lacking in useful legislative history); Balcke, Note, supra note 1, at 124 (noting that CERCLA has been imperfect environmental reform scheme and has been subject to extensive criticism).

21. See Barr, supra note 2, at 1000-01 (noting that although CERCLA's liability scheme may result in potentially unfairly harsh consequences, it has proven to be viable answer to hazardous waste problems); Colloquy, supra note 3, at 1542 (noting that despite flaws, CERCLA can be reasonable response to hazardous waste sites).

22. See Alcan, 964 F.2d at 258 (stating that because CERCLA is remedial statute, courts must interpret CERCLA liberally to realize congressional goals);
construing CERCLA in this manner, courts have imposed strict, joint and several liability on generators at sites containing commingled wastes once the government has proven a prima facie case. Moreover, many courts have determined the scope of liability as a matter of law, granting summary judgment in favor of the government. As a result, hazardous waste generators have often complained that CERCLA's statutory framework, coupled with the courts' broad interpretations, results in harsh and unfair results. Industry has argued that this approach not only imposes liability without fault, but also may require a party who contributed only a small percentage of the overall harm to pay the entire costs of the clean-up.

23. See, e.g., Alcan, 964 F.2d at 259, 267 (noting that liability under CERCLA is strict, joint and several); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989) (noting that CERCLA provides for strict liability and that courts have construed CERCLA to allow for imposition of joint and several liability when harm is indivisible); cert. denied, 494 U.S. 1057 (1990); United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989) (noting that majority of courts have held that CERCLA imposes strict, joint and several liability); United States v. Monsanto Co., 858 F.2d 160, 167, 171 (4th Cir. 1989) (noting that liability under CERCLA is strict and CERCLA permits imposition of joint and several liability in cases of indivisible harm); cert. denied, 490 U.S. 1106 (1989). For a discussion of the elements the government must establish in order to prove a prima facie case of liability, see supra note 16.

24. See R.W. Meyer, 889 F.2d at 1507 (affirming district court's grant of summary judgment holding defendants jointly and severally liable because commingling of wastes resulted in presumption of indivisible harm and defendants had not rebutted presumption with any evidence of divisibility); Monsanto, 858 F.2d at 171 (same). But see United States v. Alcan Aluminum Corp., 990 F.2d 711, 722-23 (2d Cir. 1993) (Alcan Second Circuit), (reversing district court's grant of summary judgment in favor of government because Alcan's expert affidavits had created genuine issues of material fact with respect to divisibility). Alcan, 964 F.2d at 269 (reversing district court's grant of summary judgment holding Alcan jointly and severally liable and remanding to allow Alcan to present evidence of divisibility).

25. See Barr, supra note 2, at 924 (noting that CERCLA has been described as "the harshest liability scheme around" (quoting Ruth Simon, Deals That Smell Bad, FORBES, May 15, 1989, at 49)); see also Weber, Note, supra note 18, at 1470 (noting that minor contributor of wastes with deep pocket can be held liable for entire amount of clean-up, yielding unjust results).
B. Caselaw

United States v. Chem-Dyne Corp. was the first of many cases to hold that a court may impose joint and several liability under CERCLA when commingling of wastes occurs. In Chem-Dyne, the court determined that by removing the mandatory joint and several liability provisions from the final version of CERCLA, Congress did not intend to preclude joint and several liability under CERCLA, but rather, intended CERCLA liability to be based upon principles of common law. In addressing the issue of joint and several liability under CERCLA, the Chem-Dyne court looked to the Restatement (Second) of Torts (Restatement), which states that when two or more persons act independently to cause a single and

27. Id. at 810. For a discussion of subsequent cases imposing joint and several liability under CERCLA, see infra notes 34-52 and accompanying text.

In Chem-Dyne, the government sued 24 defendants, alleging that the defendants either generated or transported the hazardous wastes located at the Chem-Dyne treatment facility. Chem-Dyne, 572 F. Supp. at 804. The defendants moved for summary judgment, asking for a determination that they were not jointly and severally liable for clean-up costs. Id. The defendants argued that Congress did not intend to impose joint and several liability under CERCLA because Congress had deleted a joint and several liability provision from the final bill. Id. at 805. The issue of whether CERCLA allowed for imposition of joint and several liability was a matter of first impression for the Chem-Dyne court and at that time, there was no case law specifically addressing this issue. Id. at 804. The Chem-Dyne court noted that the typical CERCLA case involves numerous generators and transporters who have disposed of hazardous wastes at a single site. Id. at 810.

For a discussion of cases subsequent to Chem-Dyne holding defendants jointly and severally liable on summary judgment because defendants could not create a genuine issue of material fact as to divisibility, see infra notes 41-52 and accompanying text.

28. Chem-Dyne, 572 F. Supp. at 806. The Chem-Dyne court quoted from the remarks of Senator Stafford, who was the sponsor of the bill proposing CERCLA. Id. Senator Stafford stated:

We have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act, but we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable . . . . The changes were made in recognition of the difficulty in prescribing in statutory terms liability standards which will be applicable in individual cases. The changes do not reflect a rejection of the standards in the earlier bill. Id. (quoting 126 CONG. REC. S14964 (Nov. 24, 1980)).

In reviewing CERCLA's legislative history, the Chem-Dyne court determined that Congress omitted the joint and several liability provision from the final bill in order to avoid a mandatory standard that would have unfair results in some cases. Id. at 808. The Chem-Dyne court determined that the scope of liability was to be determined under federal common-law principles on a case-by-case basis. Id. at 807. Furthermore, the court noted that liability based on varying state standards would undermine the purpose of CERCLA by encouraging dumping in states with lenient laws. Id. at 809. Thus, the Chem-Dyne court concluded, courts should assess the propriety of joint and several liability on a case-by-case basis, based on uniform federal standards. Id. at 807-09.

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indivisible harm, each is subject to liability for the entire harm. Following the Restatement, the Chem-Dyne court determined that joint and several liability was not precluded under CERCLA and held the defendants jointly and severally liable.

In 1986, Congress substantially amended CERCLA through the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA). Although Congress did not include a mandatory joint

29. Id. at 810 (citing Restatement (Second) of Torts § 875 (1976) and William L. Prosser, The Law of Torts 315-16 (4th ed. 1971)). The Chem-Dyne court also noted, however, that under common law, when two or more persons acting independently and cause a single harm, if there is a reasonable basis for division of liability according to the contribution of each tortfeasor, each is only liable for that portion of the harm attributable to him or her. Id. (citing Restatement (Second) of Torts §§ 443A, 881 (1976) and Prosser, supra, at 313-14). Under the Restatement formulation, the defendants have the burden to prove divisibility. Id. (citing Restatement (Second) of Torts § 433B (1976)). The Chem-Dyne court stated that these rules are applicable in determining liability under § 107(a) of CERCLA. Id.

30. Id. The Chem-Dyne court denied the defendants' motion for summary judgment because the wastes at the site had commingled and the defendants had not proven divisibility of harm. Id. Determining whether the defendants in this case were jointly and severally liable necessitated a complex factual inquiry. Id. The Chem-Dyne court noted that the appropriateness of joint and several liability depended on whether or not the harm was divisible. Id. If a defendant proves that the harm is divisible and that a reasonable basis for apportionment of damages exists, that individual defendant will not be jointly and severally liable. Id. Rather, the defendant will only be liable for that portion of the harm that it caused. Id. The court also noted that the volume of waste contributed by an individual generator may not be an accurate predictor of the harm caused by that waste because of the toxicity and migratory potential of many wastes. Id. The Chem-Dyne court determined that because the wastes had commingled, defendants were not entitled to summary judgment. Id.


SARA also added a provision allowing defendants to sue other potentially liable parties for contribution. Id. § 9613(f)(1). This section provides, in pertinent part:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title . . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate . . . .

Id. Thus, if a responsible party believes that it has paid more than its fair share of the costs of clean-up, it may seek indemnity from other parties. Moreover, courts may consider equitable factors in contribution proceedings, even though courts may not consider equitable factors in a cost recovery action. Id.; see also O’Neil v. Picillo, 682 F. Supp. 706, 725-26 (D.R.I. 1988) (noting that equitable apportionment considerations are best determined at subsequent contribution proceeding rather than at initial liability phase), aff’d, 883 F.2d 176 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990). At least one court has noted, however,
and several liability provision in SARA, it approved of the \textit{Chem-Dyne} court's method of applying joint and several liability on a case-by-case basis.\textsuperscript{32} Subsequent to the enactment of SARA, several United States circuit courts of appeals have considered SARA's impact on the scope of liability under CERCLA at multi-generator sites containing commingled wastes.\textsuperscript{33}

In \textit{O'Neil v. Picillo},\textsuperscript{34} the state of Rhode Island and the EPA sought to hold three companies jointly and severally liable under section 107 of CERCLA for past and future clean-up costs of hazardous wastes at the Picillo pig farm.\textsuperscript{35} In \textit{O'Neil}, the United States Court of Appeals for the First Circuit acknowledged that CERCLA's liability scheme, which presumes indivisibility where wastes have commingled, could be unfair to some defendants.\textsuperscript{36} The First Circuit determined, however, that Congress did include provisions in SARA, how-
gress intended for those who were at least partially responsible for the environmental harm to bear the costs of clean-up. Accordingly, the First Circuit held that SARA did not preclude the imposition of joint and several liability under CERCLA. Following the Restatement, the First Circuit held the defendants jointly and severally liable because the wastes had commingled and the defendants had not met their burden of proving divisibility.

ever, to ameliorate the potential harshness of CERCLA liability. See id. at 178-79 (noting that SARA directed EPA to offer settlements to de minimis generators); see also 42 U.S.C. § 9622(g) (1988). The defendants in this case were in fact offered early settlements, but chose to litigate. O'Neil, 883 F.2d at 179 n.3. For a discussion of the provisions of SARA ameliorating defendants' potential liability under CERCLA, see supra note 31.

37. O'Neil, 883 F.2d at 178. The court stated that it was "well settled that Congress intended that the federal courts develop a uniform approach governing the use of joint and several liability in CERCLA actions." Id. The rule adopted by most courts, and approved of by the First Circuit was that "damages should be apportioned only if the defendant can demonstrate that the harm is divisible." Id. The O'Neil court noted that courts had consistently been imposing joint and several liability at the time Congress enacted SARA. Id. at 179. The First Circuit further noted that although Congress considered imposing joint and several liability when enacting SARA, Congress chose to leave the resolution of this issue to the courts. Id. Congress decided to leave the issue to be resolved on a case-by-case basis, as was first approved in Chem-Dyne. Id.; see also Alean, 964 F.2d at 268 (noting that deletion of statutory provision mandating joint and several liability was not intended as rejection of joint and several liability); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989) (noting that CERCLA imposes joint and several liability when harm is indivisible), cert. denied, 494 U.S. 1057 (1990); United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988) (noting that CERCLA does not mandate imposition of joint and several liability, but does permit joint and several liability when harm is indivisible), cert. denied, 490 U.S. 1106 (1989).

38. O'Neil, 883 F.2d at 179.

39. Id. at 178-83. The district court in O'Neil had determined that the harm was indivisible due to the commingling of wastes, and thus, had held the defendants jointly and severally liable. O'Neil v. Picillo, 682 F. Supp. 706, 724-25 (D.R.I. 1988), aff'd, 883 F.2d 176 (1st Cir. 1989), cert. denied, 495 U.S. 1071 (1990). The district court specifically stated that "[u]nder these circumstances, where different substances possessing different qualities of toxicity and migratory potential commingle, there is a synergistic impact upon the environment that necessitates a finding that the consequent injury is indivisible." Id. at 725. On appeal, the First Circuit noted that the district court followed the majority of courts in adopting the Restatement formulation of joint and several liability. O'Neil, 883 F.2d at 178. The First Circuit thus affirmed the district court, noting that the defendants bore the burden of proving divisibility. Id. at 182. Although the defendants argued that the harm was divisible, the court stated that "[b]ecause there was substantial commingling of wastes, we think that any attempt to apportion the costs incurred ... would necessarily be arbitrary," Id. at 183 n.11. The court recognized that "the only way [defendants] could have demonstrated that they were limited contributors would have been to present specific evidence concerning the whereabouts of their waste at all times after it left their facilities." Id. at 182. Recognizing that clean-up efforts should be begun expeditiously, the First Circuit did not want to delay clean-ups by engaging in the lengthy, and usually impossible, task of tracing wastes to each responsible party. Id. at 179 n.4. The First Circuit stated that the defendants' only remedy
Although the district court in *O'Neil* did not resolve the issue on summary judgment, several other courts have recently granted summary judgment for the government, finding the defendants jointly and severally liable as a matter of law when wastes had commingled and defendants had not presented evidence of divisibility. The United States Court of Appeals for the Fourth Circuit recently considered this issue in *United States v. Monsanto Co.* The district court in *Monsanto* had granted summary judgment for the government, stating that the defendants' arguments concerning unfair allocation of costs should be considered at a subsequent contribution proceeding.

On appeal to the Fourth Circuit, the defendants argued that the

would be to commence a contribution proceeding. *Id.* In a contribution proceeding, the defendants' burden of proving divisibility would be reduced and the district court could apportion responsibility based on equitable factors the court deemed appropriate. *Id.*

40. For a discussion of the cases holding defendants jointly and severally liable on summary judgment due to commingling of wastes because defendants could not create a genuine issue of material fact as to divisibility, see infra notes 41-52 and accompanying text.

41. 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). In *Monsanto*, the defendant landowners leased a tract of land to a chemical manufacturing corporation in 1972 to allow the corporation to store raw materials and finished products in a warehouse at the site. *Id.* at 164. The corporation formed a subsidiary that began using the facility to store and dispose of hazardous wastes. *Id.* The subsidiary contracted with several hazardous waste generators for transport, recycling and disposal of wastes. *Id.* From 1976 to 1980, the subsidiary haphazardly deposited over 7,000 fifty-five gallon drums of waste on the land. *Id.* The drums were stacked on top of each other, no records of the contents of the drums were maintained and no safety procedures were followed. *Id.* Many of the drums leaked toxic substances into the ground, which resulted in commingling of the wastes and ultimately caused several fires and explosions. *Id.* The EPA investigated the site in 1980 and concluded that the site posed “a major fire hazard.” *Id.* at 165. The EPA instituted a clean-up action and notified the generators concerning potential responsibility for the clean-up costs. *Id.* Twelve of the generators ultimately settled with the EPA. *Id.* In 1982, the EPA and the state of South Carolina filed a complaint against the site owners and the non-settling generators, alleging that the parties were jointly and severally liable under CERCLA § 107(a). *Id.* at 165-66. The defendant owners contended that they were innocent absentee landowners and the generators claimed, inter alia, that none of their specific wastes contributed to the hazardous conditions at the site. *Id.* at 166. The district court granted the government's motion for summary judgment, holding the defendants jointly and severally liable because the harm at the site was "indivisible." United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 995 (D.S.C. 1984), aff'd sub nom. United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). The district court determined that the harm was indivisible because the wastes had commingled and contributed synergistically to the harm at the site. *Id.* at 994. The district court also noted that any questions of apportionment based on volume should be considered at a contribution hearing. *Id.* at 995 & n.8.

42. *South Carolina Recycling*, 653 F. Supp. at 995 & n.8. The district court stated that volumetric contribution is not an accurate indicator of the environmental and health dangers associated with the waste due to the varying toxicities and migratory potentials of different hazardous wastes. *Id.* at 995. Cost appor-
district court erred in granting summary judgment because the harm at the site was capable of apportionment. The Fourth Circuit rejected the defendants' argument, stating that because the wastes at the site had commingled, the district court had no basis upon which to reasonably apportion liability absent evidence as to the manner in which the chemicals interacted. The Monsanto court stated that courts should determine whether the imposition of joint and several liability is appropriate on a case-by-case basis, in accordance with federal common law. Following the Restatement, the Fourth Circuit held that the defendants had not proven that a material issue of fact existed as to divisibility and that summary judgment was appropriately granted.

In United States v. R. W. Meyer, Inc., the United States Court of Appeals for the Sixth Circuit similarly considered whether imposing joint

...
and several liability on summary judgment was appropriate. The Sixth Circuit affirmed the district court's summary judgment ruling that R.W. Meyer, as the owner of a site upon which hazardous wastes were released, was jointly and severally liable for removal costs.

In affirming the district court's grant of summary judgment for the government, the Sixth Circuit in *R. W. Meyer* stated that Congress intended for courts to determine the scope of CERCLA liability under evolving federal common-law principles. The Sixth Circuit noted that under federal common-law principles, courts have traditionally imposed joint and several liability under CERCLA when the environmental harm is indivisible and have allowed for apportionment when the harm is divisible. Applying a clearly erroneous standard, the Sixth Circuit declined to disturb the district court's factual finding that the harm was indivisible. The Sixth Circuit stated that the appropriate avenue for R.W. Meyer was to seek to limit its liability in a subsequent contribution action.

Prior to the Third Circuit's decision in *United States v. Alcan Alumi-
num Corp. (Alcan)\textsuperscript{53}, the United States District Court for the Northern District of New York decided a factually similar case also entitled \textit{United States v. Alcan Aluminum Corp. (Alcan New York)}.\textsuperscript{54} In Alcan New York, the government brought suit against eighty-three defendants under CERCLA for response costs incurred in the clean-up of a hazardous waste site, but every defendant except Alcan ultimately settled out of court.\textsuperscript{55} The government sought to hold Alcan jointly and severally liable for the balance of the response costs.\textsuperscript{56} Alcan argued that it should not be held jointly and severally liable because the harm caused by its wastes was divisible from the harm caused by the other defendants.\textsuperscript{57} The district court, however, granted the government's summary judgment motion against Alcan, finding that the wastes had commingled and that Alcan had not created a genuine issue of fact as to divisibility.\textsuperscript{58} The court summarily dismissed Alcan's argument, stating that the harm at the site was indivisible because the wastes had commingled. 


\textsuperscript{54} 755 F. Supp. 531 (N.D.N.Y. 1991), rev'd in part and remanded, 990 F.2d 711 (2d Cir. 1993) (Alcan New York). Alcan New York was also a CERCLA case involving a release of Alcan's hazardous substances, but at a different location. Id.

\textsuperscript{55} Id. at 534. In Alcan New York, the government sought to recover under CERCLA for response costs incurred in a clean-up of a hazardous waste site formerly owned by Pollution Abatement Services of Oswego, New York (PAS). Id. at 531. PAS received various chemical wastes for treatment during the 1970s and the site eventually became contaminated due to leaking drums, overflowing lagoons and surface run-off. Id. at 532. During the 1970s, Alcan had arranged for treatment and disposal of over 4,600,000 gallons of its wastes at the PAS facility. Id. In cleaning this site, the government incurred over $12 million in response costs. Id. at 531.

\textsuperscript{56} Id. at 534. The 82 other defendants settled with the government for a total of $9 million. Id. The government sought to hold Alcan liable for the $3 million balance of the response costs. Id.

\textsuperscript{57} Id. Alcan's wastes consisted solely of metal by-products. Id. at 535. As a result, Alcan asserted that any harm that its wastes could have potentially caused was limited to soil contamination. Id. at 541. Moreover, Alcan argued that EPA's studies of the site indicated that the concentration of metal contamination in the soil was not high enough to warrant concern. Id. Thus, Alcan argued that the harm from its metal wastes was divisible from the harm caused by other defendants because no remediation of the soil was necessary. Id.

\textsuperscript{58} Id. at 541. The court summarily dismissed Alcan's argument, stating that the harm at the site was indivisible because the wastes had commingled. Id. at 541-42.
III. Case Analysis

A. Facts and Procedural History

The facts in United States v. Alcan Aluminum Corp. (Alcan), 59 were undisputed. 60 From 1965 to 1989, Alcan’s manufacturing process resulted in a by-product that consisted of an oily emulsion containing certain hazardous substances. 61 Alcan’s wastes were disposed of at the Butler Tunnel Site (the Site) in Pittston, Pennsylvania. 62 The Site borders the Susquehanna River and contains five square miles of mines that are accessible via surface boreholes and that drain into the Butler Tunnel. 63

60. Id. at 255.
61. Id. at 256. Alcan’s manufacturing process at its Oswego, New York plant involved the hot-rolling of aluminum ingots, which were cooled by circulation of an emulsion containing 95% deionized water and 5% mineral oil. Id. When the emulsion was circulated, fragments of copper, chromium, cadmium, lead and zinc were deposited in the emulsion. Id. These substances are considered hazardous under CERCLA. Id. Although Alcan removed and filtered the used emulsion, fragments of hazardous substances remained in the discarded emulsion. Id. From 1978 to 1979, Alcan contracted with the Mahler Company, a government licensed waste processor, to dispose of its used emulsion. Id. at 256 & n.1. During this time, Alcan produced over two million gallons of the emulsion. Id. at 256. Mahler disposed of over 30,000 gallons of Alcan’s wastes at the site in question. Id. Alcan argued that the government did not prove that its emulsion was actually found at the site. Id. at 256 n.3. The Third Circuit, however, said that this fact did not insulate Alcan from liability. Id. The court noted that under CERCLA, liability could attach even if none of the hazardous substances contained in Alcan’s emulsion were found at the site, because Alcan admitted that Mahler disposed of the emulsion at the site. Id. Although Alcan claimed that it did not know Mahler was disposing of its wastes in an unsafe manner, the Third Circuit stated that knowledge was irrelevant to the issue of liability. Id.

Alcan further contended that the levels of the hazardous substances in the post-filtered emulsion were below a level that could be considered toxic. Id. The Third Circuit, however, affirmed the district court’s grant of summary judgment in favor of the government on this issue. Id. at 259-61. The Alcan court noted that CERCLA’s definition of “hazardous substance” contains no quantitative requirement or specific concentration level of toxicity. Id. at 259.

62. Id. at 255. The Site is listed on the EPA’s National Priorities List under CERCLA § 105. Id. Section 105 requires the EPA to prepare lists of sites throughout the country that pose the greatest risks to human health and the environment and to specify procedures for reducing these risks. 42 U.S.C. § 9605(a) (1988).

63. Alcan, 964 F.2d at 255. The Butler Tunnel is a 7500 foot tunnel that feeds directly into the Susquehanna. Id. The boreholes are essentially airholes. Id. at 256. In the late 1970s, Hi-Way Auto Service permitted Mahler and numerous other waste transport companies to deposit liquid wastes into a borehole on its property. Id. This borehole led directly into the mines at the Site. Id. Mahler collected wastes from numerous companies and disposed of two million gallons of hazardous wastes through the borehole. Id. Mahler often commingled Alcan’s wastes with discharges from other facilities before disposing of the waste through the borehole. Id. at 256 n.2. The wastes were to remain at the Site indefinitely. Id. at 256.
In 1985, 100,000 gallons of water containing hazardous wastes were released from the Site into the Susquehanna. The EPA instituted a response action and incurred over $1,300,000 in response costs due to actual and threatened releases from the Site. The EPA issued letters in 1986 to the PRPs concerning their potential liability for the clean-up of the Site. In 1989, the government filed a complaint against Alcan and nineteen other defendants seeking recovery of the response costs incurred in the clean-up of the Susquehanna. All of the defendants except Alcan ultimately reached settlement agreements with the government.

After the other nineteen defendants agreed to settle the case, the government moved for summary judgment against Alcan to collect the unpaid portion of its response costs. The government instituted the action in the United States District Court for the Middle District of Pennsylvania. The case was subsequently referred to a magistrate judge, who recommended that the court grant the government's motion for summary judgment based on the rationale of the district court in Alcan New York. Following the magistrate's recommendation, the district court entered judgment against Alcan for $473,790.18.

64. Id. at 256. This release contained the wastes that had been discharged into Hi-Way’s borehole. Id.
65. Id. at 256, 270. The EPA's response took over a year and included containing an oily material on the Susquehanna and removing and disposing of 161,000 pounds of contaminated debris. Id. at 256. As part of its response action, the EPA also monitored, sampled and analyzed the surrounding air and water. Id.
66. Id. at 256. The letters invited the PRPs to conduct their own studies of the Site and asked the PRPs to enter settlement agreements with the EPA. Id. Several of the PRPs entered into negotiations with the EPA in an attempt to settle their liability. Id. Alcan, however, did not attempt to settle. Id.
67. Id. at 257.
68. Id. Initially, 17 of the defendants agreed to a consent decree that reimbursed the government for some of the response costs. Id. In 1990, the United States District Court for the Middle District of Pennsylvania entered the decree. Id. Two of the remaining defendants subsequently executed a second consent decree, which was also entered by the district court in 1990. Id. The total settlement amount was for approximately $830,000. See id. at 270 (noting that district court found Alcan liable for $473,000 when total response cost was $1,302,000).
69. Id. at 257. Alcan cross-moved for summary judgment, arguing that its emulsion did not fall within the definition of “hazardous substance” as defined by CERCLA because it contained below ambient levels of copper, cadmium, chromium, lead and zinc. Id. Alcan also argued that its emulsion could not have caused the release or caused any of the response costs incurred. Id.
70. Id.
71. Id. at 255 & 257.
72. Id. at 255. The judgment represented the difference between the amount of response costs that the government incurred in the clean-up and the amount that the government received from settlements with the other defendants. Id.
B. Analysis

The Alcan case reached the Third Circuit on Alcan's appeal from the district court's grant of summary judgment for the government. After setting forth a detailed explanation of the facts, the Third Circuit began its discussion with a broad overview of CERCLA. The court noted that CERCLA should be construed liberally in order to effectuate its primary goal of ensuring that those parties responsible for environmental harm pay the costs of remedying that harm.

Alcan first argued that the district court erred in holding it liable for the costs that the government incurred while cleaning the Susquehanna. In support of its argument, Alcan asserted that the level of hazardous substances in its emulsion was below that which occurs naturally. While the Third Circuit agreed with the district court's finding that CERCLA does not impose any quantitative requirement in the definition of hazardous substance, the court also recognized the validity of Alcan's argument that this definition is overly broad in that it could include virtually every substance known to man. The court stated that...
its ultimate holding requiring that defendants be given an opportunity to prove divisibility of harm would quell industry's fear that CERCLA liability will reach too far. 79

Alcan next argued that the district court erred in granting summary judgment for the government because Alcan's emulsion did not fall within the definition of "hazardous substances" set forth in the EPA regulations. 80 The Third Circuit rejected Alcan's argument, agreeing with the district court that the substances in Alcan's emulsion were "hazardous" under CERCLA. 81 Accordingly, the Third Circuit affirmed sum-

(BNA) 1736, 1739 (D.N.H. 1984) (dismissing CERCLA case on ground that defendant "did not cause or contribute to cause the disposal of any hazardous waste . . . which exceeded the threshold quantity established by the EPA for hazardous wastes").

79. See Alcan, 964 F.2d at 261 n.13 ("[T]his definition of 'hazardous substances' is so broad that it encompasses virtually everything . . . However, our holding with respect to divisibility of harm . . . should assuage Alcan's fear that liability under CERCLA will be as far-reaching as the definition of hazardous substances."). For a discussion of the Third Circuit's holding and how it may lessen the potential scope of liability under CERCLA, see infra notes 108-29 and accompanying text.

80. Alcan, 964 F.2d at 261. Alcan argued that the substances contained in its emulsion were not "listed" hazardous substances under CERCLA. Id. Alcan claimed that the district court erroneously based its holding on the fact that its wastes contained minimal levels of certain compounds listed in the Code of Federal Regulations. Id. The Code of Federal Regulations contains a list of elements, compounds and wastes that are designated as hazardous under CERCLA. 40 C.F.R. § 302.4, table 302.4 (1992). Alcan argued that substances listed in Table 302.4 must have certain "Reportable Quantities" (RQs) and "Chemical Abstract Service Registry Numbers" (CASRNs) to be considered hazardous under CERCLA. Alcan, 964 F.2d at 262. The EPA defines an RQ as "that quantity, as set forth in this part, the release of which requires notification pursuant to this part." 40 C.F.R. § 302.3 (1992). Under CERCLA § 103, "the person in charge of a facility is required to notify EPA immediately of any release of a hazardous substance in a quantity equal to or exceeding the RQ for that substance." Alcan, 964 F.2d at 262 n.15. A CASRN is an identification number for each chemical listed in Table 302.4. 40 C.F.R. § 302.4, table 302.4 (1992). Alcan asserted that because Table 302.4 does not provide RQs or CASRNs for the generic compounds in Alcan's emulsion, the court should not consider these compounds to be "listed" hazardous substances. Alcan, 964 F.2d at 262. In contrast, the government contended that the generic designations in Table 302.4 are merely substantive categories of hazardous substances that trigger CERCLA liability, and that CERCLA does not require that a substance have an RQ or a CASRN to be considered hazardous. Id.

81. Alcan, 964 F.2d at 261-64. The Third Circuit outlined its reasoning as follows:

First, section 101(14) of CERCLA defines a hazardous substance to include "any toxic pollutant listed under section 1317(a) of Title 33 [the Clean Water Act]." The generic compounds contained in Alcan's emulsion are "listed" under 40 C.F.R. § 401.15, the list of toxic pollutants promulgated pursuant to section 1317(a). Thus, there is no need to reach the significance of RQs or CASRNs under Table 302.4 to determine whether generic compounds are "hazardous" by virtue of their listing under that Table.

Id. at 262 (citations omitted).
mary judgment on this issue as well. 82

The Third Circuit next rejected Alcan's argument that in order to recover response costs, the government must prove that Alcan's emulsion caused or contributed to the release of hazardous substances or caused the government to incur response costs. 83 The Third Circuit determined that CERCLA imposed no such causation requirement. 84 The court noted that CERCLA requires only that the government prove: 1) that Alcan's hazardous substances were deposited at the Site; 2) that there was a release of hazardous substances; and 3) that the release caused the government to incur response costs. 85 Finding that the government had met all three requirements, the Third Circuit upheld the district court's grant of summary judgment on this issue. 86

The Third Circuit also rejected Alcan's contention that its emulsion fell within CERCLA's "petroleum exclusion" and was thus excluded

The Third Circuit stated that "the district court . . . correctly concluded that the absence of an RQ or CASRN number does not signify that the substance is not 'hazardous.' " 82 Id. at 263. Thus, the only question presented was whether the substances in Alcan's emulsion were "listed in any of the statutory and regulatory schemes incorporated by section 101(14) . . . ." 83 Id. Alcan's emulsion contained traces of cadmium, chromium, copper, lead and zinc, which are listed as hazardous substances under regulations promulgated pursuant to the Clean Water Act. 84 Id. Thus, the Third Circuit concluded that Alcan's emulsion contained hazardous substances under CERCLA. 85 Id.

Alcan also argued that EPA did not intend for generic categories of listed substances to constitute hazardous wastes in every circumstance. 86 Id. at 263. Alcan stressed that EPA has stated that "CERCLA liability may still attach to releases of specific compounds that are within one of the generic listings but not specifically listed in Table 302.4." 82 Id. (quoting 50 Fed. Reg. 13,472-73 (emphasis added)). Alcan argued that if the EPA had intended generic categories to constitute hazardous substances in every case, it would have used the word "shall" instead of the word "may" in the foregoing regulation. 83 Id. The Third Circuit, however, stated that "the use of the word 'may' simply reflects EPA's recognition that CERCLA liability attaches only if all elements of a CERCLA cause of action are established." 84 Id. (quoting City of New York v. Exxon Corp., 766 F. Supp. 177, 183 n.1 (S.D.N.Y. 1991)).

Alcan further asserted that the district court's construction of CERCLA was inconsistent with environmental policy because it imposed liability on generators of purportedly "hazardous" substances even though the substances pose no threat to the environment. 85 Id. at 264. The Third Circuit stated that because the government responds to releases that threaten the environment, it is the release itself, rather than a particular generator's waste, that justifies response costs. 86 Id. The court also stated that the fact that a particular generator's waste would not, by itself, justify a response action, was irrelevant because Alcan's argument would not take into account the potentially harmful synergistic effects of several generators' wastes at a multi-generator site. 82 Id.

82. Id.
83. Id.
84. Id. at 264-66. The Alcan court examined CERCLA's plain meaning, the legislative history and the relevant case law, in concluding that CERCLA imposes no causation requirement. 85 Id. at 266.
86. Id.
from liability under CERCLA. The Third Circuit held that the district
court properly determined that Alcan's emulsion did not fall within the
exception because the petroleum exclusion does not apply to oils that
have had hazardous substances added to them. Thus, the Third Cir-
cuit also affirmed the district court's grant of summary judgment on this
issue.

Alcan's final argument was that the district court's conclusion that
CERCLA contains no threshold level in its definition of hazardous sub-
stances, coupled with its finding that CERCLA requires no showing of
causation, will result in unfair imposition of liability against industry.
Alcan argued that thus construed, CERCLA would impose liability on
virtually every hazardous waste generator, even those who could not
have individually caused any harm. The government countered that

87. Id. CERCLA § 101(14) provides, in pertinent part:
The term [hazardous substance] does not include petroleum, including
crude oil or any fraction thereof which is not otherwise specifically
listed or designated as a hazardous substance . . . and the term does not
include natural gas, natural gas liquids, liquified natural gas, or syn-
thetic gas usable for fuel (or mixtures of natural gas and such synthetic
gas).
Alcan asserted that the EPA has previously extended this exclusion to used
oil containing levels of hazardous substances equal to or below levels found in
unprocessed oil. Alcan, 964 F.2d at 266. Contending that this exclusion applied
to its emulsion, Alcan noted that its emulsion is a "used oil" containing concen-
trations of cadmium, chromium, copper, lead and zinc below the levels in un-
processed oil. Id.

88. Alcan, 964 F.2d at 266. The Alcan court noted that although the EPA has extended the petroleum exclusion to oil that naturally contains low levels of
hazardous substances, the EPA has not extended the exclusion to oil containing
added hazardous substances. Id. The Third Circuit stated that its interpretation
of the petroleum exclusion was consistent with CERCLA's legislative history.
See id. (noting that legislative history indicates petroleum exclusion was intended
for oil spills and was not intended for releases of oil infused with hazardous
substances due to use) (citing S. REP. No. 848, 96th Cong., 2d Sess. 30-31
(1980), reprinted in 1 A LEGISLATIVE HISTORY 405). Alcan did not dispute the fact
that its manufacturing process added hazardous substances to its emulsion. Id.

89. Id.

90. Id. at 267.

91. Id. Alcan argued that the definition of "hazardous substance" rendered
hazardous virtually every substance known to man. Id. For example, under this
definition, even federally approved drinking water could be considered hazard-
ous. Id. Several commentators agree that CERCLA's liability scheme may be
unfair. See, e.g., Barr, supra note 2, at 924 (stating that CERCLA is "the harshest
liability scheme around" (quoting Ruth Simon, Deals that Smell Bad, FORBES, May
15, 1989, at 49)); Balcke, Note, supra note 1, at 130 (noting that low thresholds
for causation and limited defenses allowed by CERCLA impose virtually abso-
lute liability on defendants). But see Colloquy, supra note 3, at 1524 (noting that
weak causation standard balances competing interests of industry in accurately
assessing liability with government's interest in rapid clean-up).

The Third Circuit noted that the Restatement also recognizes the potential
unfairness of holding defendants jointly and several liable in a multi-generator
case. See Alcan, 964 F.2d at 267. The Restatement notes:
defendants must be held accountable for environmental harm brought about by the cumulative acts of multiple defendants even if no single defendant alone could have produced the harm. The government further argued that if liability was not imposed in this manner, each individual defendant in a multi-generator case could potentially escape liability because of the low concentrations of hazardous substances in each party's waste. As a result, the government would have to pay for the clean-up necessitated by the defendants' accumulated wastes. The Third Circuit found merit in both arguments and determined that the Restatement's provisions for joint and several liability provide a fair resolution of the conflicting interests. The court noted that the imposition of joint and several liability in accordance with the Restatement is consistent with CERCLA's legislative history and with the views of other courts that have addressed the issue.

A very troublesome question arises where the acts of each of two or more parties, standing alone, would not be wrongful, but together they cause harm to the plaintiff. If several defendants independently pollute a stream, the impurities traceable to each may be negligible and harmless, but all together may render the water entirely unfit for use. The difficulty lies in the fact that each defendant alone would have committed no tort. There would have been no negligence, and no nuisance, since the individual use of the stream would have been a reasonable use, and no harm would have resulted.

PROSSER, supra note 29, § 52 at 322.

92. Alcan, 964 F.2d at 267.

93. Id. The government asserted that the strong public policy interests in forcing generators at multi-generator sites to pay the clean-up costs outweigh a defendant's interest in avoiding liability even when viewed individually, a defendant has acted in an environmentally sound manner.

94. Id. In considering the merits of the government's argument, the Third Circuit noted that one court has stated: [I]t is entirely possible for a hazardous waste facility to be comprised of entirely small amounts from many contributors. If each PRP could make [Alcan's] argument, i.e., that its particular contribution did not warrant remediation and thus that it should not be liable for any costs, no party would be liable, despite the fact that the site, as a whole, needed to be cleaned up and the government incurred costs in doing so.

95. Id. at 268.

96. Id. at 267-68. Initially, the Alcan court noted that CERCLA does not expressly provide for joint and several liability, and that Congress deleted from the final bill a provision imposing joint and several liability. Id. at 268. The Third Circuit further noted, however, that several other courts have interpreted the legislative history as requiring courts to determine, on a case-by-case basis, whether joint and several liability is appropriate. Id. at 267-68; see also United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989) ("CERCLA has been interpreted to impose joint and several liability when the environmental harm is indivisible ... and to allow for apportionment when two or more persons independently are responsible for a single harm that is divisible."); cert. denied, 494 U.S. 1057 (1990); O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989)
The Third Circuit’s decision in Alcan departed, however, from the holdings of other United States circuit courts of appeals by reversing the district court’s summary judgment ruling. The district court in Alcan had ruled that Alcan was jointly and severally liable for the government’s response costs associated with the clean-up of the Susquehanna. The district court, following the reasoning of Alcan New York, granted the government’s summary judgment motion because the wastes had commingled and because Alcan had not proven that any genuine issues of material fact existed as to divisibility. Although the Third Circuit determined that joint and several liability was appropriate in CERCLA cases, it remanded the case to the district court to conduct an evidentiary hearing to determine whether the environmental harm was divisible. The Third Circuit based its ruling on the Restatement’s general principles of joint and several liability.

"Courts have continued to impose joint and several liability on a regular basis, reasoning that where all of the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty.", cert. denied, 493 U.S. 1071 (1990); United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988) ("While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm."), cert. denied, 490 U.S. 1106 (1989); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) (stating that provision for joint and several liability was "omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis").

97. Compare Alcan, 964 F.2d at 269-70 with R.W. Meyer, 889 F.2d at 1507 (affirming district court’s grant of summary judgment holding defendants jointly and severally liable) and Monsanto, 858 F.2d at 171 (same).

98. Alcan, 964 F.2d at 269. The district court adopted the magistrate judge’s recommendation that Alcan should be held jointly and severally liable because the case was virtually identical to United States v. Alcan Aluminum Corp., 755 F. Supp. 531 (N.D.N.Y. 1991), rev’d in part and remanded, 990 F.2d 711 (2d Cir. 1993) (Alcan New York). Alcan, 964 F.2d at 255. For an overview of Alcan New York, see supra notes 54-58 and accompanying text.

99. See Alcan, 964 F.2d at 270 ("[I]n light of their belief that Alcan New York was dispositive of the arguments advanced by Alcan in this case, neither the magistrate judge nor the district court engaged in any factual investigation concerning the divisibility of the environmental harm . . . .").

100. Id.

101. Id. The court consulted the Restatement for guidance in determining whether Alcan should be held jointly and severally liable for the response costs remaining after the settlements. Id. at 268. The Third Circuit noted that the Restatement specifically provides an example of divisibility of harm in the context of water pollution. Id. at 269. The Restatement comments that:

There are other kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible . . . . Such apportionment is commonly made in cases of private nuisance, where the pollution of a stream . . . has interfered with the plaintiff’s use and enjoyment of his land.

Id. (quoting Restatement (Second) of Torts § 433A cmt. d (1976)).

Aikens: Environmental Law - Third Circuit Ruling May Foreclose Imposition

1993]
stated that if Alcan could prove that the environmental harm was divisible and that the damages were reasonably capable of apportionment, Alcan would only be held liable for that portion of the response costs attributable to its waste. The Third Circuit rejected the government's argument that the harm was presumptively indivisible because the various wastes at the site had commingled. Significantly, the Third Circuit also stated that the divisibility issue should be resolved at the initial liability phase rather than in a subsequent contribution proceeding. Based on its determination that Alcan must be given the opportunity in an evidentiary hearing to present evidence of divisibility, the Third Circuit reversed the grant of summary judgment for the government.

102. Alcan, 964 F.2d at 269. The court noted that Alcan had the burden of demonstrating that the damages were capable of apportionment. Id. According to the Restatement, placing the burden on the defendant avoids:

[the] injustice of allowing a proved wrongdoer who has in fact caused harm to the plaintiff to escape liability merely because the harm which he has inflicted has combined with similar harm inflicted by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before [it] can be apportioned. In such a case the defendant may justly be required to assume the burden of producing that evidence, or if he is not able to do so, of bearing the full responsibility. As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm should fall upon the former.

RESTATEMENT (SECOND) OF TORTS § 433B cmt. b(2) (1976).

Following this rationale, the Third Circuit stated that if Alcan could demonstrate that its emulsion, when mixed with the other wastes at the site, could not have contributed to any of the harm, Alcan would not be liable for any of the response costs. Alcan, 964 F.2d at 270. But if Alcan was unable to prove either that the harm was divisible and that the damages were capable of reasonable apportionment or that its emulsion could not have caused any of the harm, Alcan would be liable for the full amount of the unrecovered response costs. Id.

103. Alcan, 964 F.2d at 270 n.29. The court stated that "'commingled' waste is not synonymous with 'indivisible' harm." Id.

104. Id. The Third Circuit recognized that other courts have held that in a contribution proceeding, a defendant may present evidence that it has paid for more of the harm than it caused. See id. (citing United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989) (noting that defendant could attempt to demonstrate divisibility of harm in contribution proceeding), cert. denied, 494 U.S. 1057 (1990) and United States v. Monsanto, 858 F.2d 160, 173 & n.29 (4th Cir. 1988) (noting that proportionate fault could be considered in contribution proceeding), cert. denied, 490 U.S. 1106 (1989)). The Third Circuit believed, however, that it would be more equitable to industry to conduct the divisibility inquiry at the initial liability phase rather than at the contribution phase. See id. ("In our view, the logical consequence of delaying the apportionment determination may well be drastic, for it seems clear that a defendant could easily be strong-armed into settling where other defendants have settled in order to avoid being held liable for the remainder of the response costs."). The Third Circuit noted that Alcan's liability appeared disproportionate compared to the other defendants' liability because Alcan represented only 5% of defendant pool but was held liable for 36% of the clean-up costs. Id.

105. Id. at 270 n.29. The Third Circuit reasoned that if the apportionment
Other United States circuit courts of appeals that have addressed this issue have upheld district courts’ grants of summary judgment on the grounds that environmental harm was presumptively indivisible due to commingling of wastes and the defendants had not met their burden of creating a genuine issue of material fact with respect to divisibility.106 The Alcan court, however, stressing the intensely factual nature of determining the divisibility of harm, instructed the district court to conduct a full evidentiary hearing to allow Alcan to attempt to prove divisibility.107

IV. Conclusion

The Third Circuit’s reversal of the district court’s grant of summary judgment on the issue of divisibility of harm marks the first time that a United States circuit court of appeals has reversed a United States District Court’s determination that the defendants had not created a genuine issue of material fact with respect to divisibility.108 Significantly, the Third Circuit reversed the district court’s grant of summary judgment for the government despite the fact that Alcan did not present any specific evidence that the harm was in fact divisible.109 Thus, in future


107. Alcan, 964 F.2d at 269. The court stated that “Alcan’s burden in attempting to prove the divisibility of harm to the Susquehanna River is substantial, and the analysis will be factually complex as it will require an assessment of the relative toxicity, migratory potential and synergistic capacity of the hazardous waste at issue.” Id.

For a discussion of the decisions upholding district courts’ grants of summary judgment holding defendants jointly and severally liable because the environmental harm was presumptively indivisible when the wastes had commingled and defendants had failed to create a genuine issue of material fact regarding divisibility, see supra notes 40-52 and accompanying text.

108. See Daniel P. Harris & David M. Milan, Avoiding Joint and Several Liability under CERCLA, 23 Env’t Rep. (BNA) 1726, 1726 (Nov. 6, 1992) (noting that Alcan court was first court to remand government response cost action to district court with instructions to make factual determination regarding divisibility of harm and appropriateness of joint and several liability). Although the district court in Alcan did not make a specific finding that the harm was indivisible, because Alcan and Alcan New York were almost identical factually, the district court adopted the holding of the United States District Court for the Northern District of New York in United States v. Alcan Aluminum Corp., 755 F. Supp. 531 (N.D.N.Y. 1991). See Alcan, 964 F.2d at 270 (noting that neither magistrate judge nor district court engaged in any fact-finding concerning divisibility of harm). Thus, the district court essentially did make a specific finding that Alcan had not created a genuine issue of material fact as to divisibility.

109. Alcan, 964 F.2d at 269-70. Alcan vaguely asserted that its wastes could not have contributed to response costs, without presenting any specific
cases in the Third Circuit, a finding that hazardous wastes at a multi-generator site have commingled may not result in a summary judgment ruling that the defendants are jointly and severally liable even if the defendants present no specific evidence of divisibility.110

The Third Circuit’s decision in Alcan is suspect in two respects. First, although it followed the federal common law to date in applying the Restatement to CERCLA liability,111 the Third Circuit may have neglected to consider the underlying policy goal of CERCLA to expedite clean-ups.112 Second, it does not appear that Alcan presented sufficient evidence to create a genuine issue of material fact regarding divisibility.113

evidence of divisibility of harm. Id. Although the Third Circuit expressed no opinion on the merits of Alcan’s contention, it determined that Alcan had created a genuine issue of material fact with respect to divisibility. See id. at 270 (remanding case and instructing district court to permit Alcan to attempt to prove divisibility). The Third Circuit thus held that the district court had improperly granted summary judgment for the government. Id. at 271.

The Third Circuit’s reversal of the district court’s grant of summary judgment is difficult to justify in light of Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In Celotex, the United States Supreme Court held that a court may appropriately grant summary judgment against a nonmoving party when that party fails to produce sufficient evidence to support an essential element of its claim. Id. In Alcan, Alcan bore the burden of proving at trial that the harm from its wastes was divisible. Alcan, 964 F.2d at 270. On appeal to the Third Circuit, however, Alcan did not produce any evidence supporting this essential element to its case. Id. at 269-70.

110. See Alcan, 964 F.2d at 269 & n.29 (noting that district court erred in granting government’s summary judgment motion without first conducting factual inquiry regarding divisibility of harm and rejecting government’s argument that commingling of wastes necessitates finding of indivisibility of harm). The Third Circuit’s ruling thus forecloses the possibility of the government winning a CERCLA case on summary judgment even when generators at sites containing commingled wastes present no specific evidence of divisibility. See id. at 269 (noting “the intensely factual nature of the divisibility issue . . . [which] highlight[s] the district court error in granting summary judgment in favor of EPA without conducting a hearing”).

111. For a discussion of federal decisions prior to Alcan applying the principles of the Restatement to CERCLA liability, see supra notes 26-52 and accompanying text.

112. For a further discussion of the underlying policy goals of CERCLA, see supra notes 2, 3, 18 and accompanying text.

113. See Alcan, 964 F.2d at 269 (Alcan vaguely asserting that its compounds could not have caused or contributed to release); cf. United States v. Alcan Aluminum Corp., 990 F.2d 711, 722-23 (2d Cir. 1993) (Alcan making specific contention, supported with expert affidavits, that response costs were incurred due to compounds not present in its wastes). In light of the lack of specific evidence set forth by Alcan regarding the divisibility of harm, Alcan did not produce evidence supporting an essential element to its case on which it bore the burden of proof at trial. Accordingly, the Third Circuit should have granted the government’s motion for summary judgment. See Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986) (holding that summary judgment is appropriately granted against nonmoving party who failed to produce evidence supporting essential element of its case on which nonmoving party bore burden of proof at trial).
Following *Alcan*, in the Third Circuit, courts will now be required to conduct complex factual hearings to determine whether the harm from commingled wastes is in fact divisible.114 As a result, clean-ups may be delayed if defendants litigate the issue of joint and several liability.115 Because neither the government nor CERCLA defendants wish to become involved in lengthy and costly litigation involving divisibility of harm, however, both parties will often attempt to reach settlement agreements. Prior to *Alcan*, CERCLA defendants have traditionally settled quickly with the government, realizing that if the government proved a prima facie case of liability against them in court, they would probably be held jointly and severally liable on summary judgment.116 However, because the *Alcan* decision means that the government can no longer be assured of holding defendants jointly and severally liable on summary judgment even when defendants present no specific evidence of divisibility, the government’s bargaining power will now be significantly weakened.117 As a result of the Third Circuit’s decision in *Alcan*,

114. *See Alcan*, 964 F.2d at 269 (noting that divisibility issue is intensely factual in nature and district court erred in granting summary judgment without conducting hearing); *see also* Harris & Milan, *supra* note 108, at 1726 (stating that “*Alcan* decision can be read as a signal to the lower courts that they must not indiscriminately impose joint and several liability on superfund defendants.”).

Requiring these hearings on divisibility will place a substantial burden on the district courts. Determining what party contributed what waste and in what amount, if not impossible in a given situation, will at least necessitate technical, complex factual inquiries. *See* United States v. Franklin P. Tyson Gen. Devices, 1988 U.S. Dist. LEXIS 84-2663, at *8 (E.D. Pa. Jan. 29, 1988) (noting that where different hazardous substances have been dumped by different generators over several years, synergistic effects make division of harm impossible); *see also* Barr, *supra* note 2, at 978 (noting that where hazardous substances have commingled over long period of time, resulting chemical reactions make divisibility virtually impossible). *But see Alcan*, 964 F.2d at 270 n.29 (noting that commingling of wastes does not necessitate finding of indivisible harm).

115. Even if defendants do not litigate, however, the settlement process will nonetheless be impeded because defendants, realizing that the government may not be able to hold them jointly and severally liable on summary judgment, will be less willing to settle on the EPA’s terms and will contest proposed settlement agreements. This will slow the settlement process and delay the EPA’s recovery of response costs.

116. For a discussion of why defendants have traditionally been quick to settle with the EPA, see *supra* note 18.

117. *See Alcan*, 964 F.2d at 270 n.29 (noting that delaying divisibility and apportionment determinations allows EPA to compel defendants to settle to avoid being held jointly and severally liable); *see also* Harris & Milan, *supra* note 108, at 1728 (noting that *Alcan* decision “takes away some of EPA’s power to threaten non-settling with joint and several liability”). The EPA can no longer be assured that in cases where wastes have commingled at a multi-generator site, the EPA can induce settlement by threatening to seek a summary judgment ruling holding nonsettlers jointly and severally liable. *See id.* (stating that “EPA can no longer be certain that no matter what the facts, all it need do to collect from a non-settling party is to seek a summary judgment finding of joint and several liability against that party”).
CERCLA defendants in the Third Circuit may be able to exact better settlement agreements from the EPA.

The usefulness of the *Alcan* decision to defendants is unclear. Defendants still face a substantial burden in avoiding joint and several liability.\(^{118}\) Many defendants will not be able to prove that the harm is divisible and that the costs are capable of reasonable apportionment.\(^{119}\) Additionally, many more defendants will not be able to afford an attempt to prove divisibility and apportionability.\(^{120}\) Moreover, after making the required factual inquiry, district courts may still hold most defendants jointly and severally liable.\(^{121}\) If this occurs, the EPA's bargaining power will remain largely undisturbed and the EPA will still be able to induce defendants to settle for a disproportionate share of the costs.

Although it remains to be seen whether other circuits will follow the Third Circuit and whether the district courts will address the divisibility issue thoroughly, it appears that the *Alcan* decision will provide defendants with at least some basis for alleviating the hardships faced by them under CERCLA. The first indication that the Third Circuit's decision will have an impact on future cases was provided by the United States Court of Appeals for the Second Circuit in *United States v. Alcan Aluminum Corp.* (*Alcan Second Circuit*).\(^{122}\) Subsequent to the Third Circuit's decision in *Alcan* case, the Second Circuit adopted the Third Circuit's reasoning and reversed in part the district court's decision in *Alcan New York.*\(^{123}\)

In *Alcan Second Circuit*, the court held that Alcan had created genuine issues of material fact by submitting expert affidavits supporting its contentions that its wastes did not contribute to the release and thus sum-

\(^{118}\) See *Alcan*, 964 F.2d at 269 (noting that Alcan faces substantial burden in attempting to prove divisibility); *see also* Harris & Milan, *supra* note 108, at 1728 (noting that usefulness of *Alcan* decision to defendants is limited by stringent standards it requires defendants to meet).

\(^{119}\) See *Alcan*, 964 F.2d at 269 (noting that divisibility analysis will require assessment of relative toxicity, migratory potential and synergistic capacity of wastes at site); *see also* Harris & Milan, *supra* note 108, at 1727 (noting that proving divisibility will depend on whether defendants can prove either that its wastes were unique or were traceable to specific location at site).

\(^{120}\) See Harris & Milan, *supra* note 108, at 1728 (noting that in order to prove divisibility and apportionability, defendants will need to incur substantial expert and testing costs). Because of this expense, it is likely that only deep-pocket defendants will make the divisibility/apportionability argument in an attempt to avoid joint and several liability. *Id.*

\(^{121}\) See *id.* (noting that most district courts tend only to pay "lip service" to the divisibility rule). Because the issue of divisibility is a factual one, even if a district court summarily dismisses a defendant's claim of divisibility, the standard of review will be limited to "clearly erroneous," and thus, difficult to reverse. *Id.*

\(^{122}\) United States v. Alcan Aluminum Corp. (*Alcan Second Circuit*), 990 F.2d 711 (2d Cir. 1993).

\(^{123}\) *Id.*
mary judgment had been improperly granted for the government.\textsuperscript{124} The Second Circuit specifically rejected the government's argument that commingling of wastes is synonymous with indivisibility of harm and stated that Alcan must be given the opportunity to present evidence as to divisibility.\textsuperscript{125} Thus, the Second Circuit's ruling, as does the Third Circuit's ruling in \textit{Alcan}, brings a narrow causation defense into CERCLA.\textsuperscript{126}

\textit{Alcan Second Circuit}, however, differs from \textit{Alcan} in two respects. First, the Second Circuit's ruling does not require a district court to determine divisibility and apportionability at the initial liability phase.\textsuperscript{127} Rather, the Second Circuit gave district courts discretion to determine divisibility and apportionability at either the initial liability phase or in a subsequent proceeding.\textsuperscript{128} Second, in \textit{Alcan Second Circuit}, Alcan presented expert affidavits to support its contention that the harm was divisible, whereas in \textit{Alcan}, Alcan presented no evidence of

\begin{itemize}
  \item \textsuperscript{124} Id. at 723. Alcan argued that the response actions at the site were attributable to chemicals that were not found in any of its wastes. \textit{Id.} at 722. The government's contentions, also supported by expert affidavits, conflicted with Alcan's contentions. \textit{Id.} Thus, genuine issues of material fact sufficient to preclude summary judgment existed with respect to divisibility. \textit{Id.} at 722-23.
  \item \textsuperscript{125} Id. at 722. The Second Circuit stated that evidence of relative toxicity, migratory potential, degree of migration and synergistic capacities of the wastes at the site were all relevant evidence Alcan could present in order to establish divisibility. \textit{Id.}
  \item \textsuperscript{126} See \textit{id.} (noting that court is bringing causation back into CERCLA case). Because CERCLA is a strict liability scheme, the government may apportion liability initially without regard to fault at multi-generator sites containing commingled wastes once the government proves a prima facie case of liability. \textit{See id.} at 721 (noting that liability under CERCLA is strict and that once government proves prima facie case, government need not "show that a specific defendant's waste caused incurrence of response costs"). The Second Circuit stressed, however, that the burden is on the defendant to escape joint and several liability. \textit{Id.} at 722. The court also noted a defendant will only be able to escape joint and several liability when it can prove that its wastes did not contribute more than background contamination and that its pollutants cannot concentrate. \textit{Id.} Moreover, this defense is only available to a defendant who has not exceeded any EPA thresholds in its wastes. \textit{Id.} The Second Circuit's ruling, however, does allow a special exception to the usual absence of causation requirement under CERCLA. \textit{Id.}
  \item \textsuperscript{127} Id. at 723. The Second Circuit noted that it preferred the approach of the Third Circuit, whereby divisibility is determined at the initial liability phase. \textit{Id.; see Alcan}, 964 F.2d at 270 n.29 (noting that divisibility inquiry is "best resolved at the initial liability phase"). The Second Circuit noted, however, that this approach may not be in accord with the underlying policy of CERCLA to expedite clean-ups and recover remediation costs as quickly as possible. \textit{Alcan Second Circuit}, 990 F.2d at 723. The Second Circuit determined that the legislative history of CERCLA mandates that liability be fixed immediately for enforcement purposes and that litigation may later be commenced to determine divisibility and apportionability. \textit{Id.}
  \item \textsuperscript{128} See \textit{Alcan Second Circuit}, 990 F.2d at 723 ("The choice as to when to address divisibility and apportionment are questions best left to the sound discretion of the trial court in the handling of an individual case.").
\end{itemize}
divisibility.\footnote{Id. at 722-23. In Alcan, the Third Circuit held the district court erroneously granted the government's summary judgment motion and that Alcan must be given the opportunity to present any evidence of divisibility. \textit{Alcan}, 964 F.2d at 271. In Alcan, however, Alcan merely made vague contentions, unsupported by affidavits, that its wastes could not have contributed to the harm at the site. \textit{Id.} at 269-70. Alcan therefore created no genuine issue of material fact with respect to divisibility in Alcan and thus the Third Circuit should not have reversed the district court's grant of summary judgment in favor of the government. \textit{See} Celotex Corp. v. Catrett 477 U.S. 317, 323 (1986) (holding that summary judgment is appropriately granted against nonmoving party who failed to produce evidence supporting essential element to its case on which nonmoving party bore burden of proof at trial). For a discussion of the Third Circuit's rationale in reversing the district court's grant of summary judgment, see \textit{supra} notes 97-107 and accompanying text.}

Thus, although courts appear to be headed towards a more industry orientated interpretation of CERCLA, it remains to be seen whether courts will follow the Third Circuit's approach in \textit{Alcan}, the Second Circuit's approach in \textit{Alcan Second Circuit} or the approach of the courts prior to \textit{Alcan}.

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