Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin’s Lead

Elizabeth F. Mason
CONTRIBUTION, CONTRIBUTION PROTECTION, AND NONSETTLOR LIABILITY UNDER CERCLA: FOLLOWING LASKIN'S LEAD

Elizabeth F. Mason*

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I. INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)\(^1\) in 1980 to provide for prompt responses to releases of hazardous substances and to compel the cleanup of uncontrolled hazardous waste disposal sites.\(^2\) The law established a statutory mechanism for managing and financing government and private responses to actual and threatened hazardous substance releases into the environment.\(^3\) It created the well-known “Superfund”\(^4\) to pay for cleanup measures when the government cannot locate the “potentially responsible parties” (PRPs) that generated, transported, or improperly disposed of hazardous wastes at a site, or owned the site.\(^5\) One of CERCLA’s basic aims, however, was to ensure that PRPs would bear the cost of remedying the toxic

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\(^4\) See infra note 34 and accompanying text.

dangers that they caused. As a result, CERCLA requires that, when the government does locate a PRP, it give that person a limited choice: undertake and pay for the cleanup of its wastes itself, or fund a government-managed cleanup of the wastes.

In 1986, Congress amended CERCLA by passing the Superfund Amendments and Reauthorization Act (SARA). SARA is an attempt to overhaul CERCLA while preserving the features that made CERCLA effective. It retains CERCLA's basic structure and goals, but makes several major changes in the original law. In particular, SARA explicitly provides for contribution among PRPs. Contribution is an equitable remedy that spreads the burden of satisfying a plaintiff's judgment among defendants. It allows a defendant that has paid more than its fair share to the plaintiff to seek reimbursement from those defendants paying less than their fair share.

CERCLA did not address the issue of whether PRPs could sue one another for contribution, and until 1986, courts differed on whether such a right was implicit in the statute's language or in federal common law. With the enactment of SARA, section 9613(f)(1) now clarifies that PRPs may bring contribution actions against one another.

Section 9613(f)(2), however, imposes a significant limitation on PRPs' ability to sue each other for contribution. It enables the government to provide protection against nonsettling PRPs' actions for contribution—"contribution protection"—to those PRPs that reach an administrative or judicially approved settlement with the government. According to the plain language of section 9613(f)(2), after PRPs that have settled with the government have received contribution protection, a court must reduce the nonsettling PRPs' potential liability to the government by the "amount of the settlement."
The majority of courts reaching this issue have held that section 9613(f)(2) reduces nonsettlor liability only by the amount of the settlement, no matter what that amount is. One court, however, simultaneously enforced the "plain language" of section 9613(f)(2) and required that the government reduce its claim against the nonsettlers by the total amount of the settlers' proportionate shares of liability. This court, in United States v. Laskin, used a comparative fault approach to apportion liability and determine the effect of a settlement on nonsettling PRPs. It reduced the nonsettlers' potential liability by the settlers' "fair share" of the cleanup costs at the site, and not by an arbitrary settlement figure. At least two other courts have adopted this minority approach and applied the comparative fault doctrine in private cost recovery cases, to grant contribution protection to PRPs that settled with other PRPs.

This Comment proposes that courts adopt the minority, Laskin approach to contribution protection in CERCLA actions between the government and non-settling PRPs. The Laskin approach would require courts to apply the principles underlying the settlement provisions of the Uniform Comparative Fault Act (UCFA) to mitigate the now typically harsh effects of contribution protection on nonsettling PRPs. Allocating liability at hazardous waste sites using such a "fair share"-based method would further CERCLA and SARA's goals of expediting cleanups, promoting voluntary settlements, and avoiding excessive litigation.

Section II of this Comment provides an initial overview of CERCLA and SARA. It briefly discusses the laws' enforcement mechanisms and liability standards, and the evolution of the United States Environmental Protection Agency's (EPA's) settlement policy under the two laws. Section III examines contribution, both in general and within the specific context of CERCLA and SARA, and explores

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20 Id.

21 See infra notes 326–44 and accompanying text.


25 See infra note 112 and accompanying text.
courts' differing approaches to allocating liability among PRPs in contribution actions. Section IV of this Comment explores the concept of contribution protection as it has developed under CERCLA, and compares the majority and minority approaches to reducing nonsettlers' potential liability to the government and to settling PRPs under section 9613(f)(2). Section IV also examines existing standards for determining whether a settlement is fair and reasonable and thus a proper basis for providing settling parties with contribution protection. Section V concludes that using the minority, comparative fault approach—rather than the majority, "amount of the settlement" approach—to apportioning liability and determining the impact of settlement on nonsettling PRPs would improve the Superfund settlement process. It explores options for putting the comparative fault approach into practice and recommends several modifications of the approach to make it more manageable.

II. OVERVIEW OF CERCLA AND SARA

A. CERCLA: The Original Superfund Law

In 1980, Congress passed CERCLA as a "last minute compromise"26 after almost two years of wrangling over various bills from the United States Senate and House of Representatives.27 Although many courts have criticized CERCLA's legislative history


Commentators generally have agreed that the members of Congress who supported versions of CERCLA more comprehensive than the compromise bill nonetheless supported the compromise because it presented an opportunity, before President-elect Ronald Reagan entered office, to enact some federal legislation regarding the cleanup of uncontrolled hazardous waste sites. See, e.g., Richard C. Belthoff, Private Cost Recovery Actions Under Section 107 of CERCLA, 11 COLUM. J. ENVTL. L. 141, 143 (1986); Ellen J. Garber, Federal Common Law of Contribution Under the 1986 CERCLA Amendments, 14 ECOLOGY L.Q. 365, 366 (1987); Grad, supra, at 34.
as ambiguous and incomplete, it is nonetheless clear that the statute has the following objectives: to promote the greatest possible care in the handling of hazardous substances and hazardous wastes; to provide for rapid and effective responses to environmental emergencies involving hazardous substances and hazardous wastes; to encourage PRPs to clean up uncontrolled hazardous waste sites and abate hazardous substance releases and threatened releases voluntarily; and to ensure that the parties responsible for releases of hazardous substances pay the necessary response costs and natural resource damages.

Congress enacted CERCLA after recognizing that the states were unable to respond adequately to the distinctly national problem of preventing and mitigating hazardous substance releases. CERCLA proponents successfully argued that a uniformly administered federal program that imposed a single liability standard would be more effective than a patchwork of unequally stringent state laws. Congress already had enacted the Resource Conservation and Recovery Act (RCRA) of 1976, which established a "cradle-to-grave" system for tracking hazardous wastes from their generation, through their transport, storage, and treatment, and to their disposal at permitted facilities. RCRA, however, did not give the EPA authority, funding, or personnel sufficient to address the issue of cleaning up abandoned hazardous waste sites.

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The original Senate version of CERCLA also contained provisions regarding the compensation of individuals exposed to hazardous substances. The bill's proponents deleted these provisions so that the bill would pass in the Senate. See Grad, supra note 27, at 19-22.


31 See id. at 809.


CERCLA created the Hazardous Substance Response Trust Fund, a $1.6-billion fund with a life span of five years, to cover the costs of government responses at hazardous waste sites. Congress was concerned that the cost of cleaning up the hundreds of sites across the United States would exhaust the limited monies of the fund, known as the "Superfund." Legislators sought to preserve the Superfund's "precious resources" by requiring liable parties to reimburse the fund for the government's cleanup expenditures, and by encouraging the parties to undertake and pay for cleanups that the fund otherwise would finance. Congress apparently intended that CERCLA's implicit goal of forcing PRPs to internalize the costs of hazardous waste disposal would be an effective means both of penalizing PRPs and of deterring such harmful behavior in the future.

**B. SARA: The Superfund Law Amended**

During the first five years of the Superfund program, the government and PRPs completed long-term remedial measures at only ten sites across the entire United States. Dismayed by the slow pace of these cleanups, Congress amended CERCLA by enacting SARA in October 1986. The new law extended the life of the Superfund...
program for an additional five years and increased its funding more than fivefold. It authorized the EPA to continue to perform cleanup actions and recover its costs from liable parties, as well as compel PRPs to undertake cleanups. In addition, SARA established more stringent standards for cleanups and expanded the role of states and citizens in the cleanup process.

C. Enforcing CERCLA and SARA

1. The Enforcement Mechanisms

The effective enforcement of CERCLA and SARA, to which this Comment will refer collectively as CERCLA, rests primarily upon two statutory mechanisms: the section 9607(a) cost recovery action and the section 9606 injunctive or administrative cleanup order. Section 9604 empowers the EPA to use the Superfund to respond to “releases” and threatened releases of “hazardous substances” at contaminated “facilities.” The agency’s response may take the form of a “removal action” or a “remedial action.” After drawing on the Superfund to finance one of these actions, the agency may seek to recover its expenses from the responsible parties under section 9607(a).

42 See id. §§ 9604, 9606(a), 9607(a).
43 See id. § 9621 (establishing cleanup standards); id. § 9672 (providing that CERCLA does not affect state tort or insurance law); id. § 9617 (requiring public notice and opportunity for public comment and hearing before adoption of any plan for remedial action).
44 See id. §§ 9607(a), 9606(a).
45 Id. § 9604.
46 Id. § 9601(22).
48 Id. § 9601(9).
49 Id. § 9601(23) (defining “removal action”); id. § 9601(24) (defining “remedial action”).
50 See id. § 9607(a).
Section 9606 enables the EPA to compel PRPs to undertake response actions at sites where there is "an imminent and substantial endangerment" to human health and the environment.\footnote{See id. § 9606(a).} It gives the EPA the authority to seek injunctive relief from the courts, as well as to issue its own orders requiring PRPs to perform and pay for cleanups.\footnote{See id.} Congress intended to encourage PRPs to assume the responsibility for conducting and funding cleanups themselves by providing the threat of an injunction or agency order.\footnote{See id.} The spectre of treble damages and fines of up to $25,000 per day for failure to obey these orders also further this goal.\footnote{See id. § 9607(c)(3); id. § 9606(b).}

2. Liability Under CERCLA

a. Strict Liability

The backbone of CERCLA is the liability scheme established under section 9607.\footnote{See id. § 9607.} Although the statute preserves common law rights and remedies,\footnote{See id. § 9614(a).} its concept of liability does not rest on the tort principles traditionally used in pollution cases: negligence, nuisance, and trespass.\footnote{Garber, supra note 27, at 367.} Congress intentionally left CERCLA silent regarding the standard of liability that courts were to impose.\footnote{See 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980), reprinted in 2 ENVT. L. INST., supra note 27, at 260 (Senate deleted strict and joint and several liability language from its CERCLA bill); 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1980), reprinted in 2 ENVT. L. INST., supra note 27, at 168 (House deleted strict and joint and several liability language from its CERCLA bill); see also United States v. A & F Materials Co., 578 F. Supp. 1249, 1253–55 (S.D. Ill. 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 806–08 (S.D. Ohio 1983).} Nevertheless, every court to reach the issue has interpreted the

\footnote{CERCLA § 9601(32) does state, however, that, when the statute uses the terms “liable” and “liability,” they “shall be construed to be the standard of liability that obtains under section 1321 of Title 33,” which is § 311 of the Federal Water Pollution Control Act (FWPCA). 42 U.S.C. § 9601(32) (1988). Several courts have held that FWPCA § 311, which allows parties to recover their costs for responding to spills into navigable waters, imposes a strict liability standard. E.g., Steuart Transportation Co. v. Allied Towing Corp., 556 F.2d 609, 613 (4th Cir. 1977).}
statute as mandating the application of a standard of strict liability.\textsuperscript{59} CERCLA's legislative history indicates that Congress wished to leave the exact definition of that standard to the courts rather than require them to enforce a potentially inflexible and inequitable rule.\textsuperscript{60}

CERCLA holds four categories of persons strictly liable for certain costs associated with actual and threatened releases of hazardous substances.\textsuperscript{61} These categories are owners or operators of facilities where a release or threatened release has occurred;\textsuperscript{62} past owners or operators of such facilities if they owned or operated the facilities at the time when hazardous substances were deposited at the facilities;\textsuperscript{63} persons that arranged for the transport, treatment, or disposal of hazardous substances—usually generators;\textsuperscript{64} and transporters.\textsuperscript{65}

These four classes of PRPs can invoke only three limited defenses under section 9607(b): that the release or threatened release resulted from an act of God, from an act of war, or from the act of a third party not in any contractual relationship with the PRP.\textsuperscript{66} The third defense is only available if a PRP can prove that it exercised due care and took reasonable precautions against the foreseeable acts or omissions of any such third party.\textsuperscript{67}

\textbf{b. Joint and Several Liability}

Congress chose not to address the issue of apportioning liability under CERCLA.\textsuperscript{68} Despite this omission, courts generally have in-


\textsuperscript{60} \textit{See Garber, supra note 27, at 368. Congress made no express reference to joint and several liability in the final bill for the same reason. See United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983).}

\textsuperscript{61} \textit{See 42 U.S.C. § 9607(a) (1988).}

\textsuperscript{62} \textit{See id. § 9607(a)(1).}

\textsuperscript{63} \textit{See id. § 9607(a)(2).}

\textsuperscript{64} \textit{See id. § 9607(a)(3).}

\textsuperscript{65} \textit{See id. § 9607(a)(4).}

\textsuperscript{66} \textit{See id. § 9607(b).}

\textsuperscript{67} \textit{See id. § 9607(b)(3). In 1986, Congress amended the definition of “contractual relationship,” as § 9607(b)(3) employs the phrase, in order to clarify that innocent buyers of contaminated property may invoke the “third-party” defense even if they participated in a property transaction with the previous owner that was responsible for the release. See id. § 9601(35).}

\textsuperscript{68} \textit{See supra note 58; see also Frank Prager, Apportioning Liability for Cleanup Costs Under CERCLA, 6 STAN. ENVTL. L.J. 198, 211–12 (1986–1987).}
interpreted the statute as inviting the application of a joint and several liability standard. In order to determine the propriety of applying this standard, these courts have performed case-by-case evaluations. Two approaches to imposing joint and several liability on PRPs at hazardous waste sites have developed: the majority, strict "Restatement" approach and the minority, "moderate" approach.

1. The Restatement Approach

According to the Restatement approach, CERCLA section 9607(a) defines the scope of a PRP's liability pursuant to a strict interpretation of sections 433A, 875, and 881 of the Restatement (Second) of Torts. Under this interpretation, once a court has established that a group of PRPs is liable under CERCLA, it may impose joint and several liability, rendering each PRP individually liable for the full amount of the cleanup costs; in the alternative, the court may hold each PRP liable only for that party's portion of the costs. To determine which option to select, a court must undertake a factual inquiry into whether the harm at a site is divisible.

Following Restatement section 875, courts will apply the joint and several liability standard when confronted with joint tortfeasors

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74 Id. § 875.

75 Id. § 881.


79 RESTATEMENT (SECOND) OF TORTS § 875 (1979).
that have caused a single and indivisible harm.\textsuperscript{80} Conversely, as sections 433A\textsuperscript{81} and 881\textsuperscript{82} of the Restatement suggest, a court may apportion liability among tortfeasors where two or more tortfeasors acting independently have combined to bring about a harm; in this circumstance, each joint tortfeasor is liable only for the part of the harm that it caused.\textsuperscript{83} Such an apportionment is appropriate when the court can either distinguish the causes from one another or find a reasonable basis for determining how much harm each cause contributed to the total harm.\textsuperscript{84}

Courts allocating liability under CERCLA are more likely to impose joint and several liability on PRPs than to attempt to divide cleanup costs among all of them for two reasons.\textsuperscript{85} It is very difficult to distinguish among the causes of the overall harm at hazardous waste sites.\textsuperscript{86} At the typical site, disparate amounts of various wastes, which differ in makeup and degrees of toxicity, have commingled and begun to migrate.\textsuperscript{87} Moreover, generator and transporter records of the types and quantities of wastes sent to a site are often incomplete or missing altogether.\textsuperscript{88} Most courts thus have rejected theories of apportionment based solely on volume of waste contributed as inappropriate.\textsuperscript{89}


\textsuperscript{81} \textsc{Restatement (Second) of Torts} § 433A (1979).

\textsuperscript{82} Id. § 881.

\textsuperscript{83} See id. § 433A & cmt. on subsection (1), § 881; see, e.g., United States v. Monsanto, 858 F.2d 160, 171-72 (4th Cir. 1988); cert. denied, 490 U.S. 1106 (1989); Chem-Dyne Corp., 572 F. Supp. at 810, 811.

\textsuperscript{84} \textsc{Restatement (Second) of Torts} § 433A (1979). The court in Chem-Dyne Corp. concluded that, pursuant to § 433B of the Restatement (Second) of Torts, the burden of proof as to apportionment should be upon each PRP. 572 F. Supp. at 810, 811. For further discussion of the strict Restatement approach, see Dubuc & Evans, supra note 77, at 10,198; Note, Toxic Waste Litigation, supra note 69, at 1524-33.

\textsuperscript{85} See supra note 78; see also Guino, supra note 27, at 671, 674; Russo, supra note 69, at 270.


In affirming the decision in \textit{South Carolina Recycling & Disposal}, the United States Court of Appeals for the Fourth Circuit suggested that considering volume of waste as a factor in determining the divisibility of harm at a site would be possible only if defendants also offered
One commentator has suggested another reason that courts have tended to interpret CERCLA so that apportionment is the exception rather than the rule. Such an approach facilitates cleanups by enabling the government to recover the entire cost of a cleanup from one PRP without suing all of the liable parties at a site. According to this view, identifying and joining all the PRPs at a site and proving the contribution of each PRP to the harm would be a lengthy, expensive, and often impossible endeavor that would delay cleanups.

2. The Moderate Approach

The moderate approach attempts to avoid the often harsh results of the Restatement approach by encouraging equitable apportionment of costs among PRPs. This approach rejects the straightforward imposition of joint and several liability as inappropriate in light of Congress's emphasis on fairness to PRPs. Its proponents recommend a case-by-case factual analysis, using a set of specific criteria, to determine how to allocate costs fairly among PRPs.

The moderate approach borrows this set of criteria from a proposed amendment to CERCLA that Congress discarded. The amendment, known as the “Gore Amendment,” would have given courts the power to impose joint and several liability whenever a
PRP could not prove the amount of its contribution to the harm at a site.\textsuperscript{98} It also, however, would have allowed courts faced with such a PRP to apportion damages according to the following equitable factors: the PRP's ability to prove that its contribution was distinguishable from that of other PRPs; the amount of hazardous waste attributable to the PRP; the toxicity of that waste; the PRP's involvement in the generation, transportation, treatment, storage, or disposal of the waste; the degree of care that the PRP exercised in those activities; and the extent to which the PRP cooperated with government officials in preventing further harm.\textsuperscript{99}

\textit{D. Settlements Under CERCLA}

The history of Superfund settlements before SARA is murky at best and illustrates CERCLA's lack of coherent settlement provisions.\textsuperscript{100} CERCLA's liability scheme implicitly authorized the EPA to take a coercive "carrot and stick" approach to gaining the cooperation of PRPs.\textsuperscript{101} It allowed the agency to threaten the imposition of joint and several liability in order to force PRPs to settle rather than litigate.\textsuperscript{102} Despite this grant of broad enforcement power to the EPA, however, CERCLA failed to give the agency or PRPs any explicit guidelines for reaching settlement agreements.\textsuperscript{103} As a result, the EPA proceeded on a case-by-case basis, and its ill-defined settlement policy caused much confusion, delay, and frustration.\textsuperscript{104}

1. The 1985 Hazardous Waste Enforcement Policy

In early 1985, the EPA published for public comment the "Hazardous Waste Enforcement Policy," which set forth general princi-
SARAs for private party settlements under CERCLA. Designed as a guidance document for agency personnel, the Policy delineated the EPA's criteria for evaluating and responding to PRP settlement offers. It also described the methods by which the EPA intended to encourage PRPs to enter voluntarily into settlement discussions with each other and the government.

Underlying this settlement policy was the EPA's belief that many PRPs would choose to reach an agreement with the government that provided for the total or substantial cleanup of a site in exchange for receiving favorable settlement terms, such as releases from future liability. Those PRPs that did not want to settle would have to litigate their share of the cleanup costs and risk ending up paying even more than they would have if they had settled. In the view of one commentator, the Policy took an unduly rigid approach toward settling and nonsettling PRPs alike, and encouraged litigation rather than settlement whenever it appeared that the EPA might be able to win more in court than through compromise.

2. Settlements Under SARA: Section 9622

When it enacted SARA in 1986, Congress implemented new section 9622, which contains settlement provisions designed to expedite response actions, eliminate excessive litigation, promote voluntary cleanups, use Superfund monies more efficiently, and treat PRPs more fairly. Section 9622 empowers the EPA to enter into settlement agreements with PRPs for the performance of cleanups and


108 See id. at 5038–40, 5043–44. For example, the Policy required the EPA to send "notice letters" informing PRPs of the identities of the other PRPs at the site and providing them with information about the volume and nature of the wastes to facilitate settlement discussions. Id. at 5037, 5043.


110 See Dore, supra note 108, at 10,431.

111 See Cross, supra note 100, at 529.

112 See id.; Note, Toxic Waste Litigation, supra note 69, at 1511.

the payment of cleanup costs.113 It establishes a scheme that the EPA may use to negotiate with PRPs,114 as well as a mechanism that the agency may use to allocate liability among PRPs.115

Moreover, section 9622 seeks to encourage settlements between PRPs and the government by incorporating various incentives into the Superfund enforcement process.116 One of these settlement incentives, "mixed funding," clearly illustrates the goals of SARA's settlement policies.117 In a "mixed funding" settlement, the EPA agrees to pay a portion of the response costs at a site with Superfund monies rather than to collect 100% of these costs from the settling PRPs.118 The EPA then may recover its expenditures from the non-settling PRPs.119

The underlying premise of section 9622 is that the EPA's successful promotion of settlements will lead to less litigation between the government and PRPs, allowing the EPA to spend less of its time and money on litigation.120 In addition, the EPA's encouragement of settlements may not only lead to the prompt initiation of cleanup measures by PRPs, but also preserve the Superfund.121 The enactment of SARA indicates Congress's wholehearted intention that negotiation and settlement be the primary means of resolving Superfund cases.122

113 See id. § 9622(a).
114 See id. § 9622(e)(1)-(2).
115 See id. § 9622(e)(3).
116 See, e.g., id. § 9622(e)(2)(A) (moratoria on EPA enforcement and cleanup measures during settlement negotiations); id. § 9622(f)(1) (EPA may give "covenants not to sue" to certain settling PRPs); id. § 9622(g) (EPA may give release to "de minimis" settlor, which is PRP that has contributed amount of hazardous substances both minimal in comparison to total amount at site and not significantly more toxic than other hazardous substances at site). Commentators have questioned whether § 9622 has been as effective as Congress intended in providing incentives for negotiated settlements and voluntary cleanups. See generally William W. Balcke, Note, Superfund Settlements: The Failed Promise of the 1986 Amendments, 74 VA. L. REV. 123 (1988); see also Roberts, supra note 92, at 602, 610-11; Strock, supra note 100, at 629.
118 See id.
119 See id.
CERCLA NONSETTLOR LIABILITY

III. CONTRIBUTION UNDER CERCLA AND SARA

A. Contribution: An Overview

The right of contribution enables a joint tortfeasor that has paid more than its fair share in resolving a tort claim to sue its co-joint tortfeasors to recover the amount it paid in excess. A remedy that developed in equity, contribution ensures that the burden of discharging a common liability falls fairly on all of the liable parties, rather than just on those which a plaintiff chooses to hale into court or with which the plaintiff has decided to settle. In other words, by allowing the joint tortfeasor that has paid the full amount of damages for a harm to recover from the other liable parties, contribution softens the harsh effects of joint and several liability. Because of the longstanding prohibition against unjust enrichment, however, a joint tortfeasor suing for contribution may seek only the amount it paid in excess of its equitable share, and may not compel other liable parties to pay beyond their equitable shares of the common liability. In addition, no joint tortfeasor may bring a contribution action if it intentionally caused the harm for which it is liable.

Under CERCLA, an action for contribution usually arises in one of three situations: the EPA has sued fewer than all the PRPs at a site under section 9606 or 9607(a), and those “named” parties seek contribution against the other, unnamed PRPs at the site; a PRP that has financed the cleanup at a site has brought a cost recovery action under section 9607(a)(4)(B) against fewer than all of the other PRPs. Under this scenario, a PRP may choose to sue for contribution at one of several junctures in a case. See Restatement (Second) of Torts § 886A(2) (1979). The PRP may try to join its co-joint tortfeasors as third-party defendants after it has received notice of the suit against it by the government. See id. In the alternative, the PRP may bring a separate action for contribution either after it has completed a settlement agreement with the government or another PRP, or after a court has entered judgment against it. See id.; cf. Anderson, supra note 27, at 366–67 (to avoid delay in replenishing Superfund, courts should require PRPs to bring contribution claims separately, after trial on liability issues).

123 See Restatement (Second) of Torts § 886A(2) (1979).
124 Id. § 886A, cmt. c.
125 See id. § 886A; Barron’s Law Dictionary 97 (2d ed. 1984).
126 See Gulino, supra note 27, at 668.
127 See id.
128 Id. § 886A(3).
129 See Garber, supra note 27, at 374; Russo, supra note 69, at 276.
130 See Garber, supra note 27, at 374; Russo, supra note 69, at 276; see also United States v. Northernaire Plating Co., 670 F. Supp. 742, 749 (W.D. Mich. 1987), aff’d sub nom. United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), cert. denied, 110 S. Ct. 1527 (1990). Under this scenario, a PRP may choose to sue for contribution at one of several junctures in a case. See Restatement (Second) of Torts § 886A, cmt. i (1979). The PRP may try to join its co-joint tortfeasors as third-party defendants after it has received notice of the suit against it by the government. See id. In the alternative, the PRP may bring a separate action for contribution either after it has completed a settlement agreement with the government or another PRP, or after a court has entered judgment against it. See id.; cf. Anderson, supra note 27, at 366–67 (to avoid delay in replenishing Superfund, courts should require PRPs to bring contribution claims separately, after trial on liability issues).
PRPs at the site, and those named parties bring actions for contribution against the unnamed PRPs at the site, as well as counterclaims for contribution against the PRP originally seeking to recover its costs;131 or a PRP brings an action to recover its response costs from another PRP at a site.132

Courts have held that a PRP's liability for contribution is several,133 not joint and several.134 In other words, although each PRP that is a defendant in a cost recovery action is jointly and severally liable for the full cost of a cleanup, the third-party PRPs that the original defendant PRP sues for contribution are liable only for their "fair share" of the harm at the site.135

It is important to clarify that the issue of apportionment typically arises in two different stages of a government cost recovery action under CERCLA, the allocation stage and the contribution stage.136 In the first stage, a court must determine the allocation of liability among PRPs according to the principles of joint and several liability.137 The apportionment issue surfaces again after the court has made this initial inquiry into the divisibility or indivisibility of the harm.138 Once the court has found that the PRPs at the site are jointly and severally liable to the government, then any of these PRPs may try to limit the amount of damages it must pay by seeking contribution from its fellow PRPs.139 The court may use "equitable

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131 See Garber, supra note 27, at 374; Russo, supra note 69, at 276.

132 See Garber, supra note 27, at 374; Russo, supra note 69, at 276; see also FMC Corp. v. Northern Pump Co., 668 F. Supp. 1285, 1287 (D. Minn. 1987), appeal dismissed, 871 F.2d 1091 (8th Cir. 1988). This third situation does not represent a true action for contribution, but a court determining the outcome of that action must allocate liability in the same way that it would in deciding a "real" contribution action. Russo, supra note 69, at 276; cf. Laurie Burt & Robert S. Sanoff, Allocating Contribution Shares in Superfund Cases, in MINIMIZING LIABILITY FOR HAZARDOUS WASTE MANAGEMENT 17, 20 n.6 (1990) (controversy over whether private party cost recovery action under CERCLA is equivalent to contribution action).

133 Under several liability, each tortfeasor pays no more than its allocated share, and the plaintiff absorbs the loss of any uncollected share. See BLACK'S LAW DICTIONARY 1374 (6th ed. 1990).

134 See id. A few commentators have suggested that contribution among PRPs be joint and several—not merely several—so that all of the PRPs at a site, whether the original complaint named them or not, would be responsible for the full amount of the response costs. See Russo, supra note 69, at 274; Note, Toxic Waste Litigation, supra note 69, at 1539.

135 See United States v. Western Processing Co., 734 F. Supp. 930, 938 (W.D. Wash. 1990); see also Garber, supra note 27, at 370–71.

136 See Western Processing Co., 734 F. Supp. at 938; see also supra notes 68–99 and accompanying text.

137 See id.

138 See id.
factors" to apportion damages in this stage. According to several courts, a court's discretion in allocating damages among PRPs during the contribution stage does not affect the PRPs' joint and several liability.

B. Contribution Under CERCLA: An Implied Right

CERCLA provided no express right to contribution among PRPs. Congress had considered but rejected the idea of including a provision allowing contribution actions in the original law. Many courts nonetheless found an implied right to contribution in CERCLA.

Several courts found that the text of CERCLA inherently provided PRPs with a right to contribution. Some of these courts held that the right arose from section 9607(a)(4)(b), which enables PRPs to recover response costs from other PRPs at a site. Other courts located an implied right to contribution in section 9607(e)(2), which preserves any causes of action that a PRP has against other persons. The United States Department of Justice affirmed this implied right to contribution in section 9607(e)(2), which preserves any causes of action that a PRP has against other persons.

140 See id.
144 Only one court arguably held that there was no right to contribution under CERCLA. See United States v. Westinghouse Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,483, 20,485 (S.D. Ind. 1988) (CERCLA preserves right to contribution under state law but does not establish similar right under federal common law).
terpretation of section 9607(e)(2) when Congress debated the passage of CERCLA in 1980.149

Still other courts held that Congress had authorized them to formulate a federal common law of contribution under CERCLA.150 These courts held alternatively that the legislative history of CERCLA supported the judicial creation of a right to contribution for PRPs,151 or that the federal courts have the authority to create federal common law in order to protect significant federal interests, such as promoting settlements and guarding the Superfund from exhaustion.152

C. Contribution Under SARA: The Right Made Explicit

Section 9613(f)(1) expressly allows parties found liable under CERCLA to bring actions for contribution against one another.153 In enacting section 9613(f)(1) in 1986, Congress clarified that it was confirming the right to contribution that already existed under CERCLA.154


151 See, e.g., New Castle County, 642 F. Supp. at 1266–67; ASARCO, Inc., 608 F. Supp. at 1486–89. In reviewing CERCLA’s legislative history, the court in New Castle County noted that Congress was in the process of considering amendments to CERCLA. 642 F. Supp. at 1267–68. These amendments, which included an express right to contribution, became SARA.

152 See New Castle County, 642 F. Supp. at 1268–69.


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


Although § 9613(f)(1) mandates that courts use federal law in resolving actions for contribution under CERCLA, it does not define "federal law." The legislative history of SARA supports the interpretation that courts should apply the federal common law that they were
The language of section 9613(f)(1) suggests that a PRP may bring a contribution claim against any party that a court either has held liable under CERCLA or may hold liable in a pending CERCLA action. There is disagreement, however, over whether the section allows a PRP to sue for contribution before a court has found that PRP liable under CERCLA. One court has held that section 9613(f)(1) does not preclude a PRP from seeking a declaratory judgment to establish that its fellow PRPs are liable to it for contribution in the event that the plaintiff PRP is later found liable. According to another court, however, until the plaintiff PRP has resolved its liability to the government through judgment or settlement, any motion that it brings for declaratory judgment on a contribution claim is premature.

D. Approaches to Apportioning Liability in Contribution Actions Under CERCLA

Section 9613(f)(1) does not suggest what "equitable factors" courts are to use in apportioning liability among PRPs in contribution actions. As a result, commentators have weighed the benefits and disadvantages of four different approaches for allocating damages among joint tortfeasors: the pro rata, comparative fault, comparative causation, and Gore amendment approaches.

1. The Pro Rata Approach

tionment under the pro rata approach would be simple to administer, because it would require the court in a CERCLA action merely to count the number of PRPs at a site and divide the total amount of response costs at the site by that number. Commentators have suggested that the approach may be an inappropriate means of allocating liability in any type of CERCLA action. They have noted that, by forcing a PRP to bear response costs equally regardless of its actual responsibility in creating the harm, a court adopting the pro rata approach may ignore Congress's concern that courts apportion liability fairly. No court appears to have adopted the pro rata approach in a CERCLA case.

2. The Comparative Fault Approach

Several courts have applied the comparative fault approach to resolve CERCLA contribution actions. The approach requires a court to distribute liability among PRPs according to each PRP's relative degree of fault in causing the harm at a site. One commentator has noted that the concept of comparative fault seems innately applicable in Superfund cases, perhaps because it corresponds most closely to popular ideas about fairness.

The 1977 Uniform Comparative Fault Act (UCFA) embodies the comparative fault approach, which also is known as the "relative

162 See, e.g., Garber, supra note 27, at 383.

163 See Garber, supra note 27, at 382–83; Russo, supra note 69, at 276.

164 Garber, supra note 27, at 382–83; Russo, supra note 69, at 276.


166 See, e.g., Western Processing Co., 756 F. Supp. at 1430; see also Restatement (Second) of Torts § 886A, cmt. h (1979).

167 See Garber, supra note 27, at 383.

The comparative fault approach may pose some difficulty for the courts because, in order to ascertain as accurately as possible the percentage of fault ascribable to each PRP, a court must rely on factual information that, though abundant, is usually of limited usefulness and great complexity. In addition, as one commentator has noted, a PRP's degree of fault may have little relationship to the harm actually caused. See Roberts, supra note 92, at 627. For example, a generator may have exercised extreme care in packaging its wastes and hiring a reputable transporter; however, due to negligence on the part of the disposal facility operator, the generator's wastes still may escape and contaminate a major groundwater aquifer.

culpability” or “comparative contribution” approach. UCFA defines the term “fault” to include not only negligent or reckless conduct, but also any acts or omissions that subject a party to strict liability. Courts therefore have been able to use UCFA, or at least its underlying principles, in CERCLA contribution actions despite the strict liability standard commonly read into section 9607.

The courts that have taken the comparative fault approach in CERCLA cases have not followed UCFA word for word; instead, they have adopted the Act’s basic aim, the equitable apportionment of liability, and brought it to bear only in the contribution stage of the case. A strict application of UCFA in a CERCLA case would require a court initially to determine the percentage of the total fault of all the parties to a government cost recovery action for which each plaintiff, defendant, and third-party defendant, as well as each settling party, is liable. The court would assign each PRP a share of the combined fault of all the parties to the cost recovery action, basing the allocation on the PRP’s individual conduct and the causal connection between that conduct and the harm to the site. In comparing the fault attributable to each PRP, the court would consider various factors, including the extent to which a PRP knew that it was engaging in a potentially dangerous activity, the magnitude of the risk that a PRP knew or should have known it was creating, and the particular circumstances of a PRP’s activity.

169 See Burt & Sanoff, supra note 132, at 20. These authors propose that courts taking the “relative culpability” approach ask whether a given PRP is liable for intentional wrongdoing, negligence, or conduct without fault; what standard of care applies to that PRP; how foreseeable the creation of the harm at the site was; and what steps the PRP took or should have taken to avoid or mitigate the harm. Id. at 23–25.

170 Restatement (Second) of Torts § 886A, cmt. h (1979).

171 Uniform Comparative Fault Act § 1(b), 12 U.L.A. 41. According to the comment following § 1, “strict liability for both abnormally dangerous activities and for products bears a strong similarity to negligence as a matter of law (negligence per se), and the factfinder should have no real difficulty in setting percentages of fault.” Id. § 1, cmt.

172 See supra note 165. But see United States v. Cannons Eng’g Corp., 720 F. Supp. 1027, 1049 n.29 (D. Mass. 1989) (finding application of UCFA to CERCLA cases “highly inappropriate” because CERCLA has strict liability standard), aff’d, 899 F.2d 79 (1st Cir. 1990).


174 See supra note 165.

175 See Uniform Comparative Fault Act § 2(a)(2), 12 U.L.A. 45. UCFA § 2 limits courts to considering only the liability of the actual parties to the litigation. See id. § 2. Limiting the apportionment of liability to those who are parties to the action places the burden of joining additional PRPs as third-party defendants on the defendants, who likely would try to reduce their damages by spreading liability among as many of the PRPs at the site as possible. See id. § 2, cmt.

176 See id. § 2(b).

177 See id. § 2, cmt., 12 U.L.A. 46.
UCFA would require that the court, after it had completed this initial apportionment of liability according to relative fault, nonetheless enter a judgment against the liable parties on the basis of joint and several liability, which applies under the Act. Thus, a court strictly applying UCFA would not award damages on the basis of its findings with regard to PRPs' varying degrees of liability, but rather would allow the government to recover the full amount of its claim from any or all of the PRPs against which it had proven its case. The court's findings on the PRPs' relative liability then would dictate the size of the claims that the PRPs could bring against one another for contribution. In effect, in apportioning liability according to UCFA's specific terms, the court would determine the ultimate amount for which each PRP would be fairly responsible after the court resolved any contribution actions.

In reality, courts using the comparative fault approach in CERCLA cases have not first allocated PRP fault according to proportional share of the harm, then imposed joint and several liability, and then allowed contribution actions based on the court's initial allocation of fault. These courts instead have imposed joint and several liability first and then attempted to ascertain PRPs' relative degrees of fault afterwards. They have not applied UCFA's specific terms, but rather merely have borrowed its underlying tenet of assigning liability according to relative fault.

Another difference between the plain language of UCFA and the comparative fault approach that courts actually have used in CERCLA cases concerns the status of absent or insolvent parties to a CERCLA action. When part or all of a PRP's share is not collectible, because the PRP is absent or insolvent, UCFA would require that a court redistribute the uncollectible amount among the other liable parties according to their respective percentages of fault. These parties then would have to pay sums reflecting their proportionate shares of the now-divided uncollected amount to the plaintiff. The
court would be able to reallocate the uncollectible loss only upon a motion made within one year of the entry of judgment.\textsuperscript{184} The party whose liability was reallocated would remain both subject to contribution and liable to the plaintiff for its portion of the judgment.\textsuperscript{185} The UCFA approach thus would ensure that the burden of an insolvent party fell fairly upon all the parties to the action, rather than compelling the plaintiff to absorb the entire loss.\textsuperscript{186}

Courts in CERCLA cases, on the other hand, typically have forced nonsettling PRPs at a site to make up any differences among the settling PRPs' payment to the government, the full amount of damages at the site, and the amount of damages for which absent or insolvent PRPs are responsible.\textsuperscript{187}

3. The Comparative Causation Approach

Another means of apportioning liability among PRPs, the comparative causation approach, involves dividing response costs according to the amount of hazardous substances that each PRP has contributed to a site.\textsuperscript{188} Using this approach, a court considers the volume and characteristics of every substance that each PRP has disposed of at the site.\textsuperscript{189} Proponents argue that the comparative causation method is more equitable than other methods, because it is more consistent with section 9607(a), which premises PRP liability on causation rather than number of PRPs or negligence.\textsuperscript{190} Many courts have held, however, that the comparative causation method is inappropriate given the extreme difficulty of individually determining each cause of the overall harm at a site.\textsuperscript{191}

\textsuperscript{184} See id.
\textsuperscript{185} See id.
\textsuperscript{187} See infra notes 263–65 and accompanying text.
\textsuperscript{189} See Guariglia, supra note 145, at 620. These characteristics can include the substance’s toxicity, persistence, migratory potential, ignitability, and reactivity. Id.
\textsuperscript{190} See, e.g., Roberts, supra note 92, at 627–28 & nn.159–62; see also 42 U.S.C. § 9607(a) (1988).
\textsuperscript{191} See supra notes 86–89 and accompanying text. In addition, one commentator has concluded that courts can only use the comparative causation method when all the PRPs are generators. See Guariglia, supra note 143, at 621.
Section 9622(e)(3), which was enacted as part of SARA in 1986, embodies a modified comparative causation approach for dividing liability among PRPs. With a general aim of expediting settlements, section 9622(e)(3) allows the EPA to prepare “nonbinding allocations of liability” (NBARs), which assign PRPs rough percentages of the total liability at a site that is subject to SARA settlement procedures. An interim EPA guidance document implementing the section instructs the EPA to use the volume of waste that each PRP has contributed to a site as the threshold criterion for measuring liability when it prepares a NBAR.

To prepare an NBAR, the EPA first must divide 100% of the liability at a site among the waste generator PRPs there according to volume. The agency then may adjust these allocations using the following criteria: the strength of the evidence linking wastes at the site to specific PRPs; the ability of these PRPs to pay; the risks of litigation; public interest considerations; the precedential value of the case if it were to proceed to court; the value of getting a fixed monetary settlement; inequities and aggravating factors; and the nature of the case that will remain after settlement. Finally, the agency must assign shares of liability to the nongenerator PRPs: site owners and operators primarily according to degree of culpability, and transporters according to volume, packaging, and placement of the wastes at the site.

Section 9622(e)(3) limits the EPA’s use of NBARs, however, to those sites where the agency believes that the device might encourage settlement and remedial action. Moreover, once completed, an NBAR does not bind the government, which may reject PRP settlement offers based on an NBAR.

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193 See id. (EPA may, at its own discretion, use NBAR to “allocate[] percentages of the total costs of response among potentially responsible parties at [a] facility” after completion of remedial investigation and feasibility study).
195 See id. at 19,921. The agency also may consider the toxicity and mobility of the hazardous substances which each PRP has contributed to the site. See id. at 19,920–21.
199 Id. § 9622(e)(3)(E). In addition, an NBAR is not admissible in court as evidence, and courts do not have the jurisdiction to review NBARs. See id. § 9622(e)(3)(C).
4. The Gore Amendment Approach

Several courts have held that the equitable factors they must consider under section 9613(f)(1) may include the six Gore Amendment criteria: 200 a PRP's ability to demonstrate that its contribution to the harm at a site can be distinguished from that of other PRPs; the amount of hazardous waste attributable to the PRP; the toxicity of that waste; the PRP's involvement in the generation, transportation, treatment, storage, or disposal of the waste; the degree of care that the PRP exercised with respect to the waste; and the extent to which the PRP cooperated with government officials in preventing further harm. 201 According to one commentator, the Gore Amendment approach combines the comparative causation method's volume and toxicity-based standards with the comparative fault method's evaluation of the negligence of each PRP and the harm it has created. 202 Other commentators have noted, however, that the ambiguity of the amendment's six criteria makes application of the Gore Amendment approach unwieldy. 203

5. Other Approaches to Apportioning Liability

Another set of equitable factors that some courts have considered in allocating liability in CERCLA contribution actions focuses on whether certain PRPs, namely current owners of hazardous waste sites, will be unjustly enriched when their sites are cleaned up. 204 These factors include the circumstances of a PRP's purchase of the property on which the site is located, the current value of that property, and the projected value of the property after the completion of the cleanup. 205 Courts apply these factors to ensure that one PRP will not receive a benefit to the financial detriment of another PRP. 206 In addition, some courts have taken into account PRPs' use,

200 See supra notes 96–99 and accompanying text.
202 See Garber, supra note 27, at 386.
203 See, e.g., Dubuc & Evans, supra note 77, at 10,200; Prager, supra note 68, at 222.
205 See Burt & Sanoff, supra note 132, at 26.
206 See id. at 21.
permitted by CERCLA section 9607(e)(2), of indemnification, hold harmless, and similar agreements to attempt to shift the burden of liability under CERCLA among themselves.

IV. CONTRIBUTION PROTECTION UNDER CERCLA AND SARA

A. Contribution Protection and Nonsettlor Liability Under CERCLA: Pre-SARA

Because CERCLA did not provide expressly for contribution among PRPs, it did not address the issue of whether PRPs that resolve their liability to the government may receive protection against contribution actions brought by nonsettling PRPs. Nonetheless, prior to the enactment of SARA in 1986, the EPA often engaged in lengthy negotiations with PRPs that wanted clauses granting them "contribution protection" included in their settlements.

1. EPA’s 1985 Hazardous Waste Enforcement Policy: The UCATA Approach

Before settling PRPs agreed to pay the government a portion of the response costs at a site, they typically sought to ensure that they would not have to pay a second time, to nonsettling PRPs that the government subsequently would sue to recoup its remaining costs. These settlors wanted the government to agree to reduce the amount that it would seek from the nonsettlers to the extent necessary to extinguish the settlors’ potential liability for contribution to the nonsettlers.

209 See Mays, supra note 105, at 10,109.
210 See id. As the EPA's 1985 Hazardous Waste Enforcement Policy pointed out, when the Agency reaches a partial settlement with some parties, it will frequently pursue an enforcement action against nonsettling responsible parties to recover the remaining costs of cleanup. If such an action is undertaken, there is a possibility that those nonsettlers would in turn sue settling parties. If this action by nonsettling parties is successful, then the settling parties would end up paying a larger share of cleanup costs than was determined in the Agency's settlement. This is obviously a disincentive to settlement.
211 See id. at 5039, 5043.
The government, on the other hand, usually hesitated in giving settling PRPs what would amount to complete releases from liability. In the 1985 Hazardous Waste Enforcement Policy, the EPA acknowledged that contribution protection for settlers was valuable as a means of providing finality to settlements. It asserted, however, that express contribution protection clauses were “generally not appropriate.”

The EPA had two reasons for restricting the use of contribution protection clauses. It did not want to have to absorb costs that it otherwise could force PRPs to pay. In addition, the agency reasoned that existing law, in the form of section 4 of the 1955 Uniform Contribution Among Tortfeasors Act (UCATA), already protected those PRPs that entered into “good faith” settlements with the government from contribution actions by nonsettling PRPs. The EPA incorporated the UCATA approach into its 1985 settlement policy in order to enable the government to settle with some of the PRPs at a site and then pursue the nonsettling PRPs for the balance of the cleanup costs, even if that amount exceeded the nonsettlers’ “fair share” of the cleanup costs.

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212 See id.; see also Mays, supra note 105, at 10,109; Strock, supra note 100, at 604.
213 See supra notes 105–11 and accompanying text.
215 Id.
216 See id. at 5043.
217 12 U.L.A. 98 (1975). UCATA § 4 reads:
   When a release or covenant not to sue ... is given in good faith to one of two or more persons liable in tort for the same injury . . . :
   (a) It does not discharge any of the other tortfeasors from liability for the injury . . . unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
   (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.
   Id.
218 Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5043 (1985). The EPA argued that the courts should adopt UCATA § 4 as “the federal rule of decision” under CERCLA.
   The EPA did not import § 1 of UCATA into the Policy, noting that doing so would “preclude settlers from seeking contribution from non-settlers [sic] unless the settlers financed or performed a 100 percent cleanup at the site.” Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5043 (1985). UCATA § 1 states that “a tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement . . . .” UCATA § 1(d), 12 U.L.A. 63 (1975).
Under the EPA's interpretation of UCATA section 4, when the government settled in good faith with fewer than all of the PRPs at a site, it could hold each of the PRPs that had not settled, or that the settlement had not released from liability, jointly and severally liable for the remainder of the harm that the settlement was designed to remedy. Moreover, according to the agency, UCATA section 4 barred these nonsettlers from suing the settlers for contribution. The government, however, had to reduce its claim against the nonsettlers by the amount that the settlers previously had agreed to pay to resolve their liability.

2. United States v. Conservation Chemical Co.: The UCFA Approach

At least one pre-SARA court rejected the EPA's concept of nonsettlor liability and, in so doing, implicitly questioned the agency's approach to contribution protection. In United States v. Conservation Chemical Co., the United States District Court for the Western District of Missouri held that a nonsettling PRP could be liable only for its proportionate share of the cleanup costs at a site, not for whatever amount the government sought to recover from it. The parties in Conservation Chemical had asked the court to review a preliminary agreement for the cleanup of the Conservation Chemical Company site in Missouri and to determine whether the settling PRPs could recover some of their costs in a contribution action against the nonsettling PRPs.

In responding to the nonsettling PRPs' objections to the proposed agreement, the Conservation Chemical court noted that CERCLA did not describe the effect that partial settlements—settlements between the government and fewer than all the PRPs at a site—would have on claims and liabilities of nonsettling PRPs. The court examined three possible answers to the question of whether nonsettling tortfeasors may seek contribution from tortfeasors that have settled with a plaintiff. First, a nonsettlor may sue a settlor for

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222 See id.
224 See id. at 401-02.
225 See id. at 393, 394.
226 See id. at 401.
227 See id. (citing RESTATEMENT (SECOND) OF TORTS § 886A, caveat (1979)).
contribution despite the settlor's prior release from liability.\textsuperscript{228} Second, as under UCATA section 4,\textsuperscript{229} the nonsettlor may sue the settlor for contribution only if the settlement was not in good faith, while the plaintiff's claim against the nonsettlor is reduced by the amount of the settlement.\textsuperscript{230} Third, a court may take the approach contained in section 6 of the 1977 Uniform Comparative Fault Act (UCFA).\textsuperscript{231}

Under UCFA section 6, a court may reduce the amount of a plaintiff's claim against a nonsettlor by the proportionate share of the settling tortfeasor.\textsuperscript{232} As a result, a plaintiff would be able to seek from a nonsettlor only an amount equal to the nonsettlor's proportionate share of liability, and the nonsettlor would not need to bring a contribution action to recover the amount it paid over its equitable share.\textsuperscript{233} The \textit{Conservation Chemical} court decided to adopt the UCFA approach.\textsuperscript{234}

The court reasoned that the legislative history of CERCLA imposes an obligation on courts to apportion liability in CERCLA actions "in a fair and equitable manner."\textsuperscript{235} It found that, of the three approaches considered, the approach embodied in the UCFA settlement provision was the most consistent with this statutory objective and would fulfill congressional intent most effectively.\textsuperscript{236} Thus, although the \textit{Conservation Chemical} court ultimately approved the parties' proposed preliminary agreement,\textsuperscript{237} it concluded that courts thereafter should apportion liability among PRPs on the basis of comparative fault and determine the effect of settlements on nonsettling PRPs according to the principles of UCFA rather than

\begin{itemize}
\item \textsuperscript{228} See id.
\item \textsuperscript{229} See supra note 217.
\item \textsuperscript{230} See Conservation Chem. Co., 628 F. Supp. at 401.
\item \textsuperscript{231} See id.; see also UNIF. COMPARATIVE FAULT ACT § 6, 12 U.L.A. 53 (1977).
\item \textsuperscript{232} See Conservation Chem. Co., 628 F. Supp. at 401. UCFA § 6, which is the counterpart to UCATA § 4, provides:
\begin{quote}
A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation . . . .
\end{quote}
\item \textsuperscript{233} See id.
\item \textsuperscript{234} See Conservation Chem. Co., 628 F. Supp. at 402.
\item \textsuperscript{235} Id. at 401–02. The court stated that it would "not tolerate either a 'windfall' or a 'wipeout' which results in an apportionment of responsibility which arbitrarily or unreasonably ignores the comparative fault of the parties, where there is a reasonable basis for allowing that comparison to be made." Id. at 402.
\item \textsuperscript{236} See id.
\item \textsuperscript{237} Id.
Although the court’s embrace of the UCFA approach was dicta rather than holding, it did signal that not every court would accept the EPA’s views of nonsettlor liability and contribution protection.

B. Contribution Protection and Nonsettlor Liability Under SARA

In 1986, Congress enacted section 9613(f)(2) to bar contribution actions against settling PRPs, and section 9613(f)(3) to authorize the government and settling PRPs to recover a portion of their costs from nonsettling PRPs. Congress intended these provisions of SARA to encourage the negotiated resolution, rather than the litigation, of CERCLA enforcement actions. The rationale underlying section 9613(f)(2) appears to be that parties that cooperate with the government deserve reward for their cooperation, and that a release from liability is both an appropriate reward and an effective incentive to cooperation from the start. Conversely, section 9613(f)(2) implicitly promises to impose a heavier financial burden on PRPs if they wait to settle. Section 9613(f)(3) provides settlors with further reward for settling by permitting them to seek contribution from fellow PRPs.

1. The Statutory Language: Section 9613(f)(2)

Section 9613(f)(2) provides that, in specific circumstances, parties settling with the government shall receive protection from actions

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238 See id.
239 See 42 U.S.C. § 9613(f)(2) (1988); cf. id. § 9622(g)(5) (contribution protection for de minimis settlers); id. § 9622(h)(4) (contribution protection for PRPs that settle cost recovery claims with government).
240 See id. § 9613(f)(3)(A)–(B).
242 See id. One court explained that Congress’ [sic] intent in enacting the contribution protection provision was to allow a settling party to avoid the specter of future litigation after settling with the various government bodies, by providing protection from later collateral attacks by other potentially liable parties who were not willing to come to the negotiating table early [sic] rather than later. The settling party is spared the uncertainty of later contribution suits.
seeking contribution for certain costs.\textsuperscript{245} Under section 9613(f)(2), a PRP that reaches a settlement with the government to undertake all or some of the response action at a site, or to pay all or some of the response costs, is not liable to any nonsettling PRP for contribution regarding "the matters addressed in the settlement."\textsuperscript{246} For the purposes of section 9613(f)(2), the following factors comprise the subject matter of a settlement: the hazardous substance or substances involved; the particular site in question; the period of time that the settlement covers; and the costs of the cleanup.\textsuperscript{247} To determine whether section 9613(f)(2) bars a subsequent claim against a settling PRP, a court must compare these factors in both the settlement and the claim.\textsuperscript{248} Only if the settlement and the claim address the same subject matter can a court invoke section 9613(f)(2) and dismiss the claim.\textsuperscript{249}

In addition, under section 9613(f)(2), a settlement agreement releases only the settling PRP, unless it expressly absolves other parties from their obligation under CERCLA to pay their share of the response costs.\textsuperscript{250} In practice, a settlement agreement between the government and a PRP rarely releases the nonsettling PRPs, because nonsettling PRPs are often the target of subsequent EPA and private enforcement actions for contribution.\textsuperscript{251} While nonsettlers lose their right to contribution, settling PRPs keep that right and may sue the nonsettlers.\textsuperscript{252} Moreover, if a settlement does not provide for the complete cleanup of a site, or the full amount of cleanup costs, the government may bring an action against any

\textsuperscript{245} Id. § 9613(f)(2). Section 9613(f)(2) reads:
A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.


\textsuperscript{247} Union Gas Co., 743 F. Supp. at 1154.

\textsuperscript{248} Id. at 1153–55.

\textsuperscript{249} See id. at 1153. According to the Union Gas court, to interpret § 9613(f)(2) as providing total immunity from contribution actions to settling PRPs "would create a situation where persons settling with the United States who are later responsible for an unrelated act of improper disposal of hazardous waste would find themselves immune from liability under CERCLA or state laws—a result clearly not envisioned by CERCLA." Id.

In addition, several courts have held that CERCLA does not bar actions for contribution under state law. See, e.g., Allied Corp. v. Frola, 730 F. Supp. 626, 638 (D.N.J. 1990).


nonsettlor.\(^{253}\) Section 9613(f)(2) does require that the sum for which a nonsettlor is potentially liable be reduced by the specific amount of the settlement,\(^{254}\) but it does not offer these so-called "recalcitrants"\(^{255}\) any other protection.\(^{256}\)

2. Current Approaches to Determining Nonsettlor Liability Under CERCLA

The courts that have addressed nonsettling PRPs’ objections to partial settlements of CERCLA actions have taken two different approaches. Courts following what has become the majority approach basically have adopted the tenets of the EPA’s 1985 Hazardous Waste Enforcement Policy.\(^{257}\) These courts interpret section 9613(f)(2) as a modified version of UCATA section 4 and reduce nonsettlers’ liability by the amount of the settlement, no matter what that amount is.\(^{258}\)

The few courts adopting the minority approach to determining the effect of settlement on nonsettlor liability instead have paid heed to the dicta in Conservation Chemical that exhorted the application of UCFA principles to CERCLA settlements.\(^{259}\) These courts have reduced nonsettlers’ liability by the settlors’ proportionate share of the liability, rather than by the amount of any settlement.\(^{260}\) In such cases, settlors have not needed to ask for protection from nonsettlers’ actions for contribution, because the nonsettlers have not had

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\(^{253}\) See id. § 9613(f)(3)(A).

\(^{254}\) See id. § 9613(f)(2).


\(^{257}\) See supra notes 214–22 and accompanying text.


\(^{259}\) See supra notes 223–38 and accompanying text.


One court held that it did not need to decide whether UCATA or UCFA principles should govern the effect of a consent decree on nonsettling PRPs, because the issue would not be "ripe for resolution" until the government sued those parties. Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 519 (W.D. Mich. 1989).
to pay more than their equitable share and thus have not needed to seek contribution.

Many nonsettling PRPs have objected to the majority-rule interpretation of section 9613(f)(2).261 They have argued that settlements reflecting this interpretation are unfair, detrimental to them, and inconsistent with the goals of CERCLA.262 In their view, courts that take the majority view of section 9613(f)(2) approve settlements that inevitably disadvantage nonsettlers in one of two ways.263 These settlements either render nonsettlers liable for contribution to settlors that have paid more than their proportionate share of the liability at a site, or force nonsettlers to "absorb the shortfall" when the settlors have paid less than their proportionate share.264 In other words, regardless of the size of each settlor's payment to the government, a non-settlor always is left open to actions to compel it to pay more than its proportionate share in order to resolve its liability.265 The majority approach nonetheless remains the majority approach, and most courts have rejected the objections of nonsettling PRPs.

a. The Majority Approach: UCATA as the Model

United States v. Rohm & Haas Co.266 most clearly articulates the majority approach to the intersecting issues of nonsettlor liability and contribution protection under CERCLA. In brief, the case supports a strict interpretation of the language of section 9613(f)(2)267 and concludes that Congress purposefully incorporated UCATA section 4268 into CERCLA to leave nonsettling PRPs with the risk of bearing a disproportionate share of liability.269

In Rohm & Haas, the United States District Court for the District of New Jersey reviewed a proposed partial consent decree that

262 See, e.g., Cannons Eng'g Corp., 899 F.2d at 92; Rohm & Haas Co., 721 F. Supp. at 670.
264 See id.
265 See id.
267 See id. at 675–76.
268 See supra note 217.
269 See Rohm & Haas Co., 721 F. Supp. at 677; see also United States v. Cannons Eng'g Corp., 899 F.2d 79, 92 (1st Cir. 1990) ("Disproportionate liability, a technique which promotes early settlements and deters litigation for litigation's sake, is an integral part of the statutory plan.").
would have required twelve *de minimis* settlers to pay the United States and New Jersey about $3 million toward the cleanup of a landfill site in New Jersey.\(^{270}\) The estimated costs of the cleanup then totalled about $65.3 million.\(^{271}\) Several nonsettlers opposed entry of the decree, Rohm & Haas objecting on the grounds that the settlement did not reflect the settlers’ equitable share of the responsibility for the site.\(^{272}\) The court nonetheless decided to enter the decree.\(^{273}\)

The court determined that section 9613(f)(2) and section 9622(g)(5),\(^{274}\) which governs the effect of *de minimis* settlements on nonsettling PRPs’ contribution rights, each extinguished any right to contribution that Rohm & Haas could claim.\(^{275}\) In addition, the court held that, in lieu of allowing contribution, these sections lessened all the nonsettling PRPs’ liability by the amount that the *de minimis* settlers had paid the plaintiffs.\(^{276}\) It cited the fact that, before the enactment of SARA, the EPA had advocated determining the effect of partial settlements on nonsettlers in CERCLA cases by looking to UCATA section 4.\(^{277}\)

The *Rohm & Haas* court held that it neither needed nor had the authority to choose between crediting the nonsettlers with the proportionate share of liability attributable to the settlers, and crediting them only the amount of the settlement.\(^{278}\) According to the court, in enacting sections 9613(f)(2) and 9622(g)(5), Congress mandated that courts bar nonsettlers’ claims for contribution and credit nonsettlers “with the amount of the settlement and nothing more.”\(^{279}\)

\(^{270}\) *Rohm & Haas Co.*, 721 F. Supp. at 672.

\(^{271}\) Id. at 671.


\(^{273}\) *Rohm & Haas Co.*, 721 F. Supp. at 701.


\(^{275}\) See *Rohm & Haas Co.*, 721 F. Supp. at 675–76.

\(^{276}\) See id.


\(^{278}\) See *Rohm & Haas Co.*, 721 F. Supp. at 677.

\(^{279}\) Id.; see also United States v. Cannons Eng’g Corp., 899 F.2d 79, 92 (1st Cir. 1990). The court in *Cannons Engineering Corp.* stated that

the law’s plain language admits of no construction other than a dollar-for-dollar reduction of the aggregate liability . . . . This clear and unequivocal mandate overrides appellants’ quixotic imprecation that their liability should be reduced not by the amount of the settlement but by the equitable shares of the settling parties. 899 F.2d at 92.
this way, Congress created an effective and fair scheme that encouraged PRPs to settle by punishing nonsettlers.280

After reaching this conclusion, the court in Rohm & Haas discussed the reasons that the use of what it called a “UCFA proportional judgment reduction mechanism” would be inappropriate.281 First, sections 9613(f)(2) and 9622(g)(5) appear to be based on UCATA section 4, not UCFA section 6.282 According to the court, if Congress had intended courts to use a comparative fault approach in determining the amount of a nonsettlor's liability, it would have chosen language that more closely resembles UCFA section 6.283 The court implied that, instead, Congress imported much of UCATA section 4 into CERCLA word for word.284

Second, according to the Rohm & Haas court, the UCFA approach is inconsistent with SARA’s goals of minimizing litigation and promoting voluntary settlements.285 The court reasoned that application of the UCFA approach likely would deter the government from entering into partial settlements, because the approach would force the government, rather than settling PRPs, to litigate with nonsettlers the issue of whether the settlors paid their proportionate share of the response costs at a site.286 Instead of settling and later recovering the remainder of the response costs at the site from the nonsettlers, as a court applying UCATA would allow, the government would have to engage in a potentially lengthy, complex, and expensive battle with the nonsettlers over whether the initial settlement adequately reflected the settlors’ fair share of responsibility for the site.287 Thus, according to the court, using the UCFA approach would undercut one of the primary benefits that the government seeks in settling CERCLA enforcement actions: reducing the amounts of time, personnel, and money that it must spend on litigation.288

281 Id.; see also supra notes 217 and 232.
282 Id.; see also supra notes 217 and 232.
288 See id. at 678.
In addition, under the UCFA approach, if the government obtained less than the settling PRPs' proportionate share of the response costs at a site, the government would have to pay for any difference between the amount of that proportionate share and the actual amount of the settlement. A court applying UCFA principles would allow the nonsettlors to pay only their equitable share, leaving the government to absorb the costs that it could not recover from any of the PRPs. Under this scenario, the Rohm & Haas court concluded, the government always would do better to forgo any attempt at settlement and instead sue any or all of the PRPs for all of the cleanup costs at a site. Finding that Congress did not intend this result, the court rejected the idea that it should apply the UCFA approach to settlements in which the government gives contribution protection to settling PRPs.

Other courts have adopted the majority, UCATA approach in resolving the issue of what effect a CERCLA settlement has on nonsettling PRPs. In United States v. Cannons Engineering Corp., for example, the United States District Court for the District of Massachusetts concluded that using UCFA principles to review CERCLA settlements is inappropriate, because it runs counter to the purpose of UCFA. In Cannons Engineering, the United States, Massachusetts, and New Hampshire had sought the court's approval of two partial consent decrees in which fifty-nine PRPs had agreed to pay a total of almost $20 million for cleanup activities at four sites in the two states. The court accepted the governments' contention that the primary purpose of UCFA, as stated by the Act's authors, was to provide a model statute for states that wanted to replace the traditional defense of contributory negligence with a comparative fault method of dividing liability among parties. According to the court, because CERCLA liability is based on strict liability rather than on negligence or comparative

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289 See id.; cf. In re Acushnet River, 712 F. Supp. at 1032 (court rejects nonsettlor argument that government should bear loss for shortfall caused by discounted settlement).
291 See id.; cf. In re Acushnet River, 712 F. Supp. at 1032 ("The problem with [the UCFA] approach is that it would effectively read out of subsection 113(f)(2) the last phrase . . . . A court should not construe a statute so as to render any of it a nullity . . . . ") (citations omitted).
293 See id. at 1049 n.29.
294 See id. at 1030–31.
295 See id. at 1049 n.29. The National Conference of Commissioners on Uniform State Laws explained in the Act's Prefatory Note that it promulgated UCFA not to supplant UCATA, but to provide an alternative to UCATA. Id. UCATA itself would remain for use by states that chose not to adopt comparative fault principles. Id.
fault, the UCFA approach has no place in a court’s determination of a PRP’s liability to the government.296

The court in Central Illinois Public Service Co. v. Industrial Oil Tank & Line Cleaning Service297 also followed the UCATA approach. In Central Illinois, settling PRPs had agreed with the government to undertake cleanup measures at a site in Missouri where one of the PRPs had stored, treated, and disposed of polychlorinated biphenyls, or PCBs.298 These settlors sought a declaratory judgment that certain nonsettling PRPs were liable for response costs at the site.299 The United States District Court for the Western District of Missouri responded by offering three simple reasons why interpreting section 9613(f)(2) as compelling nonsettlers to bear a disproportionate share of the liability at a site is both “permissible and fair.”300

The court stated that, because liability under CERCLA is joint and several, the government may sue a PRP for up to the full amount of the cleanup costs at a site in the first instance.301 It implied that CERCLA places no greater burden on the nonsettlor by requiring it to pay more than its proportionate share in a subsequent action than it places on any PRP that is the target of the initial enforcement action.302 The major difference between settling PRPs and nonsettling PRPs is that a settling PRP may relieve its burden by seeking contribution.303

In addition, according to the Central Illinois court, a nonsettlor typically has rejected a settlement offer from the government and thus deliberately chosen not to limit its payment to the proposed settlement amount.304 Finally, in deciding not to settle, a nonsettlor has opted not to receive contribution protection from the government.305 The court held that a nonsettlor, having taken these paths willingly, may not complain.306

296 See id. This conclusion, however, fails to recognize that UCFA § 1(b) defines “fault” to include acts or omissions that subject a party to strict liability, as well as conduct that is negligent or reckless. UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 41 (1977).
298 See id. at 1501.
299 Id.
300 Id. at 1505.
301 See id. at 1505.
302 See id.; see also Allied Corp. v. Frola, 730 F. Supp. 626, 638 (D.N.J. 1990) (“Since the non-settlors remain jointly and severally liable, they must make good the balance regardless of whether the settlor pays less than its proportionate share of liability.”).
304 See id.
305 See id.
306 See id.
The courts adopting the majority approach make an effort to guarantee that the "amount of the settlement" is not purely an arbitrary figure on which the government and the settling PRPs have based a "sweetheart deal." These courts have identified their task as ensuring that partial settlements are fair, adequate, reasonable, and consistent with the Constitution and the purposes of CERCLA and SARA. They have recognized that, in reviewing the proposed consent decrees that embody these settlements, they must strike a balance between "rubber-stamping" a decree and so exhaustively examining it that they, in effect, try the case. Courts thus have applied varying but similar sets of factors in evaluating partial consent decrees in CERCLA cases.

The factors that the Rohm & Haas court applied are typical of those used by the majority of courts. In Rohm & Haas, the court adopted a six-factor test to evaluate the reasonableness of a proposed partial consent decree between the government and twelve PRPs. The six factors are the relative costs and benefits of litigating the case; the strength of the government's case against the settling PRPs; the degree to which the bargaining between the government and PRP negotiators was conducted in good faith, at arm's-length, and with candor and openness; the rational relationship of the settlement amount to a plausible, if inaccurate, estimate of the settlors' volumetric contribution of wastes to the site; the ability of the settlors to satisfy an even larger judgment; and, "finally and most importantly," the degree to which the settlement serves the public interest. This last factor is intended to take into account a settle-

ment's effectiveness in compelling the cleanup of the site in question and compensating the public for its past cleanup costs.\(^{313}\)

In addition, according to the *Rohm & Haas* court, a presumption of validity attaches to a settlement that results from informed, adversarial negotiations between a PRP and a government agency, such as the EPA, that has technical expertise and a statutory mandate to enforce CERCLA.\(^{314}\) This presumption, combined with the general judicial policy of encouraging settlements,\(^{315}\) clearly "stacks the deck" against any nonsettling PRP that objects to a proposed CERCLA settlement.\(^{316}\)

When a court finds that a partial settlement is reasonable in terms of these six factors, it does not need to undertake a separate evaluation of the settlement's fairness to nonsettling PRPs, according to the *Rohm & Haas* court.\(^{317}\) In addition, the court does not need either to hold an evidentiary hearing to consider nonsettlers' objections to the proposed settlement\(^{318}\) or to thoroughly review the paper record of a case, as *Rohm & Haas* requested.\(^{319}\) A court must enter a proposed CERCLA consent decree despite its detrimental effect on a nonsettlor.\(^{320}\) Only in circumstances when the unfairness to a nonsettlor is so extreme that it rises to the level of a constitutional harm may a court reject a proposed decree.\(^{321}\)

Rejecting the objections of nonsettling defendants, the court in *Rohm & Haas* concluded that the partial settlement before it was

\(^{313}\) See Cannons Eng'g Corp., 899 F.2d at 89–90.


\(^{315}\) See, e.g., Cannons Eng'g Corp., 899 F.2d at 84; Thomas Solvent Co., 717 F. Supp. at 516.

\(^{316}\) See Neuman, supra note 219, at 10,298.

\(^{317}\) See *Rohm & Haas*, 721 F. Supp. at 687; see also Bliss, 133 F.R.D. at 568.

\(^{318}\) See *Rohm & Haas*, 721 F. Supp. at 686–87 (citing CERCLA cases in which courts refused to hold evidentiary hearing); see also Cannons Eng'g Corp., 899 F.2d at 94; Bliss, 133 F.R.D. at 568–69. For a short but helpful discussion of this issue, see Neuman, supra note 219, at 10,300.

\(^{319}\) See *Rohm & Haas*, 721 F. Supp. at 687. The court nonetheless extensively reviewed the facts of the case. See id. at 687–94.

\(^{320}\) See id. at 687. As the court in *In re Acushnet River & New Bedford Harbor* noted:

An evaluation of the Proposed Decree which overemphasizes the importance of its potential effects on the nonsettlers . . . would frustrate the statute's goal of promoting expeditious resolution of harmful environmental conditions. This Court, therefore, holds that in measuring whether the Proposed Decree is fair, reasonable, and protective of the public interest the effect on the nonsettlers is not determinative, but is merely one factor in the calculus.


\(^{321}\) See *Rohm & Haas*, 721 F. Supp. at 687.
fair and reasonable. It reasoned that CERCLA "is not a legislative scheme which places a high priority on fairness to generators of hazardous waste." According to the court, its job was to guarantee only that the settlement was reasonable, not that the amount of the settlement accurately reflected the settling PRPs' probable contribution of wastes to the site.

c. The Minority Approach: UCFA as the Model

United States v. Laskin is the only post-SARA case to apply the UCFA approach to section 9613(f)(2) as a means of determining the effect of a partial settlement on nonsettling PRPs. In Laskin, the EPA sought approval of a proposed consent decree in which 153 PRPs had agreed to pay a total of $1.47 million to settle their liability at a hazardous waste disposal site in Ohio. Nine nonsettlers at the site brought a motion asking the United States District Court for the Northern District of Ohio to defer entry of the decree until they had completed discovery on the issues of allocating liability and contribution, and the court had tried the issues. The court then could decide whether each settlor was paying its proportionate share of the liability, according to the nonsettlers. In the alternative, the nonsettlers requested that the court modify the decree to preserve all of their rights, including their right to contribution.

The Laskin court declined to modify the proposed decree, reasoning that it would violate the plain language of section 9613(f)(2) if it provided the nonsettling PRPs with the right to sue the settlors for contribution. The court also rebuffed the nonsettlers' request for

322 See id. at 697.
323 Id. at 686.
324 See id. at 685–86; see also In re Acushnet River, 712 F. Supp. at 1032.
326 See id. at *7.
327 See id. at *1.
328 See id. at *2. The nonsettlers emphasized that they had "valid and substantial defenses" against the claims of the government and the settlors. Id. at *2 n.5.
329 See id. at *2. The nonsettlers in Laskin had two basic concerns. They wanted to ensure that they would not be liable to both the government and the settling defendants for the same share of the government's cleanup costs. See id. at *2. The nonsettlers also feared that the government would impose joint and several liability against them "for amounts underpaid by the settling defendants, and in excess of the nonsettling defendants [sic] share of liability." See id.
330 See id. at *2.
331 See id. at *4. The court approvingly cited Congress's reasons for enacting § 9613(f)(1) and § 9613(f)(2), "to encourage private party settlements and cleanups and to assure the finality of settlements." Id. at *3–*4.
an evidentiary hearing.332 According to the court, neither CERCLA nor existing case law required it to hold a hearing, either to evaluate the fairness of the settlement to the nonsettlers or to examine how the settlement apportioned liability among the PRPs.333 The court added that it would perform an equitable division of liability later in the case.334

The Laskin court approved the proposed decree.335 It also, however, expressed concern regarding the nonsettling PRPs’ objections to the “possibility of potential liability in excess of their potential share of the damage.”336 As a result of this concern, the court decided to determine the effect that the settlement of the government’s cost recovery action would have on the nonsettlers using the comparative fault approach.337 Noting that section 9613(f)(1) allowed it to select appropriate equitable factors for apportioning costs,338 the court flatly stated that it would use comparative fault principles in general—and those laid out in UCFA section 6 in particular339—to make an equitable determination of the nonsettling PRPs’ relative fault.340 The Laskin court thus rejected the majority rule that, in a cost recovery action, the government always may hold a PRP jointly and severally liable for all the cleanup costs at a site, regardless of the PRP’s actual “fair share” of those costs.

Under the Laskin court’s approach, the government must reduce its claim against any nonsettlers in a CERCLA case by the greater of two amounts: either the amount of the settlement or the total amount of the settlors’ proportionate shares of the liability.341 When the government accepts a settlement amount that is less than the settlors’ combined proportionate share, it may not recover the difference from the nonsettlers.342 Thus, according to the court, the nonsettlers will not pay, through the imposition of joint and several

332 See id. at *5.
333 See id.
334 See id. at *6.
335 Id.
336 See id.
337 See id. at *7; see supra notes 165–81. The Laskin court stated that it would follow the reasoning of the court in United States v. Conservation Chem. Co. See supra notes 223–38 and accompanying text. The Laskin court also looked to Edward Hines Lumber Co. v. Vulcan Materials Co. for support for the UCFA approach. See No. 85 C 1142, 1987 WL 27368 (N.D. Ill. Dec. 4, 1987); see also supra notes 347–53 and accompanying text.
339 See supra note 222 and accompanying text.
341 See id. at *7.
342 Id.
liability, any costs properly attributable to the settlors. The Las-kin court implied that other courts should follow this lead and use their equitable powers to reject any settlement that apportions liability in a manner that is grossly inequitable and detrimental to nonsettlers.

Other courts have turned to UCFA for guidance in apportioning liability and determining the effect of settlements on nonsettling PRPs. The settlements in these cases, however, involved contribution actions between private parties rather than cost recovery actions that the government brought against a private party. In Edward Hines Lumber Co. v. Vulcan Materials Co., the United States District Court for the Northern District of Illinois approved a settlement between the plaintiff, Hines Lumber, and one of seven defendants, Vulcan. Hines had sued the seven PRPs, all suppliers of wood-preserving chemicals, for contribution after the EPA ordered the company to clean up a defunct wood treatment facility that it once owned. The nonsettlers objected to a provision in the partial settlement that barred them from bringing cross-claims for contribution against Vulcan while preserving Hines's right to sue them.

Agreeing with the Conservation Chemical court that the UCFA approach was most consistent with the goals of CERCLA, the court in Hines Lumber applied what it called the "comparative fault rule" to the settlement. It held that the settlement provided plaintiff Hines and settling defendant Vulcan with protection from contribution actions by the nonsettlers, but offset the nonsettlers' share of

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343 See id.
344 See id.
350 See id. at *2. According to the court, "this rule precludes a nonsettling defendant . . . from asserting cross-claims for contribution against a settling defendant and allows the nonsettling defendant to offset its liability to the plaintiff by an amount proportionate to the settling defendant's responsibility." Id.
the overall cleanup costs at the site by Vulcan's proportionate share of those costs. According to the court, using the comparative fault rule was equitable, because it simultaneously allowed Vulcan to "buy its peace" from Hines and protected the nonsettlers from having to pay more than their fair share of the liability. The Hines court also ruled that a hearing on the fairness of the settlement to the nonsettlers would force the parties to assume the costs and risks of the litigation that they had designed the settlement to avoid.

In Lyncott Corp. v. Chemical Waste Management, Inc., the United States District Court for the Eastern District of Pennsylvania stated that using the UCFA approach in CERCLA cases is preferable to using the UCATA approach, because the UCFA approach is more equitable. The court explicitly rejected the use of UCATA's settlement provisions as an inappropriate tool for reviewing CERCLA settlements. It noted that UCATA would divide cleanup costs among PRPs on a pro rata basis, an apportionment method that previous courts had decided was inapplicable in CERCLA cases. The court noted that UCFA, on the other hand, allows courts to apply comparative fault principles in actions, such as CERCLA actions, that are based on strict liability. It concluded that adopting the UCFA approach enables courts to avoid the inequity of forcing nonsettling PRPs to bear costs for which the settlors were responsible but did not pay.

V. THE INTERSECTION OF SECTION 9613(f)(2) AND COMPARATIVE FAULT PRINCIPLES

A. Laskin's Answer to the Majority Courts: A Fusion of Section 9613(f)(2) and UCFA Section 6

The majority of courts that have applied section 9613(f)(2) to CERCLA settlements between PRPs and the government have held that it requires courts to reduce the nonsettling PRPs' liability ac-

351 See id.
352 Id. (nonsettlers' "liability will reflect only their responsibility for the cleanup costs, regardless of the amount the settling defendants tendered to the plaintiff.").
353 See id.
355 See Lyncott Corp., 690 F. Supp. at 1418.
356 See id.
357 See id.; see also supra notes 161–64 and accompanying text.
358 See Lyncott Corp., 690 F. Supp. at 1418.
359 See id.
360 See id.
361 See supra notes 245–56 and accompanying text.
cording to the terms of UCATA section 4, these courts have interpreted the statutory language “the amount of the settlement” to mean whatever figure at which the government and the settling PRPs arrive through arm’s-length negotiation. No court has rejected a proposed settlement on the grounds that the settlement amount is unacceptable because it represents less than the settlors’ proportionate share of liability at the site.

On the contrary, the majority-rule courts have recognized settlors’ paying less than their “fair share” as their reward for settling with the government. These courts not only have acknowledged that recalcitrant nonsettllors subsequently may bear a disproportionate share of the liability, but actually have approved of this outcome, which they describe as a crucial part of the statutory scheme. According to these courts, the majority interpretation of section 9613(f)(2) fulfills CERCLA’s goal of prompt PRP-funded cleanups by enabling the government to recover the balance of the response costs at a site from nonsettllors without having to litigate the relative fault of each PRP at the site.

Implicitly rejecting the opinions of these courts, the court in Las-kin articulated a new interpretation of section 9613(f)(2). It stated that courts must use comparative fault principles to determine the liability of nonsettling PRPs to the government. According to the court, it has the duty, as well as the authority, to ensure that nonsettllors will not be subject to inequitable settlements that force them to reimburse the government for sums exceeding the costs for which they were responsible.
In order to translate its proposal into action, the Laskin court incorporated the language of UCFA section 6\(^{371}\) into section 9613(f)(2).\(^{372}\) More specifically, the court stated that it would reduce the claims of the government against the nonsettlers before it either by the amount of the settlement or by the combined total amount of all the settlors' equitable shares of liability, whichever amount was greater.\(^{373}\) It thus fused the language of section 9613(f)(2)—“the amount of the settlement”\(^{374}\)—and the language of UCFA section 6—“the amount of the [settlor's] equitable share of the obligation”\(^{375}\)—to create a new standard for determining the amount by which courts must reduce a nonsettling PRP's liability after a CERCLA settlement. This Comment will refer to the standard created by the Laskin court as the UCFA approach.

The Laskin court did not explain in detail its understanding of how the application of the principles underlying UCFA to the apportionment of nonsettlor liability would work in practice. It concisely stated its intention to reduce the liability of nonsettling PRPs at CERCLA sites according to the alternative amount-based scheme that it had delineated, and tersely warned that it expected the government, not nonsettlers, to bear the risk that any settlor had paid less than its equitable share of liability.\(^{376}\) The court justified its decision only by quoting at length from the dicta in Conservation Chemical regarding the responsibility of courts in CERCLA cases to apportion liability fairly among PRPs,\(^{377}\) and by calling “special attention” to UCFA section 6.\(^{378}\)

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\(^{371}\) See supra notes 231–33 and accompanying text.

\(^{372}\) See supra note 340 and accompanying text.

\(^{373}\) See supra note 341 and accompanying text. After announcing that it would use the comparative fault approach, the court did not address explicitly the issue of reducing the amount of the settlors' claims against the nonsettlers; it only discussed reducing the government's claim. See Laskin, No. C84-2035Y, 1989 WL 140230, at *7. The Laskin court, however, likely intended to apply the rule of UCFA § 4(a): that settling defendants may seek contribution for any amount that they have paid in excess of their equitable share of liability. See supra note 180. The court's comment that it would consider the issue of apportioning liability “in the context of the settling defendants [sic] suits for contribution against the non-settling defendants,” in tandem with its proposal to apply UCFA, suggests that it held this view. See supra note 334 and accompanying text.


\(^{375}\) See supra note 232.

\(^{376}\) See supra note 342 and accompanying text.

\(^{377}\) See supra note 339 and accompanying text.

\(^{378}\) See supra note 337 and accompanying text.
B. The Benefits of Laskin’s Comparative Fault Approach

The Laskin court is brief but persuasive in its argument that using an approach based on the principles of UCFA to determine the liability of nonsettling PRPs to the government would be more beneficial to the CERCLA settlement process than using the majority, UCATA approach. There would be two significant results if a court used the Laskin court’s UCFA approach to apportion nonsettlor liability in CERCLA cases. First, UCFA section 6 would reduce the amount of the government’s claim against any nonsettling PRPs by the combined amount of all the settling PRPs’ equitable shares of the liability at the site, \(^{379}\) rather than just the amount of the settlement between the government and the settling PRPs, as occurs under UCATA section 4. \(^{380}\)

Second, under Laskin’s UCFA approach, each nonsettling PRP would be liable to the government only for its proportionate share of the liability at a site. \(^{381}\) Holding a nonsettling PRP accountable only for its “fair share” is a radical departure from the government’s version of the UCATA approach, which allows the government to sue each nonsettlor under a theory of joint and several liability for any and all cleanup costs that remain after settlement. \(^{382}\) There are a number of broad policy reasons, as well as reasons more specific to the implementation of CERCLA, for adopting a comparative fault approach to nonsettlor liability after CERCLA settlements.

1. The Comparative Fault Approach Is More Equitable

The primary reason for preferring the UCFA approach over the UCATA approach is simply that the UCATA approach leads to unfair results. \(^{383}\) It separates liability from fault, \(^{384}\) whereas the UCFA approach determines liability according to fault. \(^{385}\) CERCLA’s goal of compelling PRPs to pay for the harm that they have caused at a site \(^{386}\) means just that—PRPs should pay for the harm for which they themselves are responsible at the site. It does not follow, however, that PRPs should have to pay for more than that for which

\(^{379}\) See supra note 232.

\(^{380}\) See supra note 217.

\(^{381}\) See supra notes 341–43.

\(^{382}\) See supra note 220 and accompanying text.

\(^{383}\) See DeWolf, supra note 186, at 50–51.

\(^{384}\) See id.

\(^{385}\) See supra notes 166, 176 and accompanying text.

\(^{386}\) See supra notes 6, 29 and accompanying text.
they are responsible. Because the UCATA approach forces nonsettlers to bear more than their burden, it strays from Congress's purposes in enacting CERCLA. Moreover, courts in other areas have applied comparative fault principles to determine the effect of settlements on nonsettlers, on the grounds that the comparative fault approach is the most fair. Generally, a growing number of courts are apportioning liability according to parties' relative culpability.

2. The Comparative Fault Approach Encourages Settlement

The government typically argues that applying comparative fault principles in CERCLA cases would undercut the statute's aim of reaching quick settlements with PRPs. According to the government, the multitude of factors that the parties must take into account in order to allocate liability according to relative fault would act as a severe disincentive to settlement. In addition, the government argument continues, if the government were to agree to hold nonsettlers liable for their "fair share" of the costs at a site, then PRPs that might otherwise settle would hold out in order to receive the benefit of limited liability. This argument against the UCFA approach, though initially attractive, is flawed.

The government appears to suggest that, whenever it successfully litigates against nonsettling PRPs for its uncollected cleanup costs, a court must award it the full amount of these costs. However, CERCLA does not require explicitly that the government sue nonsettling PRPs to recover its cleanup costs at a site. Section 9613(f)(3) states only that the government "may" bring such actions

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387 See supra notes 2–7, 29 and accompanying text.
390 Neuman, supra note 219, at 10,302.
391 See id.
392 See id.
393 See id.
394 Id.
against nonsettlers. In addition, the statute does not require that the government always recover 100% of its unpaid costs. For example, the fact that Congress provided for "mixed funding" in section 9622 indicates that it did not intend to require the government to recover all of its costs from the PRPs at a site, whether settlors or nonsettlors. As one commentator has noted, it does not make sense to interpret CERCLA to allow the government to exercise tremendous equitable discretion while barring courts from exercising theirs.

Moreover, it is not as obvious as the government suggests that using the UCFA approach to determine nonsettlor liability would deter PRPs from settling. Settlements always will be attractive to parties that want to keep their litigation costs low and receive the contribution protection that section 9613(f)(2) provides to settlors. It also is not clear that incorporating UCFA principles into the CERCLA settlement process would dampen the government's willingness to settle. Courts promoting the UCATA approach have held that the UCFA approach would deter the government from reaching settlements with PRPs, because the government—and not the settlors—would have to litigate with the nonsettlors the issue of whether the settlors paid their equitable share of the costs at a site. As a result of this litigation, the government supposedly would lose at least the time and money that it intended to save by settling, and likely would spend much more than if it simply could sue the nonsettlors for the remainder of the cleanup costs at a site.

This argument rests upon the apparent belief of the government and the majority-rule courts that the government and the nonsettlors must fight out the apportionment issue in court, and that only a court may make the decision about who is to pay the cleanup costs at a site. If, however, the task of allocating liability among PRPs falls not to the courts, but to the government itself, or the PRPs, or even a special master, then the rationale underlying the government's argument virtually disappears. This Comment proposes to

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395 See id. at 10,302 n.88; see also 42 U.S.C. § 9613(f)(2) (1988).
396 See Neuman, supra note 219, at 10,302.
397 See id. at 10,302 n.88; see also supra notes 117-19 and accompanying text.
398 See Neuman, supra note 219, at 10,302.
399 See id.
400 Id.
401 Id.
402 See supra notes 285-88 and accompanying text.
403 Id.
assign the job of allocating liability to an entity other than the judiciary and thus to relieve all the parties of the burden of litigating the issues.

In practical terms, the UCATA approach actually undercuts CERCLA's goal of promoting settlements, because it encourages partial settlements while discouraging "global" settlements.\(^{404}\) The approach allows the government to pursue nonsettling PRPs for the remainder of the cleanup costs at a site, and reduces the amount that the government may seek from a nonsettlor only by the amount it received from the settling PRPs. The UCATA approach thus enables and even invites the government strategically to "split its bets," as one commentator has described it, by settling with one PRP for any amount it chooses, while continuing to seek the full amount of the remaining cleanup costs from the nonsettling PRPs.\(^{405}\) It encourages the government to use the settling PRPs to insure that the government will recover a definite sum, while using the nonsettling PRPs to try to get a complete recovery.\(^{406}\)

Applying the Laskin court's UCFA approach is more likely to promote global settlements in CERCLA cases, because the approach would require courts to determine the relative share of liability attributable to every party to an action before hearing claims for contribution. The resolution of all issues regarding the relative liability of each PRP would mean that few, if any, significant questions would remain for further trial. This lessening of the need for any additional litigation would make settlement both more possible and more attractive than under the UCATA approach. It would promote the increased settlement of contribution claims among PRPs, saving PRPs seeking contribution the time and money spent on litigation, and conserve judicial resources. It also would encourage the government to settle with a nonsettling PRP rather than sue, because the government ultimately might recover only an amount of damages equal to the nonsettling PRP's equitable share of liability.

\(^{404}\) See DeWolf, supra note 186, at 51. In a global settlement, all the parties to an action may resolve the whole action at one time. \textit{Id.}

\(^{406}\) See \textit{id.} DeWolf gives several reasons why a partial settlement is better than no settlement at all. A partial settlement may reduce the number or complexity of the issues that the parties must litigate at trial. It also may eliminate litigation costs that the settling parties otherwise would incur. Finally, it may lead to a total settlement. \textit{See id.} at 47 n.30. Partial settlements also ensure that a plaintiff immediately will receive a definite sum of money, and allow the parties involved to remove themselves from the litigation and "pursue more productive matters." M. Patricia Adamski, \textit{Contribution and Settlement in Multiparty Actions Under Rule 10b-5}, 66 \textit{Iowa L. Rev.} 533, 543 (1981).

\(^{406}\) See DeWolf, supra note 186, at 67.
In addition, under the UCATA approach, while the government would save the time and money it could have spent litigating against the PRPs with whom it opted to settle, it still would have to pay the costs of litigating against all the nonsettling PRPs. These costs easily could surpass the legal costs with which it began the case. As noted above, retaining these costs defeats one of the government’s main purposes in settling CERCLA cases: avoiding such costs.\footnote{See supra notes 285–88, 402–03 and accompanying text.}

Finally, if the purpose of the UCATA rule is to enable a plaintiff to be made whole for its injury, the rationale underlying this purpose does not apply in CERCLA cases.\footnote{Neuman, supra note 219, at 10,301.} The government does not need to pursue nonsettlers for more than their equitable share of liability when it may use monies from the Superfund, under the “mixed funding” provision of section 9622,\footnote{See supra notes 34, 41, 117–19 and accompanying text.} to pay for any costs that it could not recover from PRPs.\footnote{Neuman, supra note 219, at 10,301–02.}

3. The Language of Section 9613(f)(2) Supports the Comparative Fault Approach

The weakest argument of the majority courts and the government in support of the UCATA approach may be their claim that the language of section 9613(f)(2) clearly indicates Congress’s intention to inculcate the terms of UCATA into CERCLA.\footnote{See Alfred R. Light, The Importance of “Being Taken”: To Clarify and Confirm the Litigative Reconstruction of CERCLA’s Text, 18 B.C. ENVTL. AFF. L. REV. 1, 25, 34–35 (1990); Alfred R. Light, Sweetheart, Goodnight?, 4 Toxics L. Rep. (BNA) 659, 660 (1989) [hereinafter Sweetheart, Goodnight?]; Alfred R. Light, SARA’s Consequences: The Emerging Legal Debate over Liability, Contribution, and Administrative Law 57, 66–69, in HAZARDOUS WASTE LITIG. AFTER THE RCRA AND CERCLA AMENDMENTS 1987 (1987); Neuman, supra note 219, at 10,301.} The wording of section 9613(f)(2)\footnote{See supra note 245.} is not identical to the language of UCATA section 4,\footnote{See supra note 217 and accompanying text.} and an examination of the legislative history of SARA suggests that there is room for much more flexibility in interpreting section 9613(f)(2) than the majority of courts currently acknowledges. In fact, the language of section 9613(f)(2) arguably invites the application of a UCFA-based approach, rather than the UCATA approach, which the EPA has promoted so fiercely.

Before SARA’s enactment in 1986, the government had advocated the adoption of UCATA section 4 as federal common law.\footnote{See supra notes 217–22 and accompanying text; see also Sweetheart, Goodnight?, supra note 411, at 659.} When
Congress began discussions to reauthorize CERCLA, the EPA proposed legislation that embodied this pre-SARA embrace of the UCATA approach.\textsuperscript{415} The agency's suggested provision regarding contribution protection, proposed CERCLA section 113(k)(3), reduced the amount of any "claim" against a nonsettlor by an "amount stipulated by the settlement," as long as the settlement was "in good faith."\textsuperscript{416} This proposal obviously resembles UCATA section 4, which states that the release of a settling party reduces any "claim[s]" against nonsettling parties "to the extent of any amount stipulated by the release . . . or in the amount of the consideration paid for it."\textsuperscript{417} The first Senate committee to consider the EPA's proposed legislation added their own language, which furthered the agency bill's ends by allowing the government to bring actions against nonsettlers "for the remainder of the relief sought."\textsuperscript{418} The Senate committees that subsequently discussed the bill, however, made several significant changes to its text.\textsuperscript{419} These changes, to which Congress ultimately agreed, indicate that Congress did not want to incorporate the full-blown UCATA approach into the CERCLA settlement process.\textsuperscript{420} The changes suggest that proponents of the final version of the bill amending CERCLA not only saw value in a UCFA-based approach, but actually wanted to ensure that courts would apply equitable principles when they determined the liability of nonsettling PRPs.

First, proposed section 113(k)(3), the EPA bill provision that ultimately became section 9613(f)(2), was altered so that it now requires courts to reduce the amount of the nonsettlor's "potential liability," rather than the amount of the "claim" against the nonsettlor, by "the amount of the settlement."\textsuperscript{421} The second change involved the elimination of the phrase "the remainder of the relief sought" from the EPA bill provision that eventually became section 9613(f)(3).\textsuperscript{422} The combined effect of these amendments to the EPA bill was to foreclose the possibility that the size of a claim against a

\textsuperscript{415} See Sweetheart, Goodnight?, supra note 411, at 659.
\textsuperscript{417} See supra note 217.
\textsuperscript{418} See S. 51, 99th Cong., 1st Sess., § 126 (1985) (proposed CERCLA § 113(b)(4)).
\textsuperscript{419} See Sweetheart, Goodnight?, supra note 411, at 659–60; see also Neuman, supra note 219, at 10,301 n.84.
\textsuperscript{420} Id. at 660; see also Neuman, supra note 219, at 10,301.
\textsuperscript{421} See Sweetheart, Goodnight?, supra note 411, at 660.
\textsuperscript{422} See id. Section 9613(f)(3) now states that the government "may bring an action against any person who has not . . . resolved its liability" when it has "obtained less than complete relief" from that person. 42 U.S.C. § 9613(f)(3) (1988).
nonsettlor could be determined solely by the terms of an earlier settlement. 423 Despite the EPA's disagreement, the phrase "the amount of the settlement" does not place a ceiling on the amount by which a court may reduce a nonsettlor's "potential" liability. The plain language of section 9613(f)(2) requires courts to reduce a nonsettlor's liability by at least the amount of the settlement. It also permits courts to limit a nonsettlor's liability to less than the total amount of the government's uncollected cleanup costs at a site if a court decides that the nonsettlor's "fair share" of the costs at the site is less than the costs that the settlement assigned to the nonsettlor. 424 In other words, Congress's use of the word "potential" implies that courts are allowed to hold nonsettlers liable for less than all the government's costs, if it is equitable for them to do so.

C. Improvements on the Laskin Approach: A Modified UCFA Approach

This Comment proposes three modifications to the UCFA approach, as the Laskin court delineated it, that would bring it more closely into line with CERCLA's goal of ensuring that responsible parties pay to remedy the harm that they caused. 425 First, rather than requiring courts to apportion liability among PRPs, the UCFA approach should assign that responsibility to the government, a PRP committee, or even a special master, whose sole task could be to research and resolve the highly technical issues that usually surround PRP liability. Second, whatever entity performs the apportionment of liability at a site should do so before the court approves a proposed settlement between the government and the settling PRPs at the site or otherwise determines the outcome of the government's cost recovery action against the PRPs there. Third, it may be more practical to apportion liability not just among the PRPs that the government sues in a cost recovery action, but also among those PRPs that the original defendant PRPs join as third-party defendants in contribution actions.

423 See Sweetheart, Goodnight?, supra note 411, at 660.
424 See id. But see United States v. Rohm & Haas Co., 721 F. Supp. 666, 679 n.14 (1989) ("[W]e are not persuaded that § 9613(f)(2) is merely some congressionally mandated minimum benefit to non-settlors, upon which courts may improve as they wish.")
425 See supra note 29 and accompanying text.
1. Who Should Perform the Apportionment?

One argument against the adoption of the UCFA approach in CERCLA cases is that it would impose an overwhelming burden on the judiciary. This argument breaks down into two sub-arguments: first, that requiring courts to evaluate the relative fault of every PRP at a site and fashion a settlement accurately reflecting each PRP's proportionate share of liability is more costly and time-consuming than allowing them to follow the UCATA approach; and, second, that judges and juries do not have the technical expertise to apportion liability according to a comparative fault rule.\(^{426}\)

Under a modified UCFA approach, the government could assume the job of apportioning liability among PRPs on the basis of comparative fault. The EPA usually has the most information about a site, at least in the early stages of a case, and its estimates could give PRPs an idea of what the government considers an appropriate apportionment of liability at the site.\(^{427}\) The EPA, however, generally has declined most opportunities to become involved formally in PRPs' negotiations to allocate liability.\(^{428}\) Stating that PRPs should "work out among themselves questions of how much each will pay towards settlement at a site,"\(^{429}\) the EPA typically has provided only the information contained in the "special notice" letters that it sends to PRPs to notify them of their potential liability at a site, identify their fellow PRPs, and encourage them to negotiate.\(^{430}\)

Nonetheless, the government's pre-complaint-filing policy of trying to identify PRPs' contributions to the harm at a site encourages it to take an active role in PRPs' discussions on allocating liability at the site.\(^{431}\) Moreover, CERCLA provides the government with the authority to collect and use information about the contamination at a site\(^{432}\) to begin to apportion liability among PRPs at an

\(^{426}\) Even with such expertise, a court would need to review an enormous amount of documentation and conduct impractical evidentiary hearings. *See, e.g.*, *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1031 n.21 (D. Mass. 1989); *see also supra* notes 317–19 and accompanying text. This not only would threaten to exhaust the resources of the court system and the parties, but also would delay both the start of the cleanup, which is the subject and purpose of the litigation, and the replenishment of the Superfund.

\(^{427}\) *See Balcke, supra* note 116, at 153.


\(^{429}\) Sexton, supra note 428, at 946 (citing Interim Guidelines for Preparing Nonbinding Allocations of Responsibility, 52 Fed. Reg. 19,919, 19,919 (1987)).

\(^{430}\) *See 42 U.S.C. § 9622(e)(1) (1988); see also supra* note 107.

\(^{431}\) *See Gaynor, supra* note 88, at 757.

\(^{432}\) *See, e.g.*, *42 U.S.C. § 9604(b) (1988) (granting EPA power to undertake investigations,*
early stage. Most significantly, section 9622(e)(3) enables the EPA to prepare a preliminary NBAR in which the agency assigns PRPs roughly proportional percentages of the total liability at a site, after performing a remedial investigation and feasibility study (RI/FS) there. When the EPA performs an RI/FS, it collects enough factual information about the conditions at a site to select an effective remedy for the site. Section 9622(e)(3) assumes that this information may be a sufficient basis for allocating liability among the PRPs at the site, and encourages the EPA to perform such an allocation in order to promote a settlement. Section 9622(e)(3) provides that the PRPs at the site fund the NBAR.

Section 9622(e)(3) limits the use of NBARs, however, to sites where the government believes that an NBAR might encourage settlement. Moreover, the government may reject PRP settlement offers that are based on NBARs, even if an offer represents a substantial portion of the cleanup costs at a site. The fact that the government has tremendous discretion in electing to prepare an NBAR, let alone in approving a settlement offer that is based upon one, renders the NBAR less than promising as an allocation tool. And, in practice, the EPA consistently has been reluctant to use NBARs.

Providing a more devastating blow to the NBAR's usefulness, however, is the fact that courts may neither receive an NBAR as evidence nor review the documentation supporting an NBAR. Unless Congress amends section 9622(e)(3) both to allow courts to examine NBARs as they would other evidence and to give courts the jurisdiction to review NBARs as part of the administrative record regarding a site cleanup, the NBAR will remain a potentially

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433 See, e.g., id. § 9622(e)(3) (allowing EPA to prepare NBARs); id. § 9622(g) (allowing EPA to settle with “de minimis” parties).

434 See supra notes 192–97 and accompanying text.


437 Id. § 9622(e)(3)(D).

438 See supra note 198 and accompanying text.

439 See supra note 199 and accompanying text.

440 See supra note 428 and accompanying text.

effective but crippled method of starting to resolve issues of liability earlier in a CERCLA case.442

Forming a PRP committee to apportion liability at a site would be another option under a modified UCFA approach.443 The PRPs forming the committee would determine its size and powers and the procedures by which it would operate, and then would elect or designate its members. They might want to set aside a certain number of seats for owners or operators, generators, and transporters, or for larger and de minimis waste contributors. They probably would want to give the committee, at a minimum, the authority to gather information from each PRP, hire private investigators and technical experts as needed, and, most important, produce a document, binding on all committee members, that accurately divides liability among them according to relative fault. The committee also may want to hire its own attorney to conduct the extensive discovery necessary to prepare an adequate allocation.

The reliability of any numbers that parties to an action calculate by themselves is always questionable.444 At a multi-PRP site, however, where the parties ultimately have divergent interests, it is reasonable to assume that each PRP would negotiate at arm’s length and with zeal sufficient to protect its own interests. Such negotiations more likely than not will arrive at inaccurate results. Alternatively, the government may assign one of its own technical experts to the committee, as an informal advisor to the committee,445 a full and formal participant in its discussions, or the primary decision-maker. This government representative could observe or oversee the allocation process to prevent collusion or fraud, or to guard against inadvertent miscalculations.

Another option would be to have a court appoint a “special master.”446 Under a modified UCFA approach, a master could have one

442 For a discussion of the original Senate proposal regarding NBARs, see Prager, supra note 68, at 215–16; Baleke, supra note 116, at 146–47. The proposal would have required the EPA to prepare NBARs for “virtually all sites,” and subjected to judicial review agency decisions not to accept settlement offers to pay more than 50% of the allocated costs. See 198 CONG. REC. H9104 (daily ed. Oct. 3, 1986); see also Prager, supra note 68, at 216–17.

443 See generally INFORMATION NETWORK FOR SUPERFUND SETTLEMENTS, PRP ORGANIZATION HANDBOOK (1989).

444 See DeWolf, supra note 186, at 62.

445 See Sexton, supra note 428, at 946.

It could collect, assimilate, and review as much information as possible regarding the liability of a group of PRPs at a site and apportion liability among these parties using a comparative fault analysis. The master then would provide the court with findings of fact regarding apportionment, and the court would use these findings in making its own legal findings, which it would announce when it entered judgment. In the alternative, the master could assist the court in reviewing a completed allocation that the parties have presented to the court for approval as part of a consent decree settling a case. Although parties to a suit usually split the cost of a master, it might be more fair to require the PRPs at a site to shoulder the full expense, rather than require the taxpayers to pay a portion.

Yet another possibility is alternative dispute resolution (ADR). The presence of an independent third party—whether a mediator, an arbitrator, or a “judge” overseeing a mini-trial—may enable PRPs more easily to reach a consensus on how to allocate liability by introducing objectivity and credibility into the PRPs’ negotiations.

who would be “a kind of hybrid between a master and a scientific law clerk.” Harold Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Penn. L. Rev. 509, 550–54 (1974). Once the government has filed its complaint, a court could assign such a “scientific law clerk” the task of either allocating liability among PRPs or assisting the court in reviewing the allocation when the parties present it to the court for approval.

The government probably will object to having a master, rather than an “Article III judge,” make what it would argue are legal decisions: the determinations of the PRPs’ liability. See Gaynor, supra note 88, at 758. According to the government, the court should limit the tasks of the master to scheduling and discovery management. Id. It may be possible to avoid this issue by allowing a court to order the master to put its findings in factual terms rather than legal terms. In preparing its allocation, then, a master would make findings regarding the volume, toxicity, and migratory potential of each PRP’s waste and the harm that the waste has caused relative to other PRPs’ wastes, rather than findings regarding each PRP’s share of liability.

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See Gaynor, supra note 88, at 758.


See Cohen, supra note 451, at 10,158. Cohen recognizes that ADR efforts often fail, because the disputes that arise over the selection of a remedy at a site “spill over” into negotiations regarding the allocation of cleanup costs among the PRPs at the site. Id. at 10,158, 10,161. He proposes that, to prevent this “spillover” effect, PRPs agree initially to share all administrative and technical costs at a site on a per capita basis. Id. at 10,159. Once
As a result, the parties and the courts may avoid the time and
expense of litigating these issues, and most important, disagree-
ments over how to allocate liability do not delay a more timely
implementation of a site remedy.

2. When Should the Apportionment Occur?

Under a modified Laskin approach, the apportionment of liability
among the PRPs at a CERCLA site could occur before court ap-
proval of any proposed settlement that would resolve the govern-
ment's cost recovery actions against some of the PRPs. The court
then simultaneously would enter the judgment and announce the
amount of damages for which each PRP that is a party to the action
is responsible. Requiring courts to inform PRPs of the amount of
their "fair share" of liability at a site at all—let alone before reso-
lution of the government's cost recovery action—would represent a
vast improvement over the UCATA approach's explicit disregard
for the equitable apportionment of liability.

Some commentators have suggested that asking a court to make
"subtle determination[s] of relative fault" before trial, in some type
of summary proceeding, would be pointless. Because a judge or
jury usually wants to hear witnesses, view exhibits, and otherwise
carefully examine the issues before rendering such a decision, these
commentators assert, only a full trial on the merits will suffice. If,
however, the government, a PRP committee, a special master, or
an arbitrator allocates liability among the PRPs at a site, then the
court would not have to assume the complex task of performing the
allocation itself. Instead, it only would have to apply the same stan-
dard that courts use to review CERCLA consent decrees, and ex-
amine the completed allocation to ensure that it is fair, adequate,
reasonable, and consistent with the Constitution, CERCLA, and SARA.\footnote{See supra note 309 and accompanying text.}

It is important to recognize that any apportionment of liability in a CERCLA case, whether based on relative fault or some other standard, may become inaccurate. Additional information may surface about the conditions at a site or a PRP's responsibility at the site, and originally named PRPs may establish their "innocence." In addition, the apportionment may have allocated responsibility for less than the entire harm at a site, because the PRPs whose liability was determined only caused that amount of harm, and the EPA since may have discovered new PRPs at the site. These changes in the circumstances under which the apportionment occurred may increase or reduce the amounts determined to represent each original PRP's equitable share of liability.

Therefore, a modified UCFA approach would require a mechanism for redistributing the liability among PRPs at a site when an extreme change in circumstances at the site made it necessary. A court, or whatever other entity the PRPs at a site have chosen to prepare their original apportionment, could perform this redistribution in the same way that a court reallocates the share of an insolvent joint tortfeasor among other joint tortfeasors under UCFA section 2(d).\footnote{See supra notes 182–86 and accompanying text.}

It may be simplest to require the entity that performs the original apportionment to review the status of a site every two years, or at some similarly appropriate interval, to ascertain whether it needs either to reapportion liability among the original PRPs or to determine any new PRPs' "fair shares" of liability. The change in circumstances at the site would have to be so great as to make it grossly inequitable not to respond by alleviating the original PRPs' new hardship.

As a result, in order to ensure that they would be able to pay their share at a site and then be done with it, PRPs preparing the original apportionment would try to guarantee that the apportionment was as comprehensive and accurate as possible. They also would try to ensure that as many other PRPs as they could join were parties to the action, in order to reduce their individual liability to the greatest extent possible.

3. Whose Liability Should Be Subject to Apportionment?

Under the UCFA approach as presently constituted in \textit{Laskin}, only those PRPs that are defendants in the litigation at a site have
their liability apportioned according to relative fault.\textsuperscript{459} Under a modified UCFA approach, it may make sense to apportion liability among all of the PRPs joined as either defendants or third-party defendants, rather than only those PRPs that the government has chosen to join in the action.

This approach could promote the statute’s goal of placing the burdens of financing and performing site cleanups on the responsible parties. It also, however, poses serious questions concerning issues such as the binding nature of consent decrees, and the power of nonsettling parties to intervene before courts approve settlements that will deprive the nonsettlers of their claims. A discussion of these issues, however, is beyond the scope of this Comment. If the better policy is to force all of the PRPs at a site, and not just those made party to the litigation, to pay for the harm that they have caused, then the resolution of these issues is important. It would be more efficient, as well as more effective, to compel the defendant PRPs to join all of the other PRPs that they could locate to increase the size of the defendant pool. In addition, if as many PRPs were party to the litigation as possible, it would be more likely that the court’s resolution of the case would be final. Because PRPs are seeking certainty about their status at a site when they negotiate a CERCLA settlement addressing their liability at a site, they would try to make the resolution of their liability as complete and as final as they could. The more parties they joined to the action, the stronger their assurance of finality would be.

VI. CONCLUSION

When Congress amended CERCLA in 1986, it explicitly gave PRPs permission to sue one another for contribution. It also gave the government the authority to grant contribution protection—protection against nonsettling PRPs’ actions for contribution—to PRPs that reach an administrative or judicially approved settlement with the government. Courts have differed on how to determine the impact of settlements on nonsettling PRPs. Although the vast majority of courts have held that the statute’s contribution protection provisions reduce a nonsettlor’s liability only by the amount of the settlement to which the nonsettlor is not a party, the \textit{Laskin} court broke from the pack to embrace equity. Turning its back on the majority of courts that addressed the issue, the \textit{Laskin} court reduced

\textsuperscript{459} See supra note 337 and accompanying text.
the nonsettlers' potential liability at a site by the settlors' "fair share" of the cleanup costs at the site.

Future application of the Laskin court's comparative fault approach in CERCLA cases, and rejection of the current "amount of the settlement" approach, would vastly improve the Superfund settlement process, by forcing the parties on all sides of the table to take into account the principle of fairness. Adopting the Laskin court's comparative fault approach, with the three modifications that this Comment proposes, would fulfill CERCLA's goal of ensuring that responsible parties pay to remedy the harm that they caused. Moreover, allocating liability at CERCLA sites using this "fair share" method would promote CERCLA's goals of expediting cleanups, promoting voluntary settlements, and avoiding excessive litigation.