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WHEN IS ONE GENERATOR LIABLE FOR ANOTHER'S WASTE?

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I. INTRODUCTION

Since the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund Act or CERCLA)¹ was adopted as a compromise bill by the lame duck Congress in December of 1980, companies that generated and disposed of hazardous wastes at off-site facilities have been seriously concerned about the question of when one company can be held liable for clean up and other response costs associated with another company's wastes. To begin with, a company faces the prospect that courts might hold it strictly liable under Section 107² of the Superfund Act for cleanup costs associated with its own waste, even where it exercised due care and sent wastes to licensed facilities years before the statute was enacted.³ Moreover, a company that generated one percent or less of the total volume of waste ever sent to a site is faced

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¹ Pub. L. No. 96-510, 94 Stat. 2767 (1980)(codified at 42 U.S.C. §§ 9601-9657 (Supp. V 1981)).

² 42 U.S.C. § 9607 (Supp. V 1981).

³ The issue of retroactive application of the Superfund Act was addressed in Ohio *ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983), when Judge Dowd overruled a motion for dismissal filed by two companies in the business of transporting wastes. The court held that retroactive application of § 107 was permitted as a matter of statutory construction, but declined to reach the question of whether such an application is constitutionally permissible. *Id.* at 1302. However, this question was addressed in United States v. South Carolina Recycling and Disposal, Inc., No. 80-1274-6 (D.S.C. Feb. 23, 1984), in which the court considered the Superfund Act's retroactivity and concluded that the statute is constitutional. *Id.* slip op., at 18-24. In United States v. J.B. Stringfellow, No. CV-83-2501-MML (C.D. Cal., April 9, 1984), the court has declined to rule on the issue of retroactivity of the Superfund Act until the facts of that case have been developed more fully.

with the prospect of liability for cleaning up the entire site, even when there is reason to believe that the company's wastes were incinerated, recycled or otherwise disposed of by the site operators long before any response costs were incurred.

Two issues are central to the question of when one generator may be liable for another's waste: 1) whether and to what extent a causal connection must be shown to exist between a generator's waste and a particular response measure or cost, and 2) whether liability under the Superfund Act is joint and several or several only. The language of the Superfund Act does not clearly resolve either issue, and while some trial courts have recently begun to address them, no definitive solution is at hand.⁴ Nevertheless, the initial decisions have held that while joint and several liability is not mandatory, it *may* be imposed under section 107 of the Superfund Act in certain cases where an indivisible injury exists.⁵ Several courts have also concluded that a relaxed standard of causation may be employed.⁶

This article will examine the first group of judicial decisions under the Superfund Act addressing the issues of joint and several liability and causation. This Article will also note those issues that have not yet been addressed by the courts, but which must be resolved in the course of determining the liability of one generator for the waste of another.

II. JOINT AND SEVERAL LIABILITY

Courts that have addressed the issue of joint and several liability have agreed that Section 107 of the Superfund Act permits, but does not mandate, the imposition of joint and several liability. Some of these decisions include *United States v. Conservation Chemical Co.*,⁷ *United States v. Northeastern Pharmaceutical and Chemical Co.*,⁸ *United States v. A & F Materials Co.*,⁹ *United States v. Wade*,¹⁰ *United States v. Chem-Dyne Corp.*,¹¹ *United States v. South Carolina Recycling and Disposal, Inc.*,¹² and most recently, *United States v. J.B. Stringfellow*.¹³ Of these

⁴ Appeals of these initial cases will re-examine the questions of joint and several liability and causation under the Superfund Act. These issues are also pending for the first time in a number of district courts.

⁵ See *infra* notes 7-51 and accompanying text.

⁶ See *infra* notes 53-57 and accompanying text.

⁷ No. 82-0983-CV-W-5 (W.D. Mo. Feb. 3, 1984).

⁸ 579 F. Supp. 823 (W.D. Mo. 1984) (*NEPACCO or Denney Farms*).

⁹ 578 F. Supp. 1249 (S.D. Ill. 1984).

¹⁰ 577 F. Supp. 1326 (E.D. Pa. 1983), reprinted in 20 Env't Rep. Cas. (BNA) 1277 (1984) (*Wade II*).

¹¹ 572 F. Supp. 802 (S.D. Ohio 1983).

¹² No. 80-1274-6 (D.S.C. Feb. 23, 1984) (*Bluff Road*).

¹³ No. CV-83-2501-MML (C.D. Cal. April 5, 1984) (*Stringfellow*).

cases, all but *NEPACCO* involve multiple-generator defendants.¹⁴ In examining liability under the Act, these courts were cognizant of the difficulties involved in proving the liability of each individual generator at a multigenerator site. Although all but *NEPACCO* were pretrial opinions decided without the benefit of a factual record, the courts presumed that there would be at least some commingling of wastes,¹⁵ and also assumed that there would be a problem posed "when dumped chemicals react with others to form new or more toxic substances."¹⁶

Courts which have examined the issue of joint and several liability have stated that the statutory language of the Superfund Act creating liability is ambiguous, thus necessitating an examination of the legislative history.¹⁷ Previously, critics of Superfund legislation maintained that joint and several liability was "grossly unfair" even under versions of the Act that would have expressly permitted apportionment of damages.¹⁸ Consequently, references to joint and several liability present in earlier versions of the House and Senate bills were eliminated in the final bill passed by Congress in order to secure the majority necessary for enactment.¹⁹

Despite revision of the legislation, the cases generally conclude that de-

¹⁴ *NEPACCO* did not involve multiple generator-defendants.

¹⁵ See *A & F Materials*, 578 F. Supp. at 1252-53.

¹⁶ *Chem-Dyne*, 572 F. Supp. at 805-06.

¹⁷ See, e.g., *A & F Materials Co.*, 578 F. Supp. at 1252-53.

¹⁸ Senator Helms explained the views of his colleagues in the Senate regarding the unfairness of joint and several liability as follows:

Retention of joint and several liability in S. 1480 received intense and well-deserved criticism from a number of sources, since it could impose financial responsibility for massive costs and damages awards on persons who contributed only minimally (if at all) to a release or injury. Joint and several liability for costs and damages was especially pernicious in S. 1480 . . . because it was coupled with an industry-based fund. Those contributing to the fund will frequently be paying for conditions they had no responsibility in creating or even contributing to. To adopt a joint and several liability scheme on top of this would have been grossly unfair.

126 CONG. REC. § S15004 (daily ed. Nov. 24, 1980). Senator Stafford, the sponsor of the Senate bill, noted that many of his colleagues "perceive [S. 1480] as punitive and unnecessarily rigorous." *Id.* at S14967. Senator Riegle described the early bills which included provisions for joint and several liability as "too burdensome or punitive." *Id.* at S15007.

¹⁹ Senator Stafford, one of the architects of S. 1480 and the final Superfund legislation, conceded that "S. 1480 [including a provision for joint and several liability] *cannot be enacted.*" *Id.* at S14968 (emphasis added). He described the situation as follows: "I am a realist and know that many perceive [S. 1480] as punitive and unnecessarily rigorous. For that reason, Senator Randolph and I introduced [a compromise bill] last week. . . . We eliminated the term joint and several liability." *Id.* at 14967. A review of the actions of the House and Senate on bills predating the Superfund Act shows that Senator Stafford was correct: no bill providing for joint and several liability, even with apportionment, could pass both Houses of Congress. For example, during debate on the new compromise bill, Senator Cohen stressed that the elimination of joint and several liability was essential to passage of the Act in the Senate. *Id.* at S14980.

letion of the term was not intended to bar the imposition of joint and several liability in every case.²⁰ Rather, relying on the statements of legislators sponsoring the Superfund Act bills—but opposing the deletion of joint and several liability— courts thus far have determined that the controversial language creating joint and several liability was eliminated from the Superfund Act to allow its application on a case-by-case basis, subject to common law principles. As one court stated:

The deletion was not intended as a rejection of joint and several liability. . . . Rather, the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with the multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.²¹

At least one court has found support in the language of the statute for the conclusion that the Superfund Act imposes joint and several liability. Chief Judge Foreman, author of the *A & F Materials* decision, concluded that the “express statutory language” of the Act demonstrates congressional intent to impose joint and several liability.²² Liability under the Act is defined as the standard of liability under section 311 of the Federal Water Pollution Control Act (FWPCA).²³ Although that section of the FWPCA does not expressly provide for joint and several liability,²⁴ subsequent judicial interpretation has.²⁵ However, this interpretation resulting from FWPCA cases decided after Superfund’s passage involved the direct liability of those with ownership, possession, or control (the owners and operators of vessels that released hazardous substances), not the vicarious liability of third party manufacturers of chemicals or suppliers of oil carried in the vessels.²⁶ This factual situation is dissimilar to multigenerator Superfund actions. Despite this fact, Judge Foreman concluded:

Nonetheless, these cases do stand for the general proposition that courts will impose common law liability standards under FWPCA. Therefore, it is reasonable to conclude that by incorporating the liability provisions of § 311 of FWPCA into [the Superfund Act], Congress intended the courts to impose common law liability rules on generators and other entities liable under

²⁰ See, e.g., *Wade II*, 577 F. Supp. at 1337-38 (E.D. Pa. 1983).

²¹ *Chem-Dyne*, 572 F. Supp. at 808 (citations omitted). This observation was later quoted with approval in *A & F Materials*, 578 F. Supp. at 1254.

²² 578 F. Supp. at 1254.

²³ 42 U.S.C. § 9601 (32) (Supp. V 1981).

²⁴ FWPCA, § 311, 33 U.S.C. § 1321 (1982).

²⁵ See, e.g., *United States v. M/V Big Sam*, 681 F.2d 432, 439 (5th Cir. 1982).

²⁶ See, e.g., *id.* at 434.

[the Act].²⁷

While courts which thus far have decided the issue agree that liability under the Superfund Act may be joint and several, they cannot agree on what body of law to apply to determine whether joint and several liability should be imposed. The courts have looked to three possible sources: state common law; federal environmental statutes; and federal common law.

United States v. Northeastern Pharmaceutical and Chemical Co. involved the liability of one generator (NEPACCO), two of its officer-shareholders, and a transporter who disposed of a number of NEPACCO's waste drums by burying them in trenches on a Missouri farm owned by James Denney.²⁸ While all of the defendants were subject to Missouri law,²⁹ the court found that the defendants acted "in concert to produce a single indivisible harm" and were thus jointly and severally liable regardless of whether Missouri common law or the liability standards under section 311 of the FWPCA were applied.³⁰ The *NEPACCO* court did not consider federal common law as a possible source to determine whether joint and several liability should be imposed under the Act.

In contrast, Chief Judge Rubin, author of *United States v. Chem-Dyne Corp.*, declined to apply concepts of joint and several liability in cases decided under section 311 of the FWPCA or state common law.³¹ Instead, the Judge concluded that federal interest in the uniform imposition of liability supported the creation of a single national standard of liability.³² For the substance of this federal approach to joint and several liability, *Chem-Dyne* adopted principles contained in the RESTATEMENT (SECOND) OF TORTS.³³ The decisions in *United States v. Wade, Wade II*,

²⁷ *A & F Materials*, 578 F. Supp. at 1254-55. This analysis by the court does far more than rely on "express statutory language" in the Superfund Act. The Act defines liability as the "standard of liability which obtains under [§ 311 of the FWPCA]." 42 U.S.C. § 9601(32) (Supp. V 1981). Cases cited by the *A & F Materials* court as imposing joint and several liability under § 311 were all decided after passage of the Superfund Act, therefore, their holdings could not have been specifically contemplated by Congress. Senator Helms, a proponent and leader in deletion of joint and several liability, but an opponent of the Superfund bill, noted that courts construing § 311 had not interpreted it to impose joint and several liability. 126 CONG. REC. S15004 (daily ed. Nov. 24, 1980). Proponents of the bill generally discussed its incorporation of liability under the FWPCA with respect to *strict* liability. See 126 CONG. REC. H11787 (daily ed. Dec. 3, 1980) (remarks of Representative Florio); 126 CONG. REC. S14964 (daily Nov. 24, 1980) (remarks of Senator Randolph).

²⁸ *Denney Farms* 579 F. Supp. at 823.

²⁹ *Id.* at 845.

³⁰ *Id.*

³¹ *Chem-Dyne* 572 F. Supp. at 808-810. Judge Rubin's rejection of cases decided under § 311 appears to be based on an assumption that joint and several liability is mandatory under § 311 of the FWPCA. See *id.* at 810.

³² *Id.* at 809.

³³ Judge Rubin stated:

An examination of the common law reveals that when two or more persons acting

and *United States v. Conservation Chemical Co.* also agree with the approach to joint and several liability adopted by the *Chem-Dyne* court.³⁴

The *Chem-Dyne* decision focuses on apportioning damages for a *single harm* under section 433A of the *Restatement* WHILE IGNORING THE DISCUSSION OF APPORTIONMENT FOR *distinct harms* in the same section.³⁵ Similarly, the discussion in *Wade II* regarding liability emphasizes apportionment of damages for a single harm.³⁶ Implicit in the legal analysis of each court is the factual assumption that the harm or danger presented at each hazardous waste site is a single harm. Of course, as summary judg-

independently caused a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. . . . But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm. . . . Furthermore, where the conduct of two or more persons liable under [Section 107 of the Act] has combined to violate the statute, and or more of the defendants seeks to limit his liability on the ground that the entire harm is capable of apportionment, the burden of proof as to apportionment is upon each defendant. . . . These rules clearly enumerate the analysis to be undertaken when applying [Section 107] and are most likely to advance the legislative policies and objectives of the Act.

Id. at 810 (citations omitted).

³⁴ *United States v. Conservation Chemical*, No. 82-0983-CV-W-5, slip op. at 6-7 (W.D. Mo. Feb. 3, 1984); *Wade II*, 577 F. Supp. at 1338. In one respect, the reference to common law principles in ascertaining the scope of joint and several liability contradicts other courts' interpretations of the Superfund Act. In complaints filed by the United States, it is typically asserted that the defendants are liable under "federal common law" as well as under the Superfund Act (and other federal statutes). Courts have uniformly dismissed these common law counts on the ground that passage of the Superfund Act and the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (current version at 42 U.S.C. §§ 6901-6986 (1976 & Supp. v 1981)), has pre-empted federal common law in the area of hazardous waste disposal. *See, e.g., United States v. Price*, 523 F. Supp. 1055, 1069 (D.N.J. 1981). Nevertheless, courts examining the scope of liability under the Superfund Act have not hesitated to "fill in the gaps" of this federal statute relying on common law principles. *See A & F Materials Co.*, 578 F. Supp. 1255.

³⁵ *Chem-Dyne* 572 F. Supp. at 810. Section 433A provides in full:

Apportionment of Harm to Causes

- (1) Damages for harm are to be apportioned among two or more causes where
 - (a) there are distinct harms, or
 - (b) there is reasonable basis for determining the contribution of each cause to a single harm.
- (2) Damages for any other harm cannot be apportioned among two or more causes.

RESTATEMENT (SECOND) OF TORTS § 433A (1965). Section 433B provides the burden of proof as to apportionment:

- . . . (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

Id. § 433B.

³⁶ *Wade II*, 577 F. Supp. at 1338-39.

ment decisions overruling industry motions contending that joint and several liability could not, as a matter of law, be imposed under the Superfund Act, the courts did not have to reach factual issues, much less resolve them. The possibility that there could be distinct and separate harms at a site was not addressed in these opinions. However, in *United States v. South Carolina Recycling and Disposal, Inc.* (the *Bluff Road* decision), an opinion drafted by the government and approved by the judge,³⁷ the court carried this assumption so far as to grant partial summary judgement when it concluded that all the generator-defendants were jointly and severally liable for response costs incurred at the site because “[c]learly the harm was indivisible.”³⁸

Under *Chem-Dyne, Wade II, Bluff Road* and *Conservation Chemical* if there is an “indivisible injury” at a site, each defendant in a multigenerator case may be held jointly and severally liable for the entire cost of cleaning up the site if apportionment is not established (assuming the government establishes the elements of its case and no defenses are available). Under *Chem-Dyne*, a defendant must carry the burden of proof that there is a reasonable basis for apportioning the costs.³⁹ However,

³⁷ See *infra* notes 53-54 and accompanying text.

³⁸ No. 80-1274-6, slip op. at 15 (D.S.C. Feb. 23, 1984). This conclusion was reached without a trial on damages, which might have afforded defendants an opportunity to demonstrate divisibility of harm based on distinct response costs attributable to volume and type of waste, i.e., the cost of removing drums of different types of waste and the cost of groundwater remedy. Instead of considering these indicators of divisibility, the *Bluff Road* opinion stated:

Because of the deleterious condition of the site at the time of clean-up, it is impossible to divide the harm in any meaningful way. There were thousands of corroded, leaking drums at the site not segregated by source or waste type. Unknown, incompatible materials comingled [sic] to cause fires, fumes, and explosions. Because of the constant threat of further fires, explosions, and other reactions, all of the materials at the site were, if not actually oozing out, in danger of being released. Thus, while all of the substances at the site contributed synergistically to the threatening condition at the site, it is impossible to ascertain the degree of relative contribution of each substance. Clearly, the harm was indivisible, and defendants have failed to meet their burden of proving otherwise. *Id.*

³⁹ *Chem-Dyne*, 572 F. Supp. at 810. An important issue yet to be resolved by the courts under the Superfund Act is whether a defendant seeking to limit its liability should have to develop and prove a reasonable apportionment formula for the entire site (and all liable parties) or should only have to establish that a *certain part* of the response costs are reasonably attributable to that defendant's own hazardous substances. The RESTATEMENT expressly notes that it may be unjust to impose the burden of proving apportionment upon a defendant when a large number of actors have contributed relatively small, insignificant parts to the total harm. RESTATEMENT (SECOND) OF TORTS § 443B, comment e states:

e. The cases thus far decided in which the rule states in Subsection (2) has been applied [requiring apportionment where “there is a reasonable basis for determining the contribution of each cause to a single harm”] all have involved a small number of tortfeasors, such as two or three. The possibility arises that there may be so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, that the application of the rule may cause

the burden of proving "indivisible injury" in the first instance remains with the plaintiff.⁴⁰

Recognizing that the imposition of joint and several liability is an extremely harsh remedy, the court in *United States v. A & F Materials* articulated a "moderate approach" to apportioning liability among multiple defendants.⁴¹ Yet, while the *A & F Materials* court agreed with *Chem-Dyne* that a uniform federal common law should be applied to determine the scope of liability under the Superfund Act, it declined to follow *Chem-Dyne's* wholesale adoption of RESTATEMENT principles.⁴² Conceding that it was a good "starting point" for ascertaining the scope of liability under the Superfund Act, Judge Foreman rejected a rigid application of RESTATEMENT principles as inappropriate given congressional concern that the imposition of liability ought to be tempered with considerations of fairness.⁴³ Chief Judge Foreman stated:

After reviewing the legislative history, the Court concludes a rigid application of the Restatement approach to joint and several liability is inappropriate. Under the Restatement approach, any defendant who could not prove its contribution would be jointly and severally liable. This result must be avoided because both Houses of Congress were concerned about the issue of fairness, and joint and several liability is extremely harsh and unfair if it is imposed on a defendant who contributed only a small amount of waste to a site.⁴⁴

The *A & F Materials* court adopted a "moderate approach" to joint and several liability, permitting an apportionment of damages because it "promotes fairness because it does not indiscriminately impose joint and several liability. Rather, it makes rational distinction[s] based on such factors as the amount and toxicity of a particular defendant's contribution to a waste site."⁴⁵ Accordingly, the court adopted the six apportionment criteria contained in an amendment introduced by Representative Gore to the House version of the Superfund bill.⁴⁶

disproportionate hardship to defendants. Thus if a hundred factories each contribute a small, but still uncertain, amount of pollution to a stream, to hold each of them liable for the entire damage because he cannot show the amount of his contribution may perhaps be unjust. Such cases have not arisen, possibly because in such cases some evidence limiting the liability always has been in fact available.

⁴⁰ RESTATEMENT (SECOND) OF TORTS § 433B(1) (1965).

⁴¹ *A & F Materials*, 578 F. Supp. at 1255-57.

⁴² *Id.* at 1255-1256.

⁴³ *Id.* at 1256.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1257.

⁴⁶ *Id.* at 1256. These criteria were:

- (i) the ability of the parties to demonstrate that their contribution to a discharge [sic] release or disposal of a hazardous waste can be distinguished;

The *A & F Materials* decision was followed in *United States v. Stringfellow*.⁴⁷ Although the *Stringfellow* court held that joint and several liability could be imposed in an appropriate case under section 107 of the Superfund Act, it adopted the six criteria of the Gore amendment as factors which should be used in determining whether damages should be apportioned.⁴⁸ The *Wade II* court also demonstrated a moderate approach to the issue of joint and several liability despite its holding that the contribution of a "reportable quantity" of hazardous substances is not a prerequisite to liability under the Superfund Act.⁴⁹ Defendants contended that if disposal of a reportable quantity was not a prerequisite, then one could be liable for disposing a single copper penny since copper had been designated as a hazardous substance.⁵⁰ The court disagreed with both this assertion and the claim that liability should result only from the presence of reportable quantities of hazardous wastes. The court explained its rejection of the defendant's argument:

Finally, I believe the defendant's fears of draconian liability are overstated. Given my ruling on joint and several as opposed to apportioned liability, a defendant whose sole contribution to a hazardous waste dump site was a copper penny would not be responsible for the entire cost of cleaning up the site.⁵¹

The *Bluff Road* opinion drafted by the government and approved by the court contains a footnote departing from the moderate approach analysis of *A & F Materials* "to the extent that it is inconsistent with Chief Judge Rubin's opinion in *Chem-Dyne*."⁵² However, the *Bluff Road* opinion must be put in context. Judge Simons' initial decision on the motion for summary judgment in that case was rendered from the bench in January of 1984, before the decision in *A & F Materials*.⁵³ The task of writing

-
- (ii) the amount of the hazardous waste involved;
 - (iii) the degree of toxicity of the hazardous waste involved;
 - (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
 - (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
 - (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

Id.

⁴⁷ No. CV-83-2501-MML (C.D. Cal. April 5, 1984).

⁴⁸ *Id.*, slip op. at 9-10. Addressing the question of whether joint and several liability might be imposed under section 106, the "imminent hazard" provision of CERCLA, the court concluded that it saw "no role under section 106(a) of CERCLA for what plaintiffs describe as 'joint and several liability to abate.'" *Id.* at 12.

⁴⁹ *Wade II*, 577 F. Supp. at 1326, 1339-41.

⁵⁰ *Id.* at 1340.

⁵¹ *Id.* at 1342.

⁵² *Bluff Road*, No. 80-1274-6, slip op. at 14 n.7.

⁵³ See CHEMICAL & RADIATION WASTE LITIGATION REP. 2-3 (special ed. Jan. 28, 1984).

the *Bluff Road* order, issued in February 1984, was delegated to counsel for the United States and the resulting proposed opinion was subsequently signed by Judge Simons.⁵⁴ Given the circumstances of its authorship, it is hardly surprising that *Bluff Road* is the most severe of the Superfund Act opinions to date on the issues of both joint and several liability and causation.

Contrary to the footnote suggestion in *Bluff Road*, *Chem-Dyne* and *A & F Materials* do not have to be read as inconsistent. *Chem-Dyne* rejected the companies' argument that joint and several liability could never be imposed under the Superfund Act as a matter of law. Chief Judge Rubin was not required to address — nor did the briefs raise — questions which only arise if joint and several liability does apply. Chief Judge Foreman's opinion rendered after *Chem-Dyne* began to address some of these "second stage" issues on which *Chem-Dyne* is silent. This silence should not be read as rejection or inconsistency with the later-decided *A & F Materials* opinion.

Among an adverse initial group of cases, the *A & F Materials* and *Stringfellow* decisions are the most favorable for generators and transporters who are potentially liable for conditions at a hazardous waste site. Under their moderate approach, courts would be "sensitive to the inherent unfairness of imposing joint and several liability on minor contributors."⁵⁵ To apportion damages under *Stringfellow* and *A & F Materials*, a court should consider three criteria which, under *Chem-Dyne* are also available to a defendant to prove that a reasonable basis exists for apportionment. These factors are: the ability of a party to demonstrate a distinguishable contribution to conditions at a site; the amount of the defendant's hazardous waste; and the toxicity of that waste.⁵⁶ Two additional factors relevant under *A & F Material* and *Stringfellow*—the degree of involvement and the degree of care exercised by a party—reflect traditional tort concepts of culpability, recklessness and negligence. Thus, while courts that have addressed the issue to date agree that the Superfund Act may impose strict liability, *A & F Materials* and *Stringfellow* expressly allow courts to consider a defendant's culpability in determining whether or not liability should be apportioned.⁵⁷

III. CAUSATION UNDER SECTION 107 OF THE SUPERFUND ACT

In a section 107 case involving multiple generators, the extent of one generator's liability for another's waste is determined in part by the ex-

⁵⁴ *Id.*

⁵⁵ *A & F Materials Co.*, 578 F. Supp. at 1249, 1257.

⁵⁶ *Id.* at 1256. See 572 F. Supp. at 802, 811.

⁵⁷ No court has yet given authoritative interpretation to the so-called third party defense in Section 107(b)(3) of the Superfund Act which expressly provides for a "due care" affirmative defense to strict liability. 42 U.S.C. § 9607(b)(3) (Supp. V 1981).

tent to which a causal connection is shown to exist between the generator's hazardous waste and the response costs incurred. The language of section 107 that imposes liability upon generators of hazardous substances, like many federal statutes creating liability, does not directly address the issue of causation. It provides:

(3) any person who . . . arranged for disposal or treatment . . . of hazardous substances . . . at any facility owned or operated by another party or entity and containing such hazardous substances, . . . from which there is a release, or a threatened release which causes the incurrence of response costs of a hazardous substance, shall be liable. . . .⁵⁸

Interpreting this section in *Wade II*, the court rejected an argument based on "traditional tort concepts of proximate causation."⁵⁹ The *Wade* court held that the government did *not* have to prove a causal nexus between the response costs incurred and a certain generator-defendant's waste, or other waste of the type generated by a defendant.⁶⁰ The *Wade II* court required the government to show only that a defendant's waste (or type of waste) was at the site, not that such waste in any way contributed to the hazardous conditions at that site.

"The only required nexus between the defendant and the site is that the defendant have dumped his waste there and that the hazardous substances found in the defendant's waste are also found at the site."⁶¹

Thus, under *Wade II*, even if there is no release or threatened release of a hazardous substance from the generator-defendant's waste, the generator may still be liable for response costs spent entirely on cleaning up other types of waste. This conclusion is partially supported by a footnote in the earlier decision in *United States v. Price*: "Congress eliminated any language requiring plaintiff to prove proximate cause."⁶²

The *Wade II* court's conclusion is espoused by the *Bluff Road* opinion which details the federal government's argument that the Superfund Act establishes "classes" of persons who are liable unless they can prove under Section 107(b),⁶³ that a release or threatened release of hazardous substances was caused solely by unrelated persons or events.⁶⁴ With respect to generators, liability exists if the government proves that:

a. The generator's hazardous substances were, at some point in

⁵⁸ 42 U.S.C. § 9607(a) (Supp. V 1981).

⁵⁹ *Wade*, 577 F. Supp. at 1327, 1331. Judge Newcomer's opinion is more accurately viewed as a rejection of traditional concepts of causation in fact, not proximate causation.

⁶⁰ *Id.* The *Wade* case settled following Judge Newcomer's decision on causation.

⁶¹ *Id.* at 1333.

⁶² *Price*, 577 F. Supp. at 1103.

⁶³ 42 U.S.C. § 9607(b) (Supp. V 1981).

⁶⁴ *South Carolina Recycling and Disposal Co.*, No. 80-1274-6, slip op at 6-7.

- the past, shipped to a facility;
- b. The generator's hazardous substances or hazardous substances *like* those of the generator were present at the site;
 - c. There was a release or threatened release of *a* or *any* hazardous substance at the site;
 - d. The release or threatened release causes the incurrence of response costs.⁶⁵

Thus, while the government in a Section 107 action must establish a *prima facie* case against each defendant during its case-in-chief, this burden will be relatively easy to meet so far as the element of causation is concerned in courts following *Wade II* and *Bluff Road*.

In contrast to *Wade II* and *Bluff Road*, language in *Ohio ex rel. Brown v. Georgeoff*⁶⁶ suggests that a causal nexus first must be established in order to impose liability under the Superfund Act. The court stated that the doctrine of intervening cause would apply in Section 107 actions, despite the fact that Section 107(b) purports to set forth only limited and narrow defenses to liability.⁶⁷ The court's conclusion was based on its

⁶⁵ *Id.* at 8.

⁶⁶ 562 F. Supp. 1300 (N.D. Ohio 1983).

⁶⁷ *Id.* at 1306. Although the language of Section 107(b) purports to limit the availability of defenses, courts have interpreted similar federal statutes appearing absolute on their face to be subject to various rules of law and equity. For example, § 311 of the Federal Water Pollution Control Act, 33 U.S.C. § 1321(f) (1982), lists only the defenses to liability of as act of God, an act of war, and an act or omission of a third party. Nevertheless, courts have examined and considered defenses based on statute of limitations, subject matter jurisdiction, collateral estoppel and constitutionality. See *e.g.*, *United States v. Barge Shamrock*, 635 F.2d 1180 (4th Cir. 1980), *cert. denied*, 454 U.S. 830 (1981); *United States v. C & R Trucking Co.*, 537 F. Supp. 1080 (N.D. W. Va. 1982); *United States v. Slade, Inc.*, 447 F. Supp. 638 (E.D. Tex. 1978); *Sea-Land Serv., Inc. v. United States*, 684 F.2d 871 (Ct. Cl. 1982); see also *United States v. LeBeouf Bros. Towing Co., Inc.*, 537 F.2d 149 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977) (considering constitutional defenses to liability). If the statutory language had absolutely barred defenses beyond those listed in the statute, there would be no reason for courts to address their availability in each case.

Indeed, the legislative history of the Superfund Act indicates availability of defenses to liability in addition to those listed in § 107(b). It appears likely that Congress understood § 107 as imposing a standard of strict liability similar to that imposed at common law for ultrahazardous activities. See S. REP. NO. 848, 96th Cong., 2d Sess. 31-34 (1980) (available on microfiche, Congressional Information Service, 1980-5323-23); 126 CONG. REC. H9462 (daily ed. Sept. 23, 1980) (remarks of Representative Gore).

While Congress apparently did intend to preclude certain defenses available in negligence actions, a persuasive argument can be made that Congress did not preclude defenses that could have been raised at common law in an action in strict liability for an ultrahazardous activity. Instead, by listing certain defenses in § 107(b), it appears that Congress was providing *exceptions* to liability under Section 107(a) where liability might otherwise have been imposed under common law. Cf. 126 CONG. REC. E4195 (daily ed. Sept. 4, 1980) (Representative Gore remarked that a proposed third party defense which was incorporated in § 107(b) of the Act "alters the existing common law rules" of liability for ultrahazardous hazardous or inherently dangerous activities).

finding that Section 107 is derived from common law strict liability.⁶⁸ Under common law, an intervening cause may prevent the imposition of strict liability where subsequent events cause an injury outside the scope of the risks created by a defendant's conduct.⁶⁹ In discussing the effect of intervening cause in a section 107 action, Judge Dowd wrote: "Intervening cause does not act as a defense; rather, it acts to negate causation, an element of the [Section 107] cause of action."⁷⁰

This statement lends support to arguments which assert that causation is an element of a Section 107 claim for which the plaintiff carries both the burden of proof and persuasion. Contrary to the *Wade II* approach to causation, under *Georgeoff* a defendant might avoid liability if the release of a hazardous substance (or threat of such release) was totally unconnected and unrelated to that defendant's particular waste or type of waste.

One benefit of the *Georgeoff* court's reference to common law principles of causation is that it assists in the development of an internally consistent theory of liability under Section 107. In distinction, a significant difficulty with the *Wade II* decision is reconciling its holding on the causation issue with its discussion of the imposition of joint and several liability. Under *Wade II*, threshold liability may be established without proof that a generator-defendant's waste is contributing to hazardous conditions.⁷¹ The court insists, however, that liability under the Superfund Act is not draconian because it is possible for defendants to prove a basis for apportioning liability.⁷² Yet the very considerations deemed irrelevant to the threshold determination of liability under *Wade II* — the amount of waste contributed by a generator, the degree of toxicity of the waste, and the tendency of the waste to migrate from the site — would presumably be relevant in apportionment.

IV. AREAS YET TO BE ADDRESSED BY THE COURTS

The *A & F Materials* and *Stringfellow* decisions show that some courts may not be comfortable holding small contributors jointly and severally liable for massive clean up costs.⁷³ This is particularly apt to be true if liability under Section 107 is indeed strict liability which can be imposed upon a blameless generator. The imposition of joint and several liability

⁶⁸ 562 F. Supp. at 1305-06.

⁶⁹ See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 517 (4th ed. 1971) (discussing scope of risk and strict liability).

⁷⁰ *Georgeoff*, 562 F. Supp. at 1306.

⁷¹ See *supra* notes 51-55 and accompanying text.

⁷² *Wade II*, 577 F. Supp. at 1338-39.

⁷³ See *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140-41 (E.D. Pa. 1982) (suggesting that joint and several liability should not be imposed on defendants with little connection to the hazardous conditions).

in addition would be especially punitive.⁷⁴ Still, the *A & F Materials* and *Stringfellow* decisions and the statement in *Wade II* that the Superfund Act does not impose "draconian liability"⁷⁵ are of limited comfort to a generator who has sent only a small amount of waste to a facility, or to a transporter who has taken only a few loads to that site, since it will often be necessary to incur the large costs of complex, multi-party federal court pretrial and trial proceedings to establish the unfairness of substantial — but smaller — clean-up costs.

Unless a reasonable method of apportioning damages can be proven, joint and several liability appears likely for the significant contributor to a site (or the owner or operator), where an indivisible injury is found and where no defenses are available. However, courts have yet to resolve the issue of what constitutes an indivisible injury under the Superfund Act. Although the *Bluff Road* decision adopted the government's arguments on this subject, it is important to remember that that opinion was initially drafted by the Department of Justice.⁷⁶

The question of indivisible injury is necessarily connected to the question of what costs are recoverable under Section 107. Thus, it is possible that upon trial of damage issues, courts will conclude that sites have suffered distinct harm and apportion differently the costs for surface removal, soil decontamination, groundwater remedies, or a remedial investigation and feasibility study. If a generator's materials (or under *Wade II*, similar materials) are present in drums at the site, that generator may be jointly and severally liable for surface removal of materials similar to his own. However, if that type of waste has not been detected in soil or groundwater at levels requiring remedy, that generator may not be liable for any of those response costs. Furthermore, certain costs may themselves be viewed as "divisible injuries," an example being the cost of removing drums from a site.⁷⁷ Other response actions, for example, removal of the contents of bulk tanks may also involve differential costs depending on volume and type of wastes, so that apportionment would be feasible there as well. Although superficially similar, there are important differences between several liability and joint and several liability couples with apportionment. For example, under several liability the

⁷⁴ Cf. 126 CONG. REC. S14967 (daily ed. Nov. 24, 1980) (Senator Stafford noted that the initial Senate Superfund bill, allowing joint and several liability but permitting apportionment, was viewed by many as "punitive and unnecessarily vigorous.")

⁷⁵ *Id.* at 1341.

⁷⁶ See *supra* notes 53-54 and accompanying text.

⁷⁷ The government is interested in the "single" objective of removal of all drums from the surface of a site. The bids of clean up contractors reveal that the cost of accomplishing this goal is determined by the number of drums to be removed and the type of material being disposed of, broken down into a small number of very broad categories. Frequently both the government and, after discovery the generators will possess sufficient information to make a reasonable allocation of the cost of drum removal along these lines.

plaintiff bears the burden of proof on the extent of each defendant's share. Under joint and several liability coupled with apportionment, the plaintiff must show that there is a "single harm," but then, under *Chem-Dyne* and the RESTATEMENT (SECOND) OF TORTS § 433B, the defendants must shoulder the burden of proving a reasonable basis for apportionment. Among the questions yet to be addressed by the courts are whether a defendant must establish every defendant's share or only his own⁷⁸ and who will pay the "share" of either judgment-proof defendants⁷⁹, or non-party generators. Under several liability these "shares" would clearly not be assigned to the defendants; under joint and several liability coupled with apportionment, these questions await definitive judicial resolution.⁸⁰ The government and industry can be expected to differ on whether the \$1.6 billion Superfund funded approximately 85% by a special tax on petroleum and chemical feed stocks should bear these costs.⁸¹

Finally, complex issues of contribution among generators, related to the question of when one company can be held liable for another's waste under the Superfund Act, likewise await resolution by the courts.⁸²

⁷⁸ See *supra* note 39.

⁷⁹ *A & F Materials*, 578 F. Supp. at 1258. "Even where some liable parties can be located, when joint and several liability cannot be imposed the Superfund must absorb the costs associated with the liability of unknown and insolvent parties."

⁸⁰ Cf. RESTATEMENT (SECOND) OF TORTS § 433A and comments.

⁸¹ See 42 U.S.C. § 9631 (Supp. V. 1981) (establishing the Superfund).

⁸² The question of whether there is a right to contribute among generators in Superfund litigation is presented in *Chem-Dyne* where 24 generator and transporter defendants filed third-party complaints against 163 potentially responsible parties who had not been named as defendants in the suit. The third party complaints alleges that, if the 24 defendants are determined to be liable under the Superfund Act and other theories of liability asserted by the federal and state governments, the third-party defendants are liable for contribution. See Defendant's Third Party Complaint, *United States v. Chem-Dyne Corp.*, No. C-1-82-840 (S.D. Ohio filed Jan. 26, 1984).

