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Hazardous Waste - A Right of Contribution under RCRA - United States v. Valentine

Scott P. Klosterman

HAZARDOUS WASTE—A Right of Contribution Under RCRA. *United States v. Valentine*, 856 F. Supp. 627 (D. Wyo. 1994).

INTRODUCTION

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA) to address the increasing health and environmental problems associated with hazardous waste dumpsites.[1] By enacting RCRA, Congress attempted to establish a program of "cradle to grave" management of hazardous waste.[2] As amended, section 7003(a) of RCRA authorizes suit when the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.[3]

William Valentine and Sons, Inc. owned and operated the Powder River Crude Processors facility located approximately six miles west of Glenrock, Wyoming and two miles south of the North Platte River.[4] The thirty-two-acre site was constructed to process petroleum material that was below pipeline standards into pipeline quality crude.[5] The facility is no longer in operation but approximately twenty-three above and below-ground tanks, several large open earthen pits which were used as surface impoundment areas, two contaminated railroad cars and miscellaneous drums and equipment remain at the site.[6]

During initial inspections of the site, the Environmental Protection Agency (EPA) found evidence of numerous spills of oily wastes.[7] In

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1. Pub. L. No. 94-580, 90 Stat. 2826 (1976) (codified as amended at 42 U.S.C. §§ 6973, 6974 (1988)). RCRA was amended in 1978, Pub. L. No. 95-609, 92 Stat. 3083 (1978) (codified in scattered sections of 42 U.S.C.); 1980, Pub. L. No. 96-482, 94 Stat. 2348 (1980) (codified as amended at 42 U.S.C. §§ 6973, 6974 (1988)); and in 1984, Pub. L. No. 98-616, 98 Stat. 3271 (1984).

2. H.R. REP. No. 1491, 94th Cong., 2d Sess. (1976), *reprinted* in 1976 U.S.C.C.A.N. 6239, 6240.

3. 42 U.S.C. § 6973(a) (1988 & Supp. V 1993).

4. United States v. Valentine, 856 F. Supp. 627, 630 (D.Wyo. 1994).

5. *Id.*

6. Memorandum in support of motion of the United States to enter the Consent Decree at 4. Civil Action No. 93CV1005J (May 20, 1994) (on file with the *Land and Water Law Review*). The facility has not been in operation since August 3, 1989. Telephone Interview with J.N. Murdock, Attorney at Law, Reeves, Murdock & Gifford, Casper, Wyoming (Aug. 15, 1994).

7. Memorandum in support of motion of the United States to enter the Consent Decree at 4. Civil Action No. 93CV1005J (May 20, 1994) (on file with the *Land and Water Law Review*).

addition, the EPA had information about the migration of the oily wastes in the soil, subsurface and groundwater.[8] Records obtained from the site indicated that there had been a fire and/or explosion at the site on April 20, 1981.[9] Samples taken from the open pits and tanks revealed abundant quantities of benzene, polynuclear aromatic hydrocarbons and other hazardous constituents.[10]

The effects of the spills were first noted in 1991 when the EPA found disturbing numbers of bird carcasses at the site, as well as the remains of other small mammals.[11] In addition, hoof tracks on the edges of the open pits and antelope coated with a black oily substance were observed at the site.[12]

Subsequently, the EPA learned that the site serves as a habitat for various wildlife species.[13] Further, according to the United States Fish and Wildlife Service (USFWS), the site posed a threat to migratory birds, including the peregrine falcon and bald eagle, both of which are protected under the Endangered Species Act.[14] Finally, EPA determined that there was a potential for off-site migration of contaminants through a shallow drainage ditch that led from the site toward the North Platte River.[15]

Based on these inspections and the additional information regarding threats to wildlife, the EPA concluded that the site posed an imminent and substantial endangerment to human health or the environment.[16] After determining the identity of responsible parties,[17] the EPA proceeded to issue administrative orders pursuant to RCRA section 7003 for a cleanup

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8. *Id.* at 4-5.

9. Murdock Interview, *supra* note 6.

10. Memorandum in support of motion of the United States to enter the Consent Decree at 4-5. Civil Action No. 93CV1005J (May 20, 1994) (on file with the *Land and Water Law Review*).

11. *Id.* at 5.

12. *Id.*

13. *Id.* Various wildlife species found at the site include antelope, mule deer, white-tail deer and other small game. *Id.*

14. The Endangered Species Act of 1973, Pub. L. No. 93-205, 81 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1985 & Supp. 1991)). The ESA was amended by the Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3571, and the Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411. In 1988, the ESA was reauthorized by Congress. H.R. CONF. REP. NO. 1467, 100th Cong., 2d Sess., CONG. REC. H82449-58 (1988); S.R. CONF. REP. NO. 1467, 100th Cong., 2d Sess., CONG. REC. S12557-61 (1988).

15. Memorandum in support of motion of the United States to enter the Consent Decree at 5. Civil Action No. 93CV1005J (May 20, 1994) (on file with the *Land and Water Law Review*).

16. *Id.* at 5. "Endangerment" means threatened or potential harm and does not require proof of actual harm to warrant affirmative relief necessary to eliminate risks posed by toxic wastes. United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1394 (D.N.H. 1985).

17. *See infra* note 31 and accompanying text for an explanation of who constitutes a "responsible party."

of the site.[18] The administrative orders required that all defendants submit a work plan for removal and disposal of all materials from tanks and pits, for immediate action to secure the site through interim measures and for further investigation.[19]

Nevertheless, the ten defendants failed to comply with the EPA's administrative orders.[20] As a result, on February 19, 1993, the United States filed an action under section 7003 of RCRA against these defendants.[21] The complaint sought (1) an injunction requiring an investigation and cleanup of the site, (2) compliance with administrative orders issued by the EPA, and (3) civil penalties for violations of the administrative orders.[22]

After over a year of negotiations the United States issued a proposed consent decree, on March 4, 1994, which directly led to the settlement of this lawsuit with respect to the five generator defendants: Conoco, Eighty-Eight, True, Phillips and Texaco (Settling Defendants).[23] As approved by the United States District Court for the District of Wyoming, the consent decree required first, that the Settling Defendants jointly and severally finance and conduct a cleanup of the site at an estimated cost of $4.4 to $8.9 million and second, to pay a civil penalty of $300,000 for their failure to comply with initial administrative orders.[24]

In addition to the consent decree's requirements set forth above, specific language acknowledged that the Settling Defendants were entitled to such contribution protection and contribution rights as may be afforded by RCRA section 7003 or Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 113(f)(2).[25] As a result of that acknowledgment, the Settling Defendants pursued a right of

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18. *Valentine*, 856 F. Supp. at 630. EPA issued administrative orders to the following: Texaco Marketing and Refining Inc. (Texaco), Phillips Petroleum Company (Phillips), True Oil Company (True), Eighty-Eight Oil Company (Eighty-Eight), Conoco Pipe Line Company (Conoco), Jim's Water Service, Inc. (JWS), Valentine Construction Co., Inc. (Valentine Construction), Dale Valentine (Valentine), William Valentine and Sons, Inc. (William Valentine and Sons), and Richard Wallace (Wallace). These ten defendants fall into three categories as follows: owner/operators of the site; transporters of oil to the site; and generators, or those entities that were sources of oil. *Id.*

19. *District Court Holds Settling Defendants in RCRA § 7003 Action Have Implicit Contribution Rights Against Non-Settling Defendants and Third Parties*, [Vol. 28] Chemical Waste Litigation Rep. (BNA) No. 3, at 536 (August 1994).

20. *See supra* note 15, at 5.

21. *Valentine*, 856 F. Supp. at 630.

22. *Id.*

23. *Id. See supra* note 18 for a complete list of defendants.

24. *Id.* The wide discrepancy in the cost of cleanup is due to the fact that the exact extent of contamination was not yet known. *Id.*

25. *See supra* note 15, at 20. *See also infra* note 47 and accompanying text for a discussion of CERCLA.

contribution under RCRA section 7003.[26] Specifically, the Settling Defendants pursued this remedy because a large majority of the work performed by them under the consent decree resulted in the removal and treatment of wastes originating with or handled by persons not a party to the decree.[27] Therefore, the Settling Defendants asked the district court for leave to file crossclaims and third-party claims against those parties under the theory of contribution.[28] Thereafter, on June 2, 1994, in an unprecedented decision, the United States District Court for the District of Wyoming held that the Settling Defendants could seek contribution from Non-settling Defendants and third parties under RCRA section 7003.[29]

This Note addresses the decision in *United States v. Valentine*[30] and considers whether the federal district court properly held that a right of contribution among defendants should be available under RCRA section 7003. It also concludes that *Valentine* properly held that Congress created a right of contribution under RCRA by clear implication. In addition, this Note argues that the gaps in RCRA's liability provisions, the strong federal policy of abating hazardous wastes releases and RCRA's own legislative history support judicial recognition of a federal common law right of contribution. Finally, this Note discusses what the content of the federal law should be.

BACKROUND

A. *The Resource Conservation and Recovery Act*

Section 7003 of RCRA states in pertinent part:

> [U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or

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26. *Valentine*, 856 F. Supp. at 630. Due to the limitations of the right to contribution under § 113(f)(2) of CERCLA, the Settling Defendants sought contribution under § 7003 of RCRA. Contribution under § 113(f)(2) requires a release of a listed hazardous substance into the environment. The Settling Defendants had maintained that the oil released was not a hazardous substance and arguably they would have had difficulty seeking relief under § 113(f)(2). Memorandum in support of motion of the United States to enter Consent Decree at 20 n.18. Civil Action No. 93CV1005J (May 20, 1994) (on file with Law Review).

27. Chris Tollefson, *Valentine settles at $20,000 fine for Glenrock mess*, CASP. STAR-TRIB., January 20, 1995 at C1.

> The five corporate defendants in the case filed suit against Unocal Oil to force it to bear a large part of the cleanup costs, Murdock said. Unocal was not named in the EPA lawsuit because of incomplete recordkeeping by Valentine. We've identified that they (Unocal) took a little over 50,000 barrels of material to the site . . . The suit alleges that Unocal is responsible for about 50 percent of the oil taken to the site, and asks the court at a minimum to require the company to pay for 50 percent of the cleanup costs.

Id. at C1.

28. *Valentine*, 856 F. Supp. at 630.

29. *Id.* at 628.

30. 856 F. Supp. 627 (D.Wyo. 1994).

> hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit . . . against any person . . . who has contributed or is contributing to such handling, storage, treatment, transportation or disposal to restrain such person . . . or to order such person to take such other action as may be necessary or both.[31]

The Third Circuit held that the expansive language of this provision intended to confer "overriding authority to respond to situations involving a substantial endangerment to health or the environment."[32] Supporting this view, Congress said that by enacting section 7003, it is our "intent to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes."[33] "The purpose of the statute is to give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment."[34]

Adhering to the clear congressional intent of RCRA, courts have utilized the Act's broad remedy-making powers to recognize joint and several liability under section 7003. Specifically, *United States v. Conservation Chemical Co.*, held that:

> By its terms, section 7003 provides that any person contributing to an imminent and substantial endangerment may be ordered to take whatever action is necessary to abate the endangerment. Congress, by providing the courts with this broad power to order the relief necessary to abate the hazard, has authorized the imposition of joint and several liability to ensure complete relief.[35]

By enacting RCRA's endangerment provision, "Congress sought to invoke the broad and flexible equity powers of the federal courts in instances where hazardous wastes threatened human health."[36] Courts "should not undermine the will of Congress by either withholding relief or granting it grudgingly."[37]

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31. 42 U.S.C. § 6973(a) (1988 & Supp. V 1993).

32. United States v. Price, 688 F.2d 204, 213 (3d Cir. 1982) (quoting H.R. Committee Print No. 96-IFC 31, 96th Cong., 1st Sess. 32 (1979). In *Price*, the United States sought injunctive relief under RCRA § 7003 against former and existing owners of a former landfill to remedy hazards posed by past chemical dumping at the landfill. *Price*, 688 F.2d at 204.

33. S. REP. 96-848, 98th Cong., 2d Sess. 11 (1980). The express language of RCRA § 7003 permits suit as soon as the United States receives information indicating a potential endangerment. 42 U.S.C. § 6973(a) (1988 & Supp. V 1993).

34. S. REP. 284, 98th Cong., 1st Sess. 59 (1984).

35. 619 F. Supp. 162, 199 (D.C.Mo. 1985).

36. S. REP. 96-172, 96th Cong., 1st Sess. 5 (1980).

37. United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982).

B. Contribution

Contribution is an equitable tool designed to mitigate the harsh effects of joint and several liability by spreading the ultimate obligation to pay for the plaintiff's judgment.[38] It is a statutory or common law right available to any defendant who has paid more than their equitable share of a common liability.[39] Today over forty jurisdictions in the United States permit contribution in a variety of situations either by statute or judicial decree.[40] "The Supreme Court has recognized two principal elements of a common law right to contribution: (1) common liability, and (2) the party seeking contribution has been required to pay more than its just share of the award."[41] Since contribution is a remedy that developed in equity, courts are expected to do what is fair and equitable under the circumstances.[42]

As with state law, federal law initially recognized no right to contribution absent legislation.[43] However, the modern trend has been to recognize a common law right to contribution under federal law.[44] The United States Supreme Court has recognized the fairness of contribution and has succinctly articulated the policies underlying the right:

> Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability. Recognition of the right reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability.[45]

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38. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 50, at 336-41 (5th ed. 1984).

39. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 886A (1979).

40. For the status of the law in the United States, see Landes & Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 LEGAL STUD. 517, 550-51 (1980).

41. Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77, 83 (1981). "When two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability." *Id.* at 88.

42. RESTATEMENT (SECOND) OF TORTS § 886A Comment c (1979).

43. PROSSER AND KEETON, *supra* note 38, § 50 at 336-41.

44. *See e.g.*, Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 and Gould v. American-Hawaiian Steamship Co., 387 F. Supp. 163 (D.Del. 1974). The federal courts have come to realize that the policy considerations upon which the traditional rule was built are archaic and lead to inequities. Indeed, the most extensive body of law evidencing a significant trend toward fashioning a federal common law right to contribution concerns contribution for back pay awarded under Title VII. *Northwest Airlines*, 451 U.S. at 83 n.10.

45. *Northwest Airlines*, 451 U.S. at 87-88.

Contribution among defendants is an important component of a joint and several liability scheme because it ensures that responsible parties other than those actually held jointly and severally liable share the burden of liability.

C. *The CERCLA Analogy*

The debate as to whether a right of contribution exists under RCRA has only just begun. The question may be answered, in part, by drawing an analogy between the current debate and previous questions regarding contribution under CERCLA.

Prior to the Superfund Amendments and Reauthorization Act of 1986[46] (SARA), "a potentially liable party under section 107 of CERCLA faced the prospect of being singled out as a defendant in a government or private cost recovery action without any apparent means of fairly apportioning CERCLA costs awarded against it to other persons liable for these costs under the statute."[47] The courts responded to the inequity of this situation and its negative implications of discouraging private parties to undertake voluntary CERCLA cleanups by recognizing an implicit federal right to contribution under CERCLA.[48] Courts that recognized an implicit right to contribution found that contribution could be inferred from either the language of the statute or from the underlying federal interests.[49]

Courts that have inferred a right to contribution from the language of the statute based their analysis, in part, on section 107(e)(2) of CERCLA, which reads: "Nothing in this subchapter . . . shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, had or would have, by reason of sub-

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46. 42 U.S.C. § 9613(f)(2) (1988).

47. County Line Investment Company v. Tinney, 933 F.2d 1508, 1515-16 (10th Cir. 1991).

48. *Id.* at 1516. *See also*, Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1457 n.3 (9th Cir. 1986); Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913, 916-17 (N.D. Okla. 1987); United States v. New Castle County, 642 F. Supp. 1258, 1269 (D.Del. 1986); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985); State of Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1491-92 (D. Colo. 1985); United States v. Ward, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,8054, 20,805-06 (E.D.N.C. 1984). The right to contribution was not necessarily found to be implicit in the statute, but rather within the court's power to create federal common law. *Mardan*, 804 F.2d at 1455.

49. *See, e.g.*, United States v. Conservation Chemical Co., 619 F. Supp. 162, 228 (D.C.Mo. 1985) ("A right of contribution, then, is encompassed by CERCLA itself, not by independent considerations of fundamental fairness and not by the federal common law as such."); *ASARCO*, 608 F. Supp. at 1490 (explaining that a right to contribution is consistent with the underlying interest in quick cleanup of hazardous waste sites); *New Castle County*, 642 F. Supp. at 1269 (arguing that contribution encourages cooperation with the government, improves chances of settlement, increases the defendant pool, reduces government litigation costs, and protects the Superfund from depletion).

rogation or otherwise against any person."[50] Other courts have held that section 107(e)(2) did not create any rights but at most preserved claims for contribution.[51]

Supporting the court's recognition of an implied right to contribution under CERCLA, Congress subsequently amended section 113 of CERCLA to explicitly provide for such a right.[52] As amended section 113 provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under 107(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 subchapter shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.[53]

An important historical lesson can be drawn from the CERCLA debate. Given the similarities between the interests and goals of RCRA and CERCLA, it seems appropriate that courts could also provide a right of contribution under RCRA.

D. Federal Common Law

Federal common law refers to "any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutuional or congressional."[54] Historically there has been a strong presumption against the federal courts fashioning common law to

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50. 42 U.S.C. § 9607(e)(2) (1988); *see, e.g., Syntex Agribusiness*, 616 F. Supp. at 31; United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983); *see also* Comment, *Generator Liability Under Superfund for Clean-up of Abandoned Hazardous Waste Dumpsites*, 130 U. PA. L. REV. 1229, 1266 n.184 (1982).

51. *See, e.g., ASARCO*, 608 F. Supp. at 1490.

52. "In providing for contribution, the legislators made clear that they were merely confirming a right that already existed under the statute, thereby eliminating any problems of retroactivity." Ellen J. Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendements*, 14 ECOLOGY L.Q. 365, 374 n.64. *See* H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 79 (1985); *see also* 131 CONG. REC. S11,855 (daily ed. Sept. 20, 1985) (comments of Sen. Stafford).

53. SARA Pub. L. No. 99-499, § 113(b), 100 Stat. 1613, 1647 (1986); 42 U.S.C. § 9613(f) (1988).

54. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 890 (1986); *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) ("Federal common law . . . means any federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of interpretation in either a conventional or an unconventional sense.").

decide cases. The Rules of Decision Act, which was part of the Judiciary Act of 1789 and which remains largely unchanged to this day, states that "the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply."[55] This law, by its very terms, seems to deny the existence of federal common law.[56] The most dramatic statement that federal courts should not create common law is found in *Erie R.R. v. Tompkins*.[57] For nearly 100 years, federal courts did fashion federal common law in cases involving diversity jurisdiction in the absence of a state constitutional or statutory provision. In *Swift v. Tyson*, the Supreme Court held that the Rules of Decision Act only required application of state constitutional or statutory law, not state common law.[58] In overruling *Swift*, the Court in *Erie* declared that "there is no federal general common law."[59] Although *Erie* eliminated the power of federal courts to create federal common law, the power to fashion federal specialized common law remains untouched when it is necessary to protect uniquely federal interests.[60]

Federal common law has developed out of necessity. In some instances there are simply gaps in the law; the application of statutory and constitutional provisions often requires the development of legal rules.[61] In some instances, federal courts create common law to fulfill congressional intent.[62] For example, sometimes Congress has encouraged federal courts to develop a body of common law principles under a particular statute.[63] Finally, courts have created federal common law

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55. 28 U.S.C. § 1652 (1948).

56. Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989). *But see* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989) (arguing for the legitimacy of federal common law).

57. 304 U.S. 64 (1938).

58. 41 U.S. 1 (1842).

59. 304 U.S. at 78.

60. *See* Stewart Jay, *Origins of Federal Common Law*, 133 U. PA. L. REV. 1003, 1231 (1985).

61. *See, e.g.*, D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 472 (1942) ("Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon sources of the common law in cases such as the present.").

62. *D'Oench, Duhme & Co.*, 315 U.S. at 447.

> The federal courts have no general federal common law . . . But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law . . . . Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.

Id. at 469-70.

63. Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642 (1981) [hereinafter

to protect uniquely federal interests, such as developing unitary rules for hazardous waste cleanups.[64]

E. Private Rights of Action

One of the most controversial issues concerning federal common law is the creation of private rights of action by federal courts.[65] The Supreme Court's reluctance to create new causes of action reflects both separation of powers and federalism concerns.[66]

With regard to federalism, the creation of private rights of action displaces state laws, generating objections that it infringes upon state prerogatives.[67] On the other hand, the failure to create private rights of action can offend the values of federalism if the effect is to allow state law to frustrate federal interests.[68]

Similarly, the development of private rights of action can be challenged on the separation of powers grounds that Congress has the sole power to decide the existence and content of federal laws.[69] Yet, under certain circumstances, developing common law principles is an inherent part of the judicial role of deciding cases.[70] Additionally, courts create private rights of action to effectuate congressional intent, undermining any separation of powers objection.[71]

The controversy over whether Congress intended, explicitly or implicitly, to create a private right of action, centers on what constitutes sufficient evidence of intent and how restrictive or liberal the Court should be in creating causes of action under statutes. Over the past thirty years, the Court has taken three different approaches in deciding when to create private rights of action.

Initially, the Court implied causes of action very freely, the most notable example being *J.I. Case Co. v. Borak*.[72] The basic premise of

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Texas Industries] ("Federal common law also may come into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law."). *See also*, Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

64. United States v. New Castle County, 642 F. Supp. 1258, 1268 (D.Del. 1986).

65. Erwin Chemerinsky, FEDERAL JURISDICTION § 6.3.3, at 356 (2d ed. 1994).

66. *See, e.g.*, United States v. Hudson & Goodwin, 11 U.S. 32 (1812); United States v. Coolidge, 14 U.S. 415 (1816).

67. *Hudson & Goodwin*, 11 U.S. at 32.

68. *See supra* note 65, § 6.1, at 335.

69. *See, e.g.*, H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 583 (1986).

70. *See supra* note 65, § 6.1, at 335.

71. *Id.*

72. 377 U.S. 426 (1964).

Borak was that if a private right would help effectuate the purpose of the statute and if no legislative history mitigated against authorizing such a remedy, then such a right could be implied.[73]

A decade later the Court shifted its approach and required a detailed inquiry into congressional intent in deciding whether to create private rights of action. In *Cort v. Ash*, the Court articulated a four-part test for determining whether private rights of action should be created under federal statutes.[74] First, is the plaintiff a member of a class for whose benefit the statute was enacted? Second, did the legislature intend to either create or deny such a cause of action? Third, is a private cause of action consistent with the legislative purpose? Finally, is the cause of action one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law?[75]

In *Cannon v. University of Chicago*, the Court applied the four-part *Cort* test to imply a cause of action based on Title IX.[76] Noticeably, Justice Powell's dissent in *Cannon* suggested that the Court should get out of the business of implying rights of action entirely.[77] Soon after *Cannon*, the Court shifted to a third approach, recognizing Justice Powell's view the Court will create a private right of action only if there is affirmative evidence of Congress's intent to create a private right of action.[78]

Admittedly, the three approaches discussed above make the law in this area appear clearer than it truly is. Even today, when the Court uses the third approach, it cites cases decided under earlier approaches.[79] None of the decisions cited above have been expressly overruled.

PRINCIPAL CASE

United States v. Valentine established for the first time that Settling Defendants in a RCRA section 7003 action could seek contribution from Non-settling Defendants and third parties.[80] In determining that a right of

73. *Id.* at 433.
74. 422 U.S. 66 (1975).
75. *Id.* at 78.
76. 441 U.S. 677 (1979).
77. *Id.* at 731.
78. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).
79. *See, e.g.*, Karahalios v. National Federation of Federal Employees, 489 U.S. 527 (1989).
80. *Valentine*, 856 F. Supp. at 628. One of the Non-settling Defendants cited United States v. Production Plated Plastics, Inc., 21 ENVTL. L. REP. 21220 (W.D. Mich. 1991), in support of its claim that no such contribution right exists under RCRA. In *Production Plated Plastics* the court held that defendants found liable in a RCRA enforcement action may not sue an alleged owner/operator for

contribution exists under RCRA, the court specifically acknowledged that "while RCRA section 7003 does not expressly provide for contribution, such a right is evident given (1) the broad equitable authority that section 7003 grants to the courts, and (2) the existence of a right to contribution under federal common law, as evidenced by analogous pre-SARA CERCLA cases finding contribution available."[81]

In response to the argument put forth by Jim's Water Service, Inc. (JWS), a Non-settling Defendant, that nowhere in section 7003 of RCRA is there an express right to contribution,[82] *Valentine* recognized that although RCRA does not expressly provide for a right to contribution, that omission is not dispositive.[83] In deciding whether a contribution right exists by implication, the court found that it "must liberally construe section 7003 . . . [and] focus on congressional intent, which may be discerned from, among other things, the statutory language, the legislative history and the overall legislative scheme."[84] According to the court, RCRA "grants the court broad authority to fashion whatever equitable remedies are necessary to ensure the protection of the public health and the environment."[85]

Valentine also addressed JWS's claim that a private right of action for contribution by Settling Defendants lacks support in the legislative history and governmental objectives of RCRA.[86] Despite the lack of com-

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contribution for remedial expenses. However, *Production Plated Plastics* was decided under RCRA § 7002 not § 7003, consequently, the court in that case did not review § 7003 legislative history or the decisions recognizing the sweeping nature of the authority it grants to federal courts. Furthermore, *Production Plated Plastics* failed to discuss the important development of a federal common law of contribution under CERCLA. *Id.* at 637.

81. *See District Court Holds Settling Defendants in RCRA § 7003 Action Have Implicit Contribution Rights Against Non-Settling Defendants and Third Parties*, [Vol. 28] Chemical Waste Litigation Rep. (BNA) No. 3, at 531 (August 1994).

In determining that a right of contribution exists under RCRA, the *Valentine* court acknowledged that such a right is consistent with the Supreme Court's most recent decision on contribution, Musick, Peeler & Garrett v. Employers Insurance of Wausau, 508 U.S. __, 124 L. Ed. 2d 194, 113 S. Ct. 2085 (1993). *Valentine*, 856 F. Supp. at 636-37. The *Valentine* court also acknowledged that, like § 10(b) of the Securities Exchange Act of 1934, RCRA § 7003 leaves to the courts the task of determining what equitable remedies would be available under the statute. *Id.* at 637.

82. Defendant Jim's Water Service Inc.'s objection to proposed consent decree at 12. Civil Action No. 93CV1005J (May 20, 1994) (on file with the *Land and Water Law Review*).

83. *Valentine*, 856 F. Supp. at 631.

84. *Id.* (citing United States v. Aceto Agriculture Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989) (holding that RCRA is a remedial statute, which must be liberally construed); *Texas Industries*, 451 U.S. at 639; *Northwest Airlines*, 451 U.S. at 94; Cort v. Ash, 422 U.S. 66 (1975). In the cases cited above the court established factors which are relevant in determining whether a contribution right exists by implication. The relevant factors are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies.

85. *Valentine*, 856 F. Supp. at 632.

86. Defendant Jim's Water Service, Inc.'s objections to proposed consent decree at 11. Civil Action No. 93CV1005J (May 20, 1994) (on file with the *Land and Water Law Review*).

prehensive legislative history, the court found that RCRA's legislative history supported a broad grant of authority.[87] The court further noted that "recognizing a right to contribution comports with the purpose of the statute and serves the unique federal interest in the expeditious settlement of RCRA actions."[88] Moreover, even if the language and history of a statute provide little guidance, the court decided that it should infer a right to contribution where doing so would be consistent with express contribution rights granted under analogous laws and would not frustrate the purpose of the statute in question.[89]

JWS also argued that when Congress enacted RCRA in 1976, it created a detailed and stringent scheme for federal regulation of hazardous wastes.[90] As such, the judiciary should not fashion new remedies which might upset carefully considered legislative programs.[91] Additionally, JWS argued that if Congress had wanted to include a remedy such as contribution in RCRA, it had ample opportunity to do so when it amended RCRA in 1978, 1980, and 1984.[92] In response, Judge Johnson concluded that the court may formulate federal common law where it is necessary to protect uniquely federal interests or where Congress has given the court the power to develop substantive law.[93] The court reasoned that when a statute, its legislative history, or the overall regulatory scheme suggests that Congress intended for courts to have the power to alter or supplement remedies already enacted, then the court is empowered to recognize a federal common law right to contribution.[94] Further, the court said that in

87. *Valentine*, 856 F. Supp. at 632. *See, e.g.*, United States v. Aceto Agricultural Chemicals, 872 F.2d 1373, 1383 (8th Cir. 1989) ("We disagree with the district court's conclusion that RCRA should be narrowly construed. The relevant legislative history supports a broad, rather than a narrow construction . . . .").

88. *Valentine*, 856 F. Supp. at 632. *See infra* note 145 and accompanying text describing how contribution comports with the purpose of the RCRA.

89. *Valentine*, 856 F. Supp. at 631 (citing Musick, Peeler & Garrett v. Employers Insurance of Wausau, 508 U.S.___, 124 L. Ed. 2d 194, 203-05, 113 S. Ct 2085 (1993) (recognizing right to contribution in actions under Rule 10b-5 of the Securities and Exchange Act).

90. Defendant Jim's Water Service Inc.'s objections to proposed consent decree at 12. Civil Action No. 93CV1005J (May 20, 1994) (on file with the *Land and Water Law Review*).

91. *Id. See e.g., Northwest Airlines*, 451 U.S. at 97. "When Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement . . . the judiciary may not . . . fashion new remedies which might upset carefully considered legislative programs." *Id.*

92. *See supra* note 1.

93. *Valentine*, 856 F. Supp. at 635 (citing *Texas Industries*, 451 U.S. at 640).

94. *Id. See, e.g.*, Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913, 916-17 (N.D. Okla. 1987) (holding that defendants have federal common law contribution rights under CERCLA as it existed prior to the express provisions for contribution added by SARA); *New Castle County*, 642 F. Supp. at 1268-69; *ASARCO*, 608 F. Supp. at 1489 (holding that Congress intended issues of liability, including joint and several liability and contribution under CERCLA to be determined under traditional and evolving principles of federal common law).

determining whether it could formulate federal common law it was guided by cases such as *United States v. New Castle County*[95] which held that federal common law contribution rights existed under CERCLA before the SARA amendments.[96] In *Valentine*, the court stated that not only does the language and legislative history of section 7003 confirm that Congress intended to confer upon courts the authority to grant affirmative equitable relief, but also that contribution would serve the same unique federal interests under RCRA that are served under CERCLA.[97]

ANALYSIS

The Possibility That Congress Created A Federal Right Of Contribution Among RCRA Defendants

In *Texas Industries, Inc. v. Radcliff Materials, Inc.*[98] and *Northwest Airlines, Inc. v. Transport Workers Union of America*,[99] the Supreme Court held that "a right to contribution may arise under federal law in either of two ways: (1) through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, (2) through the power of courts to fashion a federal common law of contribution."[100]

I. Implied Creation of a Statutory Right of Contribution

Section 7003 of RCRA does not contain an explicit provision creating a statutory right of contribution, however, one might nonetheless be implied.

Courts may create remedies for a federal statute by inferring the remedies from the statutory scheme.[101] The Supreme Court's reluctance to infer a private cause of action under federal regulatory statutes[102] stems from separation of powers concerns. The Court is hesitant to intrude upon the legislature's domain by enlarging the remedial provisions of a statute

95. 642 F. Supp. 1258 (D.Del 1986).

96. *Valentine*, 856 F. Supp. at 635.

97. *Id.* at 636 Unique federal interests that would be served by allowing contribution under RCRA include, the preservation of the public treasury, and the ability to produce faster cleanups of hazardous waste sites.

98. 451 U.S. 630 (1981).

99. 451 U.S. 77 (1981).

100. *Texas Industries*, 451 U.S. at 638 (citing *Northwest Airlines*, 451 U.S. at 90).

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

102. *See Texas Industries*, 451 U.S. at 630 (holding that there is no implied private cause of action for contribution under Sherman and Clayton Acts); *Northwest Airlines*, 451 U.S. at 77 (holding that there is no implied cause of action for contribution under Title VII and Equal Pay Act).

beyond the scope Congress adopted.[103] Still, in *Northwest Airlines* and *Texas Industries* the Supreme Court identified specific factors indicative of congressional intent to create a statutory right of contribution.[104] These factors are: 1) the statutory language and legislative history; 2) the underlying purpose and structure of the statutory scheme; and 3) the likelihood that Congress intended to supersede or to supplement existing state remedies.[105] The determination of whether RCRA implicitly creates a right of contribution requires an analysis of these three factors.

A. Statutory Language and Legislative History

Although RCRA's provisions make no explicit reference to contribution, the breadth of the statutory language and legislative history serve as a basis for inferring a right to contribution. Several courts have acknowledged the extensive authority conferred by section 7003.[106] In *United States v. Conservation Chemical Co.*, the court held that RCRA gives broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment.[107]

Likewise, the Court of Appeals for the Third Circuit has held that the statute grants overriding authority[108] to the federal courts and further described that authority as follows:

> The unequivocal statutory language and this legislative history make it clear that Congress, by enacting section 7003, intended to confer upon courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes.[109]

> Congress, in the endangerment provisions of RCRA . . . sought to invoke nothing less than the full equity powers of the federal

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

104. *Id.* at 91. *See also Texas Industries*, 451 U.S. at 639.

105. *Northwest Airlines*, 451 U.S. at 91. The Court derived the three factors for ascertaining congressional intent from a line of cases beginning with *Cort*, 422 U.S. at 78.

106. *See, e.g.*, United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989); United States v. Price, 688 F.2d 204, 211, 213-14 (3d Cir. 1982); Middlesex County Board of Chosen Freeholders v. State of New Jersey, 645 F. Supp. 715, 722 (D.N.J. 1986); United States v. Conservation Chemical Co., 619 F. Supp. 162, 199 (D.C.Mo. 1985). These cases hold that the language of § 7003 was intended to confer upon the courts the appropriate level of authority necessary to eliminate any risks posed by hazardous wastes.

107. 619 F. Supp. at 199; *accord Aceto Agricultural Chemicals*, 872 F.2d at 1383.

108. *Price*, 688 F.2d at 213 (quoting H.R. Committee Print No. 96-IFC 31, 96th Cong., 1st Sess. 32 (1979)).

109. *Id.* at 213-14.

courts in the effort to protect public health, the environment, and public water supplies from the pernicious effects of toxic wastes. Courts should not undermine the will of Congress by either withholding relief or granting it grudgingly.[110]

Notably, a Senate report on the 1984 amendments to RCRA quotes with approval the passage from *Price* given above.[111] Additional legislative history supports a broad reading of the statute: "section 7003 is essentially a codification of common law public nuisance remedies . . . [and], therefore, incorporates the legal theories used for centuries to assess liability for creating a public nuisance (including intentional tort, negligence, and strict liability) and to determine appropriate remedies."[112]

B. Underlying Purpose and Structure of the Statutory Scheme

The second factor, the purpose and structure of RCRA, is consistent with a right of contribution. RCRA has two primary purposes: promoting rapid cleanup of hazardous waste sites, and ensuring complete protection of the public health and environment.[113] Because contribution would allow potentially liable parties to recover from other liable parties, it would encourage parties to pursue voluntary remedial work and other forms of settlement, in furtherance of RCRA's cleanup goal. Without contribution, defendants either will be forced to bear the full cost of cleanup despite the existence of other responsible parties or will be deterred from settling until after the share of every potentially responsible party has been litigated.[114] Allowing a contribution remedy has the "significant advantage of facilitating and encouraging early settlements of RCRA cases and expeditious cleanups of those sites."[115] A right of contribution would also address RCRA's second goal, ensuring complete protection of the public health and the environment, by spreading cleanup costs among all responsible parties. If the *Valentine* court had failed to recognize a right of contribution under RCRA it would have effectively immunized the Non-settling Defendants and other responsible parties from

110. *Id.* at 214.

111. *Conservation Chemical*, 619 F. Supp. at 201 (citing S. REP. No. 284, 98th Cong., 1st Sess. 59 (1984)).

112. *Valentine*, 856 F. Supp. at 633 (citing S. REP. No. 172, 96th Cong., 1st Sess. 5, *reprinted in* 1980 U.S.C.C.A.N (94 Stat.) 5019, 5023; *see also Conservation Chemical*, 619 F. Supp. at 199 and Jones v. Inmont Corp., 584 F. Supp. 1425, 1436 (S.D. Ohio 1984).

113. *See supra* note 111.

114. *See, e.g.*, Polger v. Republic National Bank, 709 F. Supp. 204, 209 (D.Colo. 1989). If owners believe that they will not be allowed to recover from others who actually generated or dumped the waste, they may decide to ignore a hazardous waste site in hope that federal or state authorities will either not discover the waste, or will be unsuccessful in pinning liability on them. *Id.* at 206.

115. *Valentine*, 856 F. Supp. at 634-35.

any costs of the cleanup despite their possible liability.[116] Absent a right to contribution, there is no other mechanism by which cleanup costs could have been recovered by the Settling Defendants.[117] In most hazardous waste cleanups, there is no contractual privity between the responsible parties, thus a contractual remedy such as implied or express indemnification would be unavailable. Because of the recent evolution of tort law in most states towards a pure comparative negligence system with an abrogation of joint and several liability, there is really no contribution mechanism within the tort system for the settling defendant to recover under. The prospect of liability for contribution to other responsible parties would deter careless handling of wastes by waste generators, transporters, and operators of waste facilities. Absent a right of contribution, other responsible parties might escape liability unless the government is able to locate and sue them, a difficult and unlikely undertaking.[118]

Opponents of contribution argue that it would impede the prompt cleanup goal by discouraging settlement.[119] They maintain that contribution would give responsible parties incentives to litigate and attempt a successful defense of the action rather than agree to settlement.[120] The prospect of litigation would involve little risk for responsible parties because in the event of liability, the responsible parties could still recover contribution from settling parties. Additionally, parties who settle would still remain liable to other responsible parties for contribution.[121] However, these arguments do not apply because the contribution rule established in *Valentine* prohibits contribution claims against persons who settle in good faith and reduce a plaintiff's claim against other tortfeasors by the amount the settling party paid in settlement.[122] This contribution rule encourages settlement because a plaintiff knows how much of his claim he is risking by settling with one party, and the settlor gains protection from the contribution claims of other liable parties. Opponents also argue that a court ought not to provide relief to a party whose claim rests solely on his own wrongdoing.[123] However, today it is clear that courts and legislatures

116. *Id.* at 635.

117. *Id.*

118. *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1982) (explaining that in this case the government sued about 40 companies; however, aproximately 150 companies escaped suit by agreeing to settle with the EPA).

119. Supplemental Memorandum of Certain Settling Third-Party Defendants (filed Feb. 16, 1984) (on file with the *Land and Water Law Review*); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1982).

120. *Id.*

121. *Id.*

122. *Valentine*, 856 F. Supp. at 630.

123. PROSSER AND KEETON, *supra* note 38, at 345-52.

have found doing justice to the defendants more compelling than adhering to the historic prohibition against providing relief to a wrongdoer.[124] As Prosser said:

> There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or the plaintiff's collusion with the other wrongdoer, while the latter goes scot free.[125]

Justice would have been disserved by rewarding the Non-settling Defendants and other parties for refusing to contribute to cleanup costs.

C. Likelihood that Congress Intended to Supersede or Supplement State Law

The third factor, the likelihood that Congress intended to supersede or supplement state law, also favors the recognition of a right of contribution under RCRA. Contribution among jointly and severally liable parties is not exclusively relegated by state law; it exists in federal statutory and common law.[126] Joint and several liability is a powerful tool for the government to achieve its goal of expeditious cleanup of hazardous waste.[127] It allows the government to select one primarily responsible party as the defendant, determine liability as to that defendant and then collect the total amount of damages from that one defendant.[128] In doing so, the

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124. *Id.* at 349.

125. *Id.* at 337-38.

126. *See, e.g.*, the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a (1982), Congress fashioned three express provisions for contribution: 15 U.S.C. §§ 77k(f), 78i(e), and 78r(b). Barbara J. Gulino, *A Right of Contribution Under CERCLA: The Case For Federal Common Law*, 71 CORNELL L. REV. 668, 684 n.86 (1986).

127. *ASARCO*, 608 F. Supp. at 1491 The result of joint and several liability can be characterized by the carrot and stick analogy. The carrot, the EPA, can offer potential settlors is that they no longer need to fear that a later contribution action by a non-settlor will compel them to pay still more money to extinguish their liability. As for the stick, if the settlor pays less than its proportionate share of liability, the non-settlor, being jointly and severally liable must make good the difference.

128. *Id.* It is likely that if one defendant is held jointly and severally liable for the entire cleanup cost of a waste site, he will bring in as many other defendants as possible into the suit before damages are assessed. In that case the responsibility of a settlor for damages would need to be fully litigated by the government to determine the settlor's proportional share, thus largely duplicating the aspects and expense of the litigation the settlement was designed to avoid. It thus might cost the government more to settle with one party than not to settle. The result is an increase in the cost of the suit and also an increase in the amount of time it takes to get a resolution, both of which are contrary to the goals of RCRA. If the defendant can seek contribution from other responsible parties, the

government reduces its litigation costs and, more importantly, speeds up the cleanup of the site.[129] A right to contribution is an integral component of joint and several liability.[130] As of 1985, eighty percent of the states have recognized the equities of a right to contribution where joint and several liability exists.[131] "Because Congress has largely left the judiciary with the responsibility for fashioning rules of joint and several liability and remedies resulting therefrom, the federal judiciary has no choice but to accept its charge by fashioning a federal remedy of contribution in CERCLA cases as it has done in similar circumstances under other statutes."[132] In light of the fact that joint and several liability is in large part federal in nature, federal law should govern the extent of liability under RCRA and a defendant's ability to seek contribution.

The statutory language and legislative history of RCRA demonstrate a congressional intent to create a statutory right of contribution. Also, the purpose and structure of RCRA along with the likelihood that Congress intended to supersede or to supplement existing state remedies support an implied right of contribution under RCRA.

II. Federal Common Law Right of Contribution Among RCRA Defendants

Although RCRA does not explicitly provide for a right of contribution, courts can still apply contribution to RCRA cases by creating federal common law. The areas where federal common law exists can be grouped into two major categories. The first major area of federal common law rules is where the Court has acted to effectuate congressional intent, usually in the context of filling in gaps in congressional legislation.[133] The second major area of federal common law has developed where the Supreme Court has decided that federal rules are necessary to protect uniquely federal interests.[134]

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government will not have to determine the exact share of each defendant and can shift that burden to the defendants themselves, thus saving time and money.

129. *Aceto Agricultural Chemicals*, 872 F.2d at 1383; *cf. ASARCO*, 608 F. Supp. at 1491 (arguing that once cleanup is assured, no statutory goal would be promoted by forcing only some of the responsible parties to bear cleanup costs).

130. *ASARCO*, 608 F. Supp. at 1490; County Line Investment Co. v. Tinney, 933 F.2d 1508, 1515-16 (10th Cir. 1991).

131. *Conservation Chemical*, 619 F. Supp. at 226.

132. United States v. Bear Marine Services Inc., 509 F. Supp. 710, 716 (E.D. La. 1980), *remanded on other grounds*, 696 F.2d 117 (5th Cir. 1983); *In re Berkley Curtis Bay Co.*, 557 F. Supp. 335, 339 (S.D. N.Y. 1983).

133. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.3, at 353 (2d ed. 1994).

134. *See supra* note 64.

A. The Development of Federal Common Law to Effectuate Congressional Intent

The Supreme Court has created federal common law when it believes it necessary to effectuate the intent behind a federal statute. The central question is whether common law is needed to fulfill Congress's purposes in adopting a particular statute. This type of federal common law is easily justified. In adopting statutes, Congress cannot forsee every possibility. Inevitably, statutes have gaps and the application of statutes to specific situations requires the development of rules not expressly provided by statute. The courts can justify creating a federal common law right of contribution under RCRA. First, courts could choose to create a uniform contribution rule to fill the gaps that Congress left in RCRA's liability provisions.[135] Second, courts could interpret RCRA's legislative history and statutory language scheme as authorizing them to create a federal common law rule.

1. Gap Filling

In *Illinois v. City of Milwaukee*[136] the Supreme Court discussed gap filling in the context of federal water pollution statutes. In *Milwaukee*, the Court recognized a federal common law of nuisance in certain bodies of water.[137] Even though the statute did not prescribe the remedy that Illinois sought, the Court maintained that "the remedies which Congress provides are not necessarily the only federal remedies available."[138] According to the Court, federal courts could create federal common law to abate nuisances in interstate waters.[139]

The Court based its decision on the competence of and need for the courts to fill gaps Congress had left in the federal water pollution statutes. The Court emphasized the strong federal concern for abating water pollution, a policy evidenced by the water pollution statute.[140] In addition, the Court noted its past practice of fashioning federal common law in areas in

135. *See supra* note 35 and accompanying text for discussion of § 7003 statutory language Although RCRA holds responsible parties strictly liable, the statute fails to prescribe a method for allocating that liability when multiple parties bear responsibility for a hazardous release.

136. 406 U.S. 91 (1972) (explaining that Illinois brought suit against the city of Milwaukee to abate public nuisance caused by the city's disposal of sewage into Lake Michigan.).

137. *Id.* The Court reasoned that federal law applied to the dispute concerning pollution to interstate waters and that Illinois could therefore appeal to federal common law to abate a public nuisance in interstate or navigable waters.

138. *Id.* at 103.

139. *Id.* at 103-04.

140. *Id.* at 101-02.

which an overriding federal interest triggered a need for a uniform rule of decision or in which the controversy touched basic interests of federalism.[141] Thus in *Milwaukee*, the Court applied federal common law to a controversy that exposed a gap in a federal regulatory scheme and implicated a strong federal policy.

The Court's filling of statutory gaps by generating federal common law in *Milwaukee* supports the creation of a federal common law right of contribution under RCRA. First, RCRA's liability scheme fails to specify how to allocate liability among multiple responsible parties.[142] Second, RCRA cases implicate a strong federal interest. RCRA and CERCLA together stand for the strong federal policy of abatement of toxic waste hazards similar to the federal interest in abatement of water pollution that the Milwaukee Court held sufficient to generate federal common law of nuisance.

The existence of the gap in RCRA's liability scheme and the presence of a strong federal interest give courts a sufficient basis to fashion a federal common law of contribution.

2. Congressional Authorization

A second basis for courts to fashion a federal common law rule of contribution under RCRA is congressional authorization.[143] In *United States v. New Castle County*, the federal district court reviewed CERCLA's legislative history and concluded "that Congress did intend that the courts develop a substantive law of CERCLA contribution as a matter of federal common law."[144] The court also held that the application of federal common law would enhance unique federal interests, reasoning as follows:

> [T]he Federal Government is authorized by CERCLA to take action against responsible persons to achieve compliance with the goals of the Act. A right to contribution would encourage expeditious settlement of Superfund suits brought by the Government against these responsible persons. Because CERCLA liability is joint/several, the Government needs to sue only a limited number

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

142. *See supra* note 135.

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

144. 642 F. Supp. 1258, 1268 (D.Del 1986).

> of responsible parties in order to recover all costs of cleanup and remedial operations at a site. With a right to contribution available to CERCLA defendants, they will be willing to undertake the burden to locate and implead other responsible persons into a CERCLA action in order to minimize their own liability. As the size of the defendant pool increases, the chances for settlement of the suit and achievement of one of the federal government's objectives under the Act-site cleanup at the expense of responsible parties-is met. In addition, a right to contribution, through its ability to encourage settlement, will cause a substantial reduction in the Government's CERCLA enforcement costs by eliminating the need for expensive and drawn out litigation.[145]

However, the *New Castle* court failed to discuss certain factors considered by the Supreme Court in *Texas industries* as relevant to determining whether congressional authorization exists.

The Court in *Texas Industries*[146] discussed three factors relevant to determining whether Congress intended to authorize courts to formulate a common law right of contribution: the language of the statute, its legislative history, and the overall regulatory scheme. These three factors are the same criteria the Court used to discern an implied statutory right of contribution.[147] Although the factors are the same, the focus of the inquiry is different. In a congressional authorization analysis, courts inquire whether the factors indicate that Congress authorized courts to develop common law.[148]

RCRA's statutory language contains no reference to contribution. However, RCRA's legislative history indicates an intent to give courts the power to formulate rules allocating liability and to determine appropriate remedies.[149]

In addition, the statutory scheme of RCRA supports the argument that Congress empowered courts to fashion a federal common law rule of contribution under RCRA. First, RCRA is a remedial rather than a punitive legislative scheme.[150] Because RCRA is remedial in nature, contribution follows from the statute's overall remedial purpose, expediting clean-

145. *New Castle County*, 642 F. Supp. at 1268-69; *accord Sand Springs Home*, 670 F. Supp. at 916.

146. 451 U.S. at 645 (analyzing three factors, but fixing no relative weight to any).

147. *See supra* note 105 and accompanying text.

148. *Texas Industries*, 451 U.S. at 645.

149. *See supra* note 112 and accompanying text.

150. RCRA enforcement actions under § 7003 impose liability for costs of cleanup and for damages to natural resources. 42 U.S.C. § 6973(a) (1988 & Supp. V 1993).

up by distributing liability among all responsible parties. Second, the gaps in RCRA's liability scheme support the conclusion that Congress authorized courts to fashion liability rules, including a contribution rule. The combination of an incomplete statutory scheme along with a legislative history indicating congressional intent that courts use common law to fill the gaps provides a strong basis for inferring congressional authorization for the courts to fashion a common law rule of contribution.

B. The Development of Federal Common Law to Protect Uniquely Federal Interests

The Supreme Court has articulated a two-part test in deciding whether to create federal law to safeguard uniquely federal interests.[151] First, the Court considers whether the matter before it is properly subject to the exercise of federal power.[152] The existence of federal power to create rules and regulations which protect our lands from the effects of hazardous wast is evident in the United States Constitution which states, "The Congress shall power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States."[153] Second, the Court considers whether there is an important federal interest which justifies development of federal common law.[154] In determining what constitutes a federal interest sufficient to justify the development of federal common law, the Court in *Clearfield Trust Co. v. United States*, explained that the need for a uniform rule concerning commercial paper issued by the United States justified the fashioning of new federal common law.[155] Likewise, there is a great need for uniformity in rules covering the area of hazardous waste clean-ups which justifies the creation of new federal common law under RCRA.

III. The Source of the Right of Contribution

Having determined that a right of contribution exists under RCRA, the *Valentine* court failed, however, to address the issue of what the content of that federal rule should be. The court can base the federal law on already existing state law principles, sometimes termed "incorporating or borrowing state law as the federal rule of decision."[156] Alternatively, the Court can create a new uniform federal rule.[157] In deciding whether to incorporate state

151. Field, *supra* note 54, at 886.
152. Clearfield Trust Co. v. United States, 318 U.S. 363 (1953).
153. U.S. CONST. art. IV, § 3, cl. 2.
154. *Clearfield Trust*, 318 U.S. at 363.
155. 318 U.S. 363, 367 (1953).
156. P. LOW & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL STATE RELATIONS, 302 (2d ed. 1989).
157. *Clearfield Trust*, 318 U.S. at 367.

law or to fashion new federal law, the Court balances the need for federal uniformity and for special rules to protect federal interests agaist the disruption that will come from creating new legal rules.[158] The Court in *Kimbell Foods* stated that federal programs, which by their nature are and must be uniform in character throughout the nation, necessitate the formulation of federal rules of decision.[159] RCRA is such a federal program. As discussed above, the nature of RCRA is such that its rules must be uniformly applied across the nation. The right of contribution under RCRA must also be uniformly applied if the statute is to be effective in its objectives. A contribution standard which varies in the different forum states would frustrate the federal interest in obtaining expeditious cleanup of hazardous waste sites. Also, a uniform rule of contribution will prevent excessive dumping in states with more lenient laws. There is no reason why the nation should be subjected to the needless uncertainty and subsequent delay of diversified state contribution rules when this matter is appropriate for uniform national treatment.

CONCLUSION

The Wyoming district court's decision to allow Settling Defendants in a RCRA section 7003 action to seek a right to contribution from Non-settling Defendants and third parties was appropriate. The absence of an express contribution provision in RCRA should not preclude courts from fashioning a common law contribution rule for defendants held jointly and severally liable.

Without a RCRA contribution rule, responsible parties not sued by the government would escape liability and the burden of cleanup costs would fall on only some of the responsible parties. The presence of an incomplete statutory scheme and a strong federal interest in abating hazardous waste dumpsites bolsters the argument for gap filling by the courts. Courts may also find a separate ground for fashioning federal common law in RCRA's legislative history and statutory scheme which suggest that Congress authorized courts to fill the statute's liability gaps with common law principles. Finally, the application of federal common law would enhance the uniquely federal interests of RCRA by encouraging expeditious cleanup of hazardous waste sites and reducing government litigation costs.

SCOTT P. KLOSTERMAN

158. United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).
159. *Id.* at 728.