DETERMINING DAMAGES IN ENVIRONMENTAL CASES IN THE WORLD AFTER BURLINGTON NORTHERN

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In 2009, the United States Supreme Court issued its decision in *Burlington Northern & Santa Fe Ry. Co v. United States*, 556 US 599, 129 S. Ct. 1870, 173 L.Ed.2d 812 (2009), finding among other things that liability under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 USC § 9601 et seq., is subject to a divisibility of harm analysis, notwithstanding the joint and several liability language contained in the statute. 42 USC § 9607. Because decisions from the Supreme Court in environmental matters are few and far between, and because the analysis in the decision held the potential to limit the liability of responsible parties, many CERCLA practitioners touted the case as ushering in a new era in Superfund litigation. Notwithstanding that enthusiasm, cases decided since *Burlington Northern* have not led to a substantial limitation in the damages faced by responsible parties. The truth of the matter is that despite all the attention shown to the Supreme Court's decision in *Burlington Northern*, there is no new law, no change in the way the federal courts apportion liability under CERCLA and no requirement that a court apportion liability (and in turn clean-up costs) where there are multiple parties responsible for a single harm. However, what is also true is that in the five years since *Burlington Northern*, there has been a magnum of confusion and an equal amount of cases hoping to guide litigants through the rocky landscape of the apportionment analysis.

This article will explain the underpinnings of CERCLA liability and discuss the application of the *Burlington Northern* decision in subsequent cases. While the *Burlington Northern* decision is something to be considered in any CERCLA case, unless there are unique facts presented to allow the apportionment of liability, the underlying damages will still be determined, in most instances, through the allocation process.

One of the key objectives of CERCLA Section 107 has always been to impose strict joint and several liability on parties responsible for contamination at a site. In turn, liable parties fall into several categories, as defined in CERCLA, including present and former owners, parties that generated hazardous substances that ended up at a site, parties that arranged for the disposal of hazardous substances at a site, and transporters of wastes to a site. Under this broad construct, many sites have multiple responsible parties often spanning several categories of responsible parties.

Once joint and several liability is established, courts go through a process of allocation to determine the percentage of damages to be paid by each liable party. This involves the application of equitable factors, including those known as the "Gore Factors." *See, e.g., Allied Signal, Inc. v. Amcast International Corp.*, 177 F. Supp. 2d 713 (S.D. Ohio 2001). Thus damages attributable to a party in a CERCLA case would be based upon facts such as the length of time a party owned a site, the volume of waste that was sent to a site, the relative toxicity of waste sent to a site, the degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of a hazardous waste, the degree of care exercised by a party, the degree of cooperation of the party with government officials to prevent harm, and the ability of the parties to demonstrate that contribution to a discharge can be distinguished.

However, some courts have recognized that, notwithstanding the language in CERCLA, application of "joint and several" liability is not appropriate in every CERCLA case. Starting with the decision in *United States v. Chem-Dyne Corp.*, 572 F. Supp 802 (S.D. Ohio 1983), a number of courts began to rule that joint and several liability would not apply when it could be shown that the harm caused by a CERCLA liable party is "divisible." The analysis in these cases begins with the Restatement (Second) of Torts, Section 433A, which states:

> When two or more persons acting independently cause 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 himself caused.

If the Restatement approach applies, there still must be a process of determining how much each party should pay when the parties are not jointly and severally liable under CERCLA § 107(a).

In *Burlington Northern*, *supra*, the Supreme Court adopted and applied the rationale set forth in *Chem-Dyne*. That decision involved a cost recovery action by the United States Environmental Protection Agency which had spent a significant amount to cleanup a site owned in part by two railroads. The contamination at the site had been caused by an operator on both the railroads' property and an adjacent site. The District Court attempted to apply equitable factors and determined to "apportion" liability to the railroads of 9 percent of the total cleanup costs.

The Supreme Court in *Burlington Northern* pointed out that while equitable factors apply to allocation of liability among parties that are jointly and severally liable, "equitable considerations play no role in the apportionment analysis; rather, apportionment is proper only when the evidence supports the divisibility of the damages jointly caused by the PRPs." *Id.* at 1882 n. 9.

Thus, the analysis is a factual one for which ''the defendants seeking to avoid joint and several liability bear the burden of providing that a reasonable basis for apportionment exists.'' *Id*. at 1881. In particular, the Supreme Court was persuaded by the District Court's finding that the contamination on the railroads' portion of the site was remote from the primary source of contamination and that spills of contaminants on the railroads' portion of the site led to no more than 10 percent of the cleanup. The railroads' liability as ''apportioned'' was 9 percent of the total costs.

Thus, the Supreme Court upheld the *Chem-Dyne* approach. However, because of the nature of the ruling, and the way the District Court determined the facts of the case, confusion ensued about the gravamen of the decision. Compare *Evansville Greenway and Remediation Trust v. Southern Indiana Gas and Electric Company, Inc.*, 661 F. Supp. 2d 989 (S.D. Indiana 2009) (*Burlington Northern* raises new questions and legal uncertainty) with *United States v. Iron Mountain Mines*, 2010 U.S. Dist. LEXIS 44331 (E.D. California, May 6, 2010) (*Burlington Northern* does not establish new law); compare also Michael Foy, Comment, ''Apportioning Cleanup Costs in the New Era of Joint and Several CERCLA Liability,'' *51 Santa Clara L. Rev. 625 (2011)* and Bruce S. Gelber, ''Alive and Well: CERCLA Liability After Burlington Northern,'' *Superfund and Natural Resource Damages Litigation Committee Newsletter, Vol. 5., No. 1 (March 2010)*. However, what is clear is that CERCLA defendants have been emboldened to seek ways to limit liability by asserting a divisibility defense. Cases that have been decided after *Burlington Northern* demonstrate the limitations and concerns for those who are doing so.

As a starting point, the distinction between ''apportionment'' and ''allocation'' must be clearly understood. CERCLA liability derives from Section 107 of that statute, which creates joint and several liability among the classes of parties defined therein. Section 113 of CERCLA creates a right of contribution among parties that are liable under Section 107. The court in *Yankee Gas Services Co. v. UGI Utilities, Inc.*, 852 F. Supp. 2d 229, 241 (D. Conn. 2012) explained the distinction:

> Apportionment is a way of avoiding the joint and several liability that would otherwise result from a successful 107(a) claim; allocation under 113(f), is the equitable division of costs among liable parties. To apportion is to request separate checks with each party paying only for its own meal. To allocate is to take an unitemized bill and ask everyone to pay what is fair.

However, even when determining whether ''separate checks'' are appropriate, under *Burlington Northern*, consideration of the total ''bill'' or harm caused by pollution at a site is an important consideration. As the court explained in

Pakootas v. Teck Cominco Metals, 868 F. Supp. 2d 1106 (E.D. Wash. 2012), the timing of when apportionment can be raised may vary from case to case based upon the facts, but in every case, even though a distinction may exist between "damages" and "harm," what is ultimately apportioned are the cleanup costs at a given site. As the court noted:

> The nature of cleanup costs are an important consideration in determining whether a defendant can prove the harm is divisible and beyond that, whether there is a reasonable factual basis for apportionment. Id. at 1126

Under this view, the separate checks analogy could be viewed as akin to ordering a pizza, when there are only two slices of plain and the rest have pepperoni. The party ordering the plain slices would ask for the separate check only for the cost of two plain slices, not for a quarter share of the total.

Perhaps not surprisingly, courts have been reluctant to agree to divide up the cost of the single pie absent compelling facts, and the potential scope of the *Burlington Northern* holding is now even more clearly driven by particular facts. In one of the first cases decided after *Burlington Northern*, the District Court did allow defendants to proceed with a divisibility defense based upon a market share theory. That case involved a claim by a number of municipalities seeking to recover the costs of addressing ground water contamination caused by MTBE, a gasoline additive. The court ruled that the defendants could pursue a divisibility defense based upon market share. However, the burden of proof to show that there was a reasonable basis for apportionment was placed upon the defendants. *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 643 F. Supp. 2d 461 (S.D.N.Y. 2009).

United States v. Saporito, 684 F. Supp. 2d 1043 (N.D. Ill. 2010) involved an effort by the current owner of a plating operation to argue that his liability should be apportioned. The court ruled that the defendant did not meet his burden of proof to establish a reasonable basis for apportionment. Indeed, the court found compelling that the theory advanced by the defendant did not present any way to compute defendant's liability other than to argue that it was zero. The District Court was careful to distinguish *Burlington Northern* by noting expressly that because the harm was geographically separated, it was easy to divide the responsibility.

Other courts have considered divisibility arguments based upon geographic issues and based upon the type of contaminant at a given site. Thus in *ITT Industries v. Borgwarner, Inc.*, 700 F. Supp. 2d 848 (W.D. Mich. 2010), the court considered a geographic argument where contamination emanating from two separate sites resulted in a comingled plume. In that case, the court ruled that the defendants had not met the burden of showing divisible harm when there was clearly a unitary operation; actual migration of contaminants

occurred and there was no way to separate investigation and cleanup costs shown among the various contaminants.

Defendants have also tried unsuccessfully to argue for divisibility based upon the length of time of operations at a particular site. For example, in *3000 E. Imperial, LLC v. Robertshaw Controls Co.*, 2010 U.S. Dist. LEXIS 138661 (C.D. Cal. 2010), the defendant asserted that it should only be liable for the portion of harm based upon the percentage of years that it owned the underground storage tank that leaked, causing the pollution being remediated. Because there was no proof about when the tank leaked, or that all of the contamination did not leak during the defendants ownership, the court ruled that the defendant had not met its burden to show divisibility. The same result was reached in *Board of County Com'rs of County of La Plata Colorado v. Brown Group Retail, Inc.*, 768 F. Supp 2d 1092 (D. Col. 2011). There the court determined that based on the facts presented, the length of time of ownership was not a basis for apportionment. The court specifically noted that further proof should have been produced about the extent of activity that caused contamination, including the volume of material processed or produced during each period of ownership before a divisibility determination could be reached.

Parties have also attempted to use volumetric arguments to avoid or limit CERCLA liability. *United States v. NCR Corporation*, 688 F.3d 833 (7th Cir. 2012), involved the long running remediation of PCB contamination in the Fox River in Wisconsin. NCR had complied with an order issued by the USEPA and undertaken significant cleanup in the river. Under the belief that it had done more than its fair share of the work, NCR stopped. USEPA sought and obtained an injunction compelling NCR to proceed. In opposing the USEPA, NCR argued that its liability should be apportioned and, therefore, that the EPA order was improper. The District Court examined the issue, looking at harm as measured by remediation cost, harm as measured by danger to the public and harm as measured by the amount of pollution. The District Court concluded that NCR did not establish divisibility under any of these approaches. On appeal, the Circuit Court agreed. It rejected NCR's arguments based upon the particular facts of the case. The court explained that there is not one universal way to approach apportionment but rather that "apportionment will vary depending on how the harm from pollution is characterized." The Circuit Court's decision was guided by the fact that "NCR did not put forth any evidence to refute the government's contention that NCR's contribution of PCB would alone, require approximately the same remedial measures." *Id*. at 839.

The NCR court also responded to a claim that the district court decision was contrary to *Burlington Northern*. It noted that the parties in the *Burlington*

Northern case had agreed that apportionment was possible, which is why the Supreme Court focused on the method of apportionment used by the lower court. As the *NCR* court noted, the issue of divisibility is a separate fact-based determination and that equitable considerations play no role. NCR was unable to establish the facts needed for divisibility.

Apportionment was also one of many issues considered in *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 746 F. Supp. 2d 692 (D.S.C. 2010), *aff'd.*, 714 F.3d 161 (2013). In that case, the district court characterized the apportionment issue as:

> whether the harm at the Site is divisible based upon how much contamination each party contributed to the Site and how much soil each party caused to be included in the remediation by spreading contamination throughout the Site.

In order to meet this test, PCS advanced five different approaches. First, it argued that the amount of fill placed at the site during each party's period of ownership could be determined by aerial photography. Second, it asserted that apportionment could be determined by volume. Third, it asserted that the length of time various parties owned the contaminated site could be used. Fourth, it argued that historic aerial photography could be used to determine which party disturbed which area of the site. Last, it asserted that sampling data could be used to distinguish contamination among the parties. On the particular facts before it, the District Court concluded that there was no basis to apportion and held the parties jointly and severally liable.

On appeal, the Fourth Circuit upheld the findings of the District Court that there was no rational basis in the record to find that harm was divisible. It went on to consider an argument by PCS, that an owner or operator could avoid joint and several liability by showing that there is a reasonable basis to apportion only its share of the harm, not the total harm at a site. PCS also claimed that a current operator could apportion liability by arguing that there was no disposal during its period of operations. The Court rejected both arguments. As to the first, the court did not reach the legal question but ruled that PCS provided no basis to apportion even its share. As to the latter, it ruled that a current owner or operator could not benefit from a zero share apportionment as a means to avoid liability because such a ruling would obviate the narrow defenses available under CERCLA to a current owner or operator.

As these cases show, the fanfare accompanying *Burlington Northern* was largely misplaced. The unique facts presented in that case provided the theoretical basis to divide harm geographically, and by time of operation. The other reported cases do not have fact patters that establish a basis for divisibility of harm quite as clearly.

Notwithstanding the lack of a strong body of case law supporting apportionment post *Burlington Northern*, CERCLA practitioners should in every case consider whether divisibility can be established by looking at the facts in each circumstance. While it is unlikely that a divisibility argument will work when there is a single plume of mixed contamination, a better apportionment argument can be made where contamination is distinct by type or geographic location. Although *Burlington Northern* did not change the law, because it is a Supreme Court decision, district courts appear to be more likely to allow parties some leeway in making a divisibility argument and in fully analyzing the facts presented.

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