

Superfund and Natural Resource Damages Litigation Committee Newsletter

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EDITORS' NOTE

Ashley A. Peck and Andrew W. Homer

We are pleased to bring you another issue of the ABA SEER Superfund and Natural Resource Damages Litigation Committee Newsletter. In this issue, we feature four timely articles that we believe will be useful to Superfund and NRD practitioners.

The first two articles were presented as part of a panel discussion at the ABA SEER Spring Conference in Salt Lake City, and will allow those who could not make the meeting to enjoy some of the content. These articles provide different perspectives on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) allocation and apportionment in the current legal setting. The next article revisits the Supreme Court's 2012 decision in *Sackett v. EPA*, and analyzes whether the Court's holding regarding pre-enforcement review of EPA orders issued under the Clean Water Act could extend to similar orders issued under CERCLA. The final article discusses the split between circuits on the issue of whether declaratory relief should be available for future response costs where the expenditure of past response costs has not been proven, and offers the author's opinion on which is the better approach.

As always, we would like to extend thanks to this issue's contributors on behalf of the entire committee membership and ourselves as newsletter vice chairs. Contributions help increase thoughtful dialogue among the Superfund and NRD bar and our committee

members. We welcome submissions from members and practitioners of all stripes, and would be pleased to discuss proposed topics with anyone who is interested. Please spread the word, and feel free to contact either of us using the e-mail addresses below.

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Editors

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MESSAGE FROM THE CHAIR

Kirk T. O'Reilly

Like many of you, I receive daily updates of what's new in environmental law. It's clear that the field of Superfund and natural resource damages (NRD) litigation continues to evolve. This newsletter, along with sponsored conference sessions and webinars, list serve news flashes, and the annual year in review serve as tools to help committee members keep informed. They also provide a forum for you to share with your peers. Feel free to contact me or any of our vice chairs to discuss how you can get more involved. Looking ahead, I'd like to remind members that our committee is sponsoring a session entitled "CERCLA Case Studies and Lessons Learned—Novel Approaches and Noteworthy Outcomes" at the SEER meeting this October in Baltimore. Hope to see you there.

Kirk T. O'Reilly is senior managing scientist with Exponent's Environmental Sciences Practice in Bellevue, Washington, and is a member of the Washington State Bar.



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CERCLA ALLOCATION AND APPORTIONMENT

David R. Erickson and Vanessa D. Dittman

Under the Comprehensive Environmental Response, Compensation, and Liability Act, parties are often held jointly and severally liable for response costs related to the clean up of contaminated sites. However, courts may instead apportion liability if there is a reasonable basis for division of a distinct or single harm. This article will explore cost recovery by potentially responsible parties under section 107 or section 113 after *Atlantic Research* as well as recent case law on apportionment of liability, including a discussion of the pivotal *Burlington Northern* case on divisibility, and how courts have responded.

CERCLA Apportionment and Allocation Background

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 to address the threat of hazardous waste sites nationwide. Courts generally agree that CERCLA imposes strict retroactive liability on potentially responsible parties (PRPs) for releases of hazardous substances as they are defined under the act. PRPs that have incurred response costs related to contaminated sites may be able to recover costs from other PRPs through a cost recovery claim under section 107 of CERCLA or a contribution claim under section 113. 42 U.S.C. §§ 9607, 9613. Section 107 allows any party who voluntarily cleans up a site to recover "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe . . ." and "any other necessary costs of response incurred by any other person . . . " from PRPs. 42 U.S.C. § 9607. Section 113 provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [CERCLA § 107(a)] . . . during or following any civil action under [CERCLA § 106] or under [CERCLA § 107(a)] . . ." 42 U.S.C. § 9613(f)(1).

CERCLA does not explicitly state that liability under its section 106/107 cost recovery provisions is joint and several, but courts have often held that such is the

case. *United States v. Chem-Dyne Corp.*, 572 F.2d 802, 808 (S.D. Ohio 1983); *United States v. Monsanto Co.*, 858 F.2d 160, 172 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). Indeed, early drafts of the CERCLA statute included joint and several liability language, but the language was removed before the legislation was passed. *Chem-Dyne Corp.*, 572 F.2d at 806 (citing 126 CONG. REC. S14964 (Nov. 24, 1980)). Thus, when liability under CERCLA involves multiple parties, all parties may be jointly and severally liable to parties who conduct response activities. However, as this section will explain, parties may be able to divide the harm and apportion the costs when “there is a reasonable basis for determining the contribution of each cause to a single harm.” *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1881 (2009). As a preliminary note, under CERCLA, “apportionment” is the term to describe the process by which courts determine whether a PRP is jointly and severally liable for an entire site or, instead, severally liable for a portion of the site. Indeed, “[a]pportionment is a way of avoiding the joint and several liability that would otherwise result from a successful § 107(a) claim.” *Yankee Gas Services v. UGI Utilities, Inc.*, 852 F. Supp. 2d 229, 241 (D. Conn. 2012). In contrast, allocation is performed after apportionment to decide a PRP’s share of liability after joint and several liability of the defendant has been established. Thus, “allocation, under § 113(f), is the equitable division of costs among liable parties.” *Id.* Section 113 contribution actions allow courts to take equitable factors into account when allocating costs after liability has been determined. As one court described it, “[t]o 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.” *Id.* at 241–42. The following sections discuss the evolution of cost recovery and contribution before and after *Atlantic Research*, as well as apportionment and the impacts that the *Burlington Northern* decision had on lower courts’ application of apportionment.

***Atlantic Research* and Contribution/Cost Recovery**

The question of how PRPs can sue to seek cost recovery or contribution under sections 107 and 113 is

the source of many contradicting and convoluted cases. In *Cooper Industries, Inc. v. Aviall Services, Inc.*, the Court held that contribution under section 113(f) is available to a PRP only “during or following” a suit under sections 106 or 107. 543 U.S. 157 (2004). However, the Court did not address whether a PRP that had not been subject to a section 106 or 107 cost recovery action itself had a cost recovery right against other PRPs under section 107.

Atlantic Research addressed the question of whether a PRP could bring a cost recovery action under section 107(a)(4) where contribution was unavailable under the holding in *Cooper Industries*. In *Atlantic Research*, the owner of a facility that retrofitted rocket motors for the United States sued the government for partial reimbursement of costs incurred in cleaning up contamination at the facility. *United States v. Atlantic Research*, 551 U.S. 128, 133 (2007). The company sought reimbursement under section 107. *Id.* The Supreme Court held that “[b]ecause the plain terms of § 107(a)(4)(B) allow a PRP to recover costs from other PRPs, the statute provides *Atlantic Research* with a cause of action.” *Id.* at 141. Thus, a party that voluntarily cleans up a CERCLA site is not confined solely to sue for contribution under section 113. However, the Court left unanswered whether a party that is forced to incur response costs, such as pursuant to a consent decree, may recover costs under section 107. *Id.* at 139, n.6 (“We do not decide whether [consent decree costs] of response are recoverable under § 113(f), § 107(a), or both”).

More recently, on October 9, 2012, the Supreme Court denied a petition for certiorari in *Solutia, Inc. v. McWane, Inc.*, declining to clarify the question left unanswered post-*Atlantic Research*, whether, under CERCLA, a party who incurs response costs pursuant to a consent decree may pursue a cost recovery claim under section 107 or is limited to a contribution claim under section 113 as its exclusive remedy. Thus, this issue remains unresolved and will likely continue to be a source of litigation in the circuit courts.

Pre-*Burlington Northern* Apportionment

Prior to the seminal *Burlington Northern* opinion, courts applied apportionment differently and caused

much confusion. Apportionment discussions tended to focus on simplistic, single-factor analyses, with a focus on only one factor, such as volume of waste, amount of time PRP spent associated with the site, or geographical location of waste at the site. Before *Burlington Northern* was decided, *United States v. Chem-Dyne Co.*, 572 F. Supp. 802 (S.D. Ohio 1983), operated as the “seminal opinion on the subject of apportionment.” *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 613. *Chem-Dyne* determined that CERCLA did not mandate joint and several liability in every case, and the scope of liability instead should be determined using principles of common law. *Chem-Dyne Co.*, 572 F. Supp. at 807–08.

Following the *Chem-Dyne* decision, courts of appeals acknowledged that “[t]he universal starting point for divisibility of harm analyses in CERCLA cases is § 433A of the Restatement (Second) of Torts.” *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 614. Under the Restatement, “when two or more persons acting independently caus[e] 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.” *Chem-Dyne Co.*, 572 F. Supp. at 810 (citing Restatement (Second) of Torts, §§ 433A, 881 (1976); Prosser, Law of Torts, at 313–14 (4th ed. 1971)). However, “where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.” *Id.* (citing Restatement (Second) of Torts, § 875; Prosser, at 315–16). Thus, “apportionment is proper when ‘there is a reasonable basis for determining the contribution of each cause to a single harm.’” *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 614 (quoting Restatement (Second) of Torts § 433A(1)(b)(1963–1964)). Despite *Chem-Dyne*’s acknowledgment and explanation of the application of apportionment principles, courts rarely apportioned liability. See, e.g., *Metropolitan Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 n.3 (7th Cir. 2007) (“The only exception to joint liability is when the harm is divisible, but this is a rare scenario”).

***Burlington Northern* and Apportionment**

Burlington Northern was decided amidst the confusion of the circuit courts’ varying application of apportionment under CERCLA and gave PRPs hope by suggesting that it might be easier to raise a divisibility defense under CERCLA than before. Similar to many CERCLA sites, *Burlington Northern* involved a complicated fact pattern that led to the contamination at issue. The owners of a business (B&B) on a 3.8 acre parcel of land were adjoining to a .9 acre parcel owned by two railroad companies. *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 603–04. B&B and the railroad companies both spilled hazardous substances onto the land, and Shell Oil sold a soil fumigant to B&B along the way that also got spilled during and after delivery. *Id.* B&B went bankrupt and the government sought to hold Shell and the railroads jointly and severally liable for the response costs. *Id.* at 605. After an in-depth discussion, the Supreme Court found Shell not liable as an “arranger” because “knowledge alone is insufficient to prove that an entity ‘planned for’ the disposal. . .” *Id.* at 612.

Shell and the railroads argued that the harm was capable of apportionment amongst the PRPs. The Court cited to *Chem-Dyne* for the concept that joint and severability is not mandated in every CERCLA cost-recovery action and that Congress intended the scope of liability to “‘be determined from traditional and evolving principles of common law[.]’” *Id.* at 613. However, the Court noted that the burden is on defendants to prove there is a reasonable basis for the divisibility of harm. *Id.* at 614. The Court further noted that equitable considerations only play a role in contribution analysis (§ 113(f)) and not in apportionment analysis. *Id.* at 615 n.9. The Court affirmed the district court’s findings of divisibility based on geography, time, and volume of the waste. *Id.* at 616–17. The district court had determined divisibility by taking the railroad’s percentage of the entire site (19 percent) and multiplying it by the time period that the railroad parcel was used in relation to the entire time period of site operations (45 percent) to get 9 percent. *Id.* It multiplied that by 2/3 to get the contamination represented by the companies and

applied a 50 percent margin of error to get back to 9 percent again for the RR liability. *Id.*

After *Burlington Northern* and the long line of cases before and subsequent to it, the test used for apportionment of liability is whether there is “a reasonable basis for division” of a distinct or single harm.” *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 615. First, courts must determine whether the harm at issue is theoretically “capable of apportionment.” *Id.* at 614. This is a question of law for the court to decide. *United States v. NCR Corporation*, 688 F.3d 833, 838 (7th Cir. 2012). Factors to determine this include “what type of pollution is at issue, who contributed to that pollution, how the pollutant presents itself in the environment after discharge, and similar questions.” *Id.* Second, if the court finds that the harm is capable of apportionment “the fact-finder must determine how actually to apportion the damages, which is a question of fact.” *Id.*

Case law prior to *Burlington Northern* tended to rely upon more simplistic theories of apportionment. *See, e.g., In re Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993) (finding apportionment where only one contaminant was at issue and the three PRPs had operated on the site at mutually exclusive times); *United States v. Broderick Investment Co.*, 862 F. Supp. 272 (D. Colo. 1994) (holding apportionment was proper where the site simply consisted of two lots that had distinct contamination). Departing from this trend, the *Burlington Northern* decision granted apportionment based on a complex apportionment scheme. The Court’s approval of an apportionment scheme based on multiple factors that involved diverse contaminants and several PRPs made PRPs optimistic that lower courts would be more receptive to apportionment schemes under CERCLA.

Apportionment Post-*Burlington Northern*

Despite PRP hope that *Burlington Northern* would pave the way for a more liberal application of apportionment, cases since the decision have essentially limited the application of apportionment and established *Burlington Northern* as an outlier. Indeed, approximately 40 cases have discussed apportionment

since *Burlington Northern* was decided, and none have apportioned liability.

For example, in *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, PCS offered five methods for apportionment, but the district court determined that none of the suggested bases for apportionment were reasonable. 791 F. Supp. 2d 431, 489 (D.S.C. 2011), *motion to certify appeal granted*, CIV.A. 2:05-2782-MBS, 2011 WL 5827786 (D.S.C. Nov. 17, 2011). Although the court determined that the harm at the site was theoretically 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 area, the court still found no reasonable basis to apportion the harm because it found no method sufficient to account for each PRP’s contribution to the spread of contamination across the site. *Id.* The Fourth Circuit recently upheld the district court’s denial of apportionment, stating that the district court properly refused to make an arbitrary apportionment, as any apportionment without adequate evidence as to the harm caused by secondary disposals necessarily would have been arbitrary. *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, No. 11-1662, 2013 WL 1340018, at *16 (4th Cir. Apr. 4, 2013). Similarly, in *Pakootas v. Teck Cominco Metals, Ltd.*, Teck “failed to establish as a matter of law that the relevant harm is a single harm divisible in terms of degree.” 868 F. Supp. 2d 1106, 1117 (E.D. Wash. 2012). The court noted that “[n]one of Teck’s apportionment theories address the entirety of the contamination. Instead, they begin with the assumption that the only harm at issue is whatever metals were released from Teck’s slag and/or liquid effluent and the same metals which were released from non-Teck sources.” *Id.* By failing to account for all harm at the site, the court reasoned that Teck could not prove the harm was divisible. *Id.*; *see also United States v. Saporito*, 684 F. Supp. 2d 1043 (N.D. Ill 2010) (apportionment was not applied where PRPs who caused the harm owned separate pieces of equipment that caused the harm; ownership of the equipment was more comparable to being a joint venturer than as an owner of a discrete portion of contaminated land).

Lastly, in *United States v. NCR Corporation*, the Seventh Circuit held that NCR could not prove that its costs were reasonably capable of apportionment. 688 F.3d 833, 838 (7th Cir. 2012). *NCR* involved CERCLA efforts to clean up the Fox River in Wisconsin. NCR admitted in this case that it was a liable party under CERCLA because of PCB discharges from two plants located alongside Fox River. Throughout the cleanup process, NCR maintained that it was not 100 percent liable for the remediation work. The district court ruled adversely to NCR on several occasions regarding its contribution actions, so NCR notified EPA that it would no longer comply with EPA's order because NCR performed more than its fair share of remedial work. *Id.* at 837. EPA then filed a preliminary injunction against NCR to require it to finish the remediation. *Id.* Citing *Burlington Northern*, NCR argued that the harm to Fox River was divisible and that remediation costs should be apportioned to all of the potentially responsible parties.

The Seventh Circuit agreed with the district court and found that NCR failed to meet its burden of showing that the harm was capable of apportionment. *Id.* at 839. The Seventh Circuit stated it was guided by the commentary to Restatement § 433A(2) which reasoned “[a]pportionment is improper ‘where either cause would have been sufficient in itself to bring about the result, as in the case of merging fires which burn a building.’” *Id.* (citing Restatement § 433A(2) cmt. i). The Seventh Circuit was convinced this reasoning applied to this case because, although NCR's expert testified that NCR's discharge of PCBs into the Lower Fox River contributed about 9 percent of the PCBs, the Seventh Circuit reasoned that this testimony did not automatically mean that NCR was only responsible for 9 percent of the cleanup. Instead, because the river would still need to be dredged and capped due to EPA's maximum safety threshold of 1 ppm for PCBs, the remediation would have been required even if only NCR's contamination had been present. *Id.* Quoting the district court, the Seventh Circuit noted that “[t]he overwhelming point is that the expense of cleaning up the Lower Fox River is only weakly correlated with the mass of PCBs discharged by the parties.” *Id.* at 839–40 (the court further clarified: “Put another way, the

need for cleanup triggered by the presence of a harmful level of PCBs in the River is not linearly correlated to the amount of PCBs that each paper mill discharged. Instead, once the PCBs rise above a threshold level, their presence is harmful and the River must be cleaned.”). “The details of that cleanup may vary depending on exactly how much PCB is present, but not in any way that suggests that the underlying harm caused—the creation of a hazardous, polluted condition—is divisible.” *Id.* Thus, the volume of a contaminant, alone, was not a good measure of apportionment in this case because this situation involved a chemical that is harmful when it surpasses a certain amount. *Id.* at 841.

Further, the Seventh Circuit refused to take into account equitable considerations, because *Burlington Northern* held that equitable considerations can only be considered in contribution actions and not in the apportionment analysis. *Id.* at 842. The Seventh Circuit also distinguished *Burlington Northern* because there multiple entities did not independently contribute amounts of pollutants sufficient to require remediation. *Id.* After a trial in December 2012 on the issue of whether the defendants must comply with the unilateral administrative order and continue cleaning up the Fox River, the district court essentially affirmed the ruling on divisibility by finding each defendant (except for Appleton Papers Inc.) to be jointly and severally liable for the harm resulting from the PCB contamination in the Lower Fox River and ordering each defendant to comply with the remedial measures in the unilateral administrative order. *See Order, United States v. NCR Corp.*, No. 10-C-910 (May 1, 2013).

Thus, courts are essentially applying apportionment as they did pre-*Burlington Northern*, shying away from complicated, multi factor apportionment theories and instead imposing joint and several liability. As in *Ashley II* and *Pakootas*, some courts have found that proffered methods of apportionment do not account for all of the harm at a site, while others, as in *NCR Corporation*, have found that the proffered method (i.e., volume) does not correlate with the harm caused at the site. Regardless, it remains difficult for PRPs to prove to courts a reasonable basis for division of harm.

Conclusion

In conclusion, *Atlantic Research* brought some clarity to cost recovery actions by holding that a PRP could bring a cost recovery action under section 107(a)(4) where contribution was unavailable under the holding in *Cooper Industries*. However, there is still some uncertainty in the field because it is still unclear whether a PRP who incurs response costs pursuant to a consent decree may pursue a cost recovery claim under section 107 or is limited to a contribution claim under section 113 as its exclusive remedy.

Additionally, although *Burlington Northern* gave defendants hope that the divisibility analysis would be more available under CERCLA, this has not played out in the cases following the decision. Instead, courts have narrowly interpreted *Burlington Northern* and continued to deny apportionment. In the future, it is unclear what potential factual scenarios would allow for application of divisibility.

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SUPERFUND COST ALLOCATION—AN ECONOMIC PERSPECTIVE

Joseph J. Egan and Dayna Anderson

Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601, et seq. (CERCLA or Superfund)), was enacted by Congress in December 1980. According to the U.S. Environmental Protection Agency (EPA), CERCLA:

- Established prohibitions and requirements concerning closed and abandoned hazardous waste sites;
- Provided for liability of persons responsible for releases of hazardous waste at these sites; and
- Established a trust fund to provide for cleanup when no responsible party could be identified.

Under CERCLA, potentially responsible parties (PRPs) responsible for the release of hazardous substances may be liable for the investigation and remediation costs associated with cleaning up the site, among other costs. This paper discusses apportionment of liability and allocation of these costs amongst the PRPs from an economic perspective, as well as some recent court decisions addressing these issues.

Superfund Cost Recovery and Contribution

Pursuant to CERCLA section 107(a), liable PRPs include (1) current owners and operators of a facility; (2) past owners and operators of a facility at the time hazardous wastes were disposed; (3) generators and parties that arranged for the disposal or transport of the hazardous substances; and (4) transporters of hazardous waste that selected the site where the hazardous substances were brought. The issue of allocating cleanup costs between PRPs is addressed under CERCLA sections 107 (cost recovery claims) and 113 (contribution claims).