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Never Say Never: The Search for Divisibility Under CERCLA

By William S. Hatfield and Adam C. Arnold

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§9601 et seq., was enacted to ensure the cleanup of hazardous waste sites and to hold polluters financially responsible for such cleanup. The statute imposes strict liability on statutorily defined classes of responsible parties. Although the bill initially included express language imposing "joint and several" liability on these responsible parties, Congress deleted that language before enactment. Nonetheless, courts usually apply joint and several liability under CERCLA § 107(a) when the government pursues cleanup against polluters.

A party seeking to avoid joint and several liability when sued under § 107(a) has the burden of proving not only that divisibility of harm is possible amongst the potentially responsible parties (PRPs), but that a reasonable basis for such divisibility exists. Satisfying this burden requires a very case-specific and fact-intensive inquiry, which is a challenge in many cases.

As recognized by the U.S. Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009), the "universal starting point for divisibility of harm analyses in CERCLA cases is § 433A of the Restatement (Second) of Torts," which states that:

> [W]hen 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 himself caused…. But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.

In *Burlington Northern*, a watershed case on the issue of divisibility, the Supreme Court overruled the Ninth Circuit and upheld a district court's calculation of a defendant's share of harm at a site as only 9 percent. The District Court considered such factors as the relative percentages of land area leased, the relative periods of ownership, and the types and quantities of hazardous substances that were driving the remediation at the site. Given the specific (and arguably simplistic) facts before it, the Supreme Court found that the methodology employed by the district court was reasonable. However, the Supreme Court cautioned that "[n]ot all harms are capable of apportionment…. When two or more causes produce a single, indivisible harm, courts have refused to make an arbitrary apportionment for its own sake." (Internal citations omitted.) Indeed, recent decisions from the Eastern District of Wisconsin and the Fourth Circuit demonstrate how reluctant courts are to relieve CERCLA defendants of joint and several liability unless they can establish that a reasonable basis for divisibility exists in the specific context of a given lawsuit.

In *Ashley II of Charleston v. PCS Nitrogen*, 746 F.Supp.2d 692 (D.S.C. 2010), the plaintiff, the current owner of a contaminated fertilizer plant, brought a § 107 claim against the defendant, a successor in interest to a former owner of the site, seeking a declaratory judgment that the defendant was jointly and severally liable for the cost of remediating the site. The district court made over 200 findings of fact, including a finding that the "predominant factors contributing to the cost of the cleanup are the amount of hazardous materials and the spread of these hazardous materials throughout the Site." Citing to *Burlington Northern* and the *Restatement*, the district court noted that proving a reasonable basis for apportionment at a CERCLA site can be difficult because of "the commingling of wastes,

Hatfield is a director, and Arnold an associate, in the real property and environmental department at Gibbons PC in Newark. Both practice environmental law.

the migration of contamination over time, and other complex fact patterns."

The defendant in *Ashley* presented the court with five distinct methods for apportionment based upon: (1) the amount of fill contributed during each ownership period; (2) the volume of contaminants; (3) how long each party operated; (4) the disturbance of various portions of the remediation area; and (5) which soil samples were believed to be impacted by a particular defendant. Having already determined that the predominant factors contributing to the cost of the remediation were both the amount of hazardous materials and the spread of these hazardous materials throughout the site, the court concluded that none of the five proposed methods accounted for both of these factors, and therefore held that divisibility was unreasonable under the facts of the case. Interestingly, the court maintained that the harm was theoretically capable of being apportioned, but that the defendant had not provided a reasonable basis for doing so.

On appeal, the Fourth Circuit affirmed the district court, citing to *Burlington Northern*, and stating that a "reasonable basis for apportionment need not be mathematically precise and may be based on the simplest of considerations…. However, *Burlington Northern* neither mandates the 'simplest of considerations,' nor establishes their presumptive propriety in every case." *PCS Nitrogen v. Ashley II of Charleston*, 714 F.3d 161, 183 (4th Cir. 2013) (internal citations omitted). The Fourth Circuit believed that the comparative simplicity of the facts in *Burlington Northern* is what enabled the court to find the proposed methodology reasonable in that case, but "apportionment necessarily remains a fact-intensive, site-specific determination." Because the methodology proposed in *Ashley* did not include evidence as to *both* of the factors that were driving the harm under the specific facts of that case, the Fourth Circuit affirmed the district court's holding. The U. S. Supreme Court recently declined to review the Fourth Circuit holding, leaving the decision intact. See *PCS Nitrogen v. Ashley II of Charleston*, 134 S.Ct. 514 (2013).

The *Ashley* court addressed the reasonableness of a proposed methodology for apportionment. In *U.S. v. NCR Corp*., 2012 U.S. Dist. LEXIS 59089 (E.D. Wis. April 27, 2012), however, the district court never reached that question because it held that the harm at issue was not even theoretically divisible. *NCR Corp.* involved the historical discharge of PCBs into the Fox River. NCR argued that the harm was divisible based on a mass balance theory of apportionment. The court held that a mass balance approach to divisibility was unreasonable because the costs of cleanup in certain circumstances had very little to do with the mass of contaminants in the sediment.

For example, the court found that "[a] cubic yard of sediment costs the same to dredge or cap whether it contains 10ppm or 100ppm" of PCBs. The court also analyzed what it termed "independent factors," which transform the nature of a harm and may create a different kind of harm altogether, "one that is largely (albeit not completely) divorced from the relative contributions of the parties to the original harm." In the context of a river, fish consumption may be seen as an independent factor, as fish ingest contaminants and then transfer the toxicity acquired to the humans that ingest them. In such a case, the district court held, the toxicity in the fish may not be strongly correlated with the relative volumes of PCBs in the river. Because the court found that the harm in *NCR Corp.* was the result of complex collateral effects and independent factors as opposed to the straightforward mass of PCB discharges, it concluded that the harm in that case was not even theoretically capable of apportionment, and granted a preliminary injunction requiring NCR to comply with a Unilateral Administrative Order issued by the Environmental Protection Agency (EPA). That decision was affirmed by the Seventh Circuit Court of Appeals in August 2012. The district court subsequently determined that its preliminary injunction should be made permanent. See *U.S. v. NCR Corp.*, 2013 U.S. Dist. LEXIS 62265 (E.D. Wis. April 30, 2013).

In the wake of *Burlington Northern*, *Ashley* and *NCR Corp*., litigants are left with limited guidance on how and when divisibility may be applied under CERCLA. The challenge for defendants is to avoid multiple independent factors that will complicate an otherwise reasonable basis for apportionment. Based upon *Ashley* and *NCR Corp*., such factors may include the commingling of pollutants, migration of pollutants, consumption by wildlife and other synergistic effects which are often context-specific (e.g., effects of wind, gravity, current and dredging in the context of a river). It is imperative from the outset of litigation to consider how to frame the facts and theory of the case in order to demonstrate the reasonableness or unreasonableness of divisibility.

Plaintiffs should focus on highlighting any and all independent factors that are arguably relevant to the "harm" at issue in a given case. While the decisions outlined above identified some factors, the list is by no means exhaustive, and plaintiffs may identify other issues that complicate the analysis. Defendants should focus on simplifying the equation by dismissing such independent factors as irrelevant to the "harm" involved in a given case. Clearly, this balance of simplicity vs. complexity will play out differently in every case, but early planning and a focused strategy can make the difference in determining whether divisibility is both possible and reasonable. ■