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Allocating CERCLA Liability: Divisibility or Section 113 Equitable Contribution

Assessing Harm, Proving Divisibility of Harm Defense Absent a Bright-Line Test, and Apportioning Costs

THURSDAY, JANUARY 19, 2023

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Jane B. Story, Partner, **Jones Day**, Pittsburgh

Rachel K. Roberts, Associate, **Beveridge & Diamond**, Seattle

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Allocating CERCLA Liability: Divisibility Defense

Strafford Webinar

Rachel Roberts

January 19, 2023

Beveridge & Diamond

Agenda

- Quick CERCLA Basics
- The influence of Burlington Northern
- Divisibility defense after Burlington Northern
- Key Messages

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Quick CERCLA BASICS

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Potentially Responsible Parties – Section 107(a)

- Current owners and operators of a facility.
- Prior owners and operators of a facility at the time of disposal.
- Generator/Arrangers (arrange for disposal).
- Transporters.

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Elements of Liability

- Release or threatened release
- of a hazardous substance
- from a facility into the environment
- causing the incurrence of response costs.
  - Defendants have burden of proving response costs are not consistent with the National Contingency Plan.

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Joint and Several Liability

- Established judicially.
- Based on the Restatement (Second) of Torts.
- Indivisibility of harm tends to be presumed.
- Divisibility is a defense to joint and several liability under Section 107.
  - Not a defense to a Section 113 contribution claim – though it may be an "equitable factor." (*See, e.g., Appleton Papers Inc. et al. v. George A. Whiting Paper Co., et al.*, 776 F. Supp. 2d 857 (E.D. Wis. March 1, 2011).)

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Joint and Several Liability

- Based on the Restatement (Second) of Torts Section 433A.
  - "[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."
- Harm apportioned where:
  - there are distinct harms, or
  - there is a reasonable basis for determining the contribution of each cause to a single harm.

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Burlington Northern & Santa Fe Railway v. United States, 556 U.S. 599 (2009)

Background Facts

- Brown & Bryant – pesticide formulator and chemical distributor in Arvin, CA.
- Groundwater plumes and soil contamination.
- Pesticides, primarily Dinoseb (weed killer) and D-D (1,2-DCP) are main groundwater contaminants.

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Potentially Responsible Parties

- Brown and Bryant - Owner/Operator – 3.8 acre site - Largely responsible for contamination.
  - Defunct - Very big orphan share.
- Shell – Alleged Arranger- sold D-D and Nemagon, alleged liability for spills during transfer of pesticides from tanker trucks.

- Burlington Northern and Union Pacific – Joint owners of a 0.9 acre – adjacent property B&B leased to expand operations.

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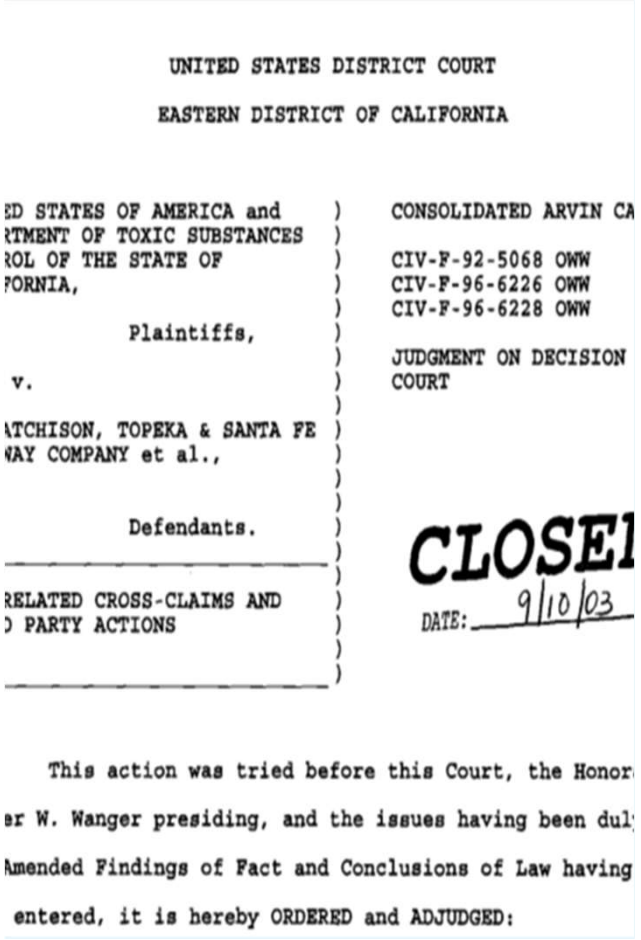
Cleanup History

- EPA issued order to railroads to perform certain remedial tasks at the site.
- Railroads (BNSF and Union Pacific) incurred more than $3 million in cleanup costs.
- Railroads brought suit against Brown and Bryant, consolidated with EPA/CA Department of Toxic Substances Control suit against Shell and the railroads.
- 6 week bench trial in 1995; took court four years to enter judgment in favor of EPA/DTSC.

District Court

- 185 page decision – court made over 500 findings – Very detailed record.
- Over 50 findings addressing flow of surface water and groundwater; 50 more on handling of waste; many on transport of spilled pesticides and migration to groundwater.
- Found parties liable, but did not impose joint and several liability on Shell and the RRs.



UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ED STATES OF AMERICA and RTMENT OF TOXIC SUBSTANCES ROL OF THE STATE OF FORNIA,

Plaintiffs,

v.

ATCHISON, TOPEKA & SANTA FE WAY COMPANY et al.,

Defendants.

RELATED CROSS-CLAIMS AND D PARTY ACTIONS

CONSOLIDATED ARVIN CA

CIV-F-92-5068 OWW
CIV-F-96-6226 OWW
CIV-F-96-6228 OWW

JUDGMENT ON DECISION COURT

CLOSED

DATE: 9/10/03

This action was tried before this Court, the Honor
er W. Wanger presiding, and the issues having been dul
Amended Findings of Fact and Conclusions of Law having
entered, it is hereby ORDERED and ADJUDGED:

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Facts Supporting Apportionment for the Railroads

- **Geographic**: Railroads owned 0.9 of the total 4.7 acres (19 percent).
- **Duration of Operations:** Railroads leased their parcel to B&B for 13 of the 29 years of operations (45 percent).
- **Volume and Type of Contaminant**: Railroad parcel did not have D-D contamination – only Nemagon (DBCP) and Dinoseb, contributing two thirds of the total Site contamination(66 percent) and less than 10% of the volume.

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District Court

- Affirmed law on divisibility – still factually based and difficult to prove.
  - "a classic 'divisible in terms of degree' case, both as to the time period in which defendants' conduct occurred, and ownership existed, and as to the estimated maximum contribution of each party's activities … that caused Site contamination."
- Court found a single harm.
- The math was sua sponte.
  - Court complained about lack of helpfulness from the parties on briefing divisibility.
  - Railroads: 0.19 x 0.45 x 0.66 = 5.6%, rounded up to 6%. Went up to 9% to account for 50% error rate.
- Held Shell 6% responsible.

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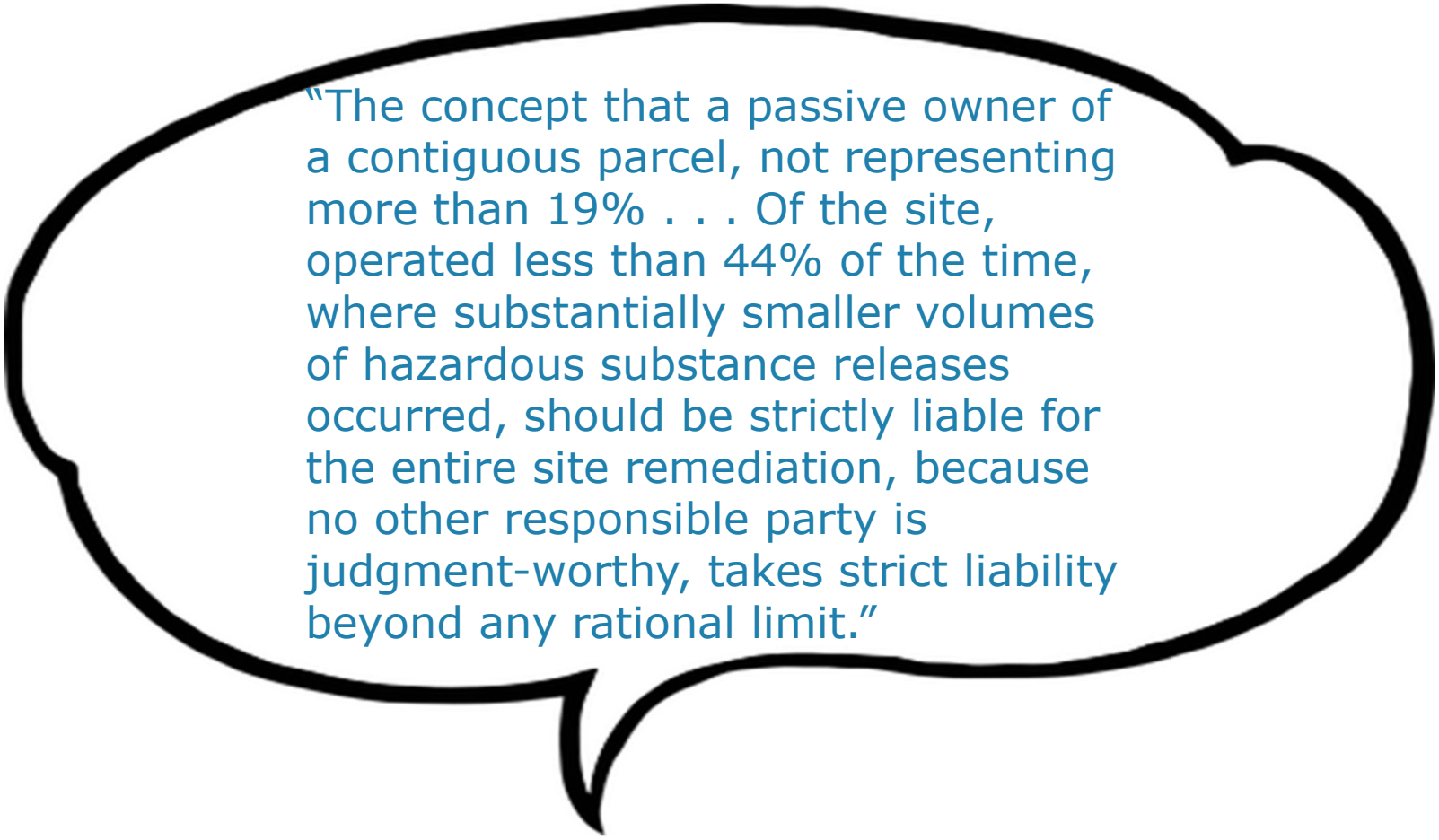
Struggling with Strict, Joint & Several Liability



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Why Appeal?

- District Court's conclusions of law supported a government appeal.
  - "Where there is indivisible harm, courts refuse to make an arbitrary apportionment for its own sake."
  - "Equitable considerations play no role in the apportionment analysis."
  - "If they are in doubt, district courts should not settle on a compromise amount that they think best approximates the relative responsibility of the parties."

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On Appeal

- Ninth Circuit: Record did not establish a "reasonable basis" for apportionment.
- SCOTUS: Reversed and reinstated the District Court's apportionment ruling with respect to the railroads.

Supreme Court Decision

- 8-1 decision, with Stevens writing the majority opinion and Ginsburg dissenting.
  - Ginsburg would have found Shell liable as an arranger and found it was inappropriate for the court to *sua sponte* perform a divisibility analysis.
- Arranger liability – Shell not liable for spills occurring during transfer of useful product.
  - Shell aware that spills commonplace among its distributors, but took steps to address spills.
  - Court does not need to address divisibility of Shell's harms.
- Divisibility – Affirmed railroads' divisibility defense to a 107(a) claim based on Section 433A of the Restatement (Second) of Torts.

Supreme Court Decision

- Agreed with EPA/DTSC that court erred to the extent it referenced equitable considerations favoring apportionment.
  - But found that the district court's actual apportionment decision was properly rooted in evidence.

- Estimates can provide a reasonable basis. Specific, detailed records not required.

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Divisibility After Burlington Northern

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Before Burlington Northern

- High burden for defendants.
- Responsible parties rarely escape joint and several liability.
- Where wastes of varying (and unknown) degrees of toxicity and migratory potential commingle, it simply is impossible to determine the amount of environmental harm caused by each party (*O'Neil v. Picillo*).

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After Burlington Northern

- High burden for defendants.
- Responsible parties rarely escape joint and several liability.
- Where wastes of varying (and unknown) degrees of toxicity and migratory potential commingle, it simply is impossible to determine the amount of environmental harm caused by each party (*O'Neil v. Picillo*).

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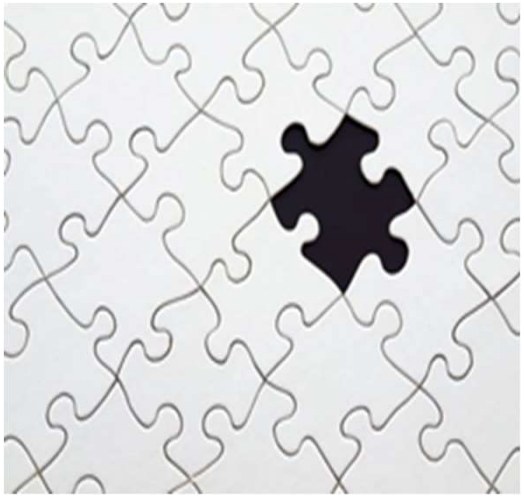
After Burlington Northern

- Some say it may be easier now to establish a reasonable basis for divisibility.
- Equitable allocation can have more success – allocation may be easier than asserting the divisibility defense.



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Proving The Divisibility Defense (Step 1)

Divisibility analysis has two steps *(US v. NCR Corp*., 688 F.3d 833 (7th Cir. 2012):

1. Determine whether the harm is theoretically capable of apportionment.
    - Question of law
    - The Court's decision, however, will often rest on underlying findings of fact, such as:
        - what type of pollution is at issue
        - who contributed to that pollution
        - how the pollutant presents itself in the environment after discharge.

Proving The Divisibility Defense (Step 2)

2. If the harm is capable of apportionment, the fact-finder must determine how actually to apportion the damages.

- Question of fact
  - Apportionment is a "fact-intensive, site-specific determination." *PCS Nitrogen v. Ashley II of Charleston LLC*, 714 F.3d 161, 183 (4th Cir. 2013).
- 7th Circuit reversed a district court that "theoretically" determined apportionment on summary judgment even though there were genuine disputes of material fact. *Von Duprin LLC v. Major Holdings LLC*, 12 F. 4th 751 (7th Cir. 2021).

Burden of Proof

- The party arguing for apportionment must "provide reliable evidence" to support apportionment and "establish a reasonable basis for apportioning the harm at the Site." *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 183 (4th Cir. 2013).
  - When in doubt, the district court "should avoid apportionment altogether by imposing joint and several liability." *Emhart Indus. Inc. v. New England Container Co.*, 130 F. Supp. 3d 534, 604 (D.R.I. 2015).
- Courts Generally Reject an Apportionment of Zero
  - *PCS Nitrogen Inc.,* 714 F.3d at 185: in that case, an apportionment of zero to an owner would render the innocent landowner defense superfluous.
  - *See also Gould Electronics Inc. v. Livingston Cnty Road Comm'n*, 2020 WL 6793335 (E.D. Mich. 2020): rejecting an owners' proposed "zero-share apportionment based on its lack of causation or contribution to the contamination" because this theory was "completely untethered to the basis of its liability . . ."
  - *But see Reichold Inc. v. U.S. Metals Refining Co.*, 655 F. Supp. 2d 400, 449 (D.N.J. 2009): contamination at one site apportioned between two parties plaintiff found not liable for contamination on that person because did not contribute releases.

Insufficient Basis for Apportionment

- Amount of contamination may not be a sufficient proxy to estimate harm. *United States v. NCR Corporation,* 688 F.3d 833 (7th Cir. 2012).
  - Some hazardous substances are harmful when they surpass a certain amount or may become harmful when mixed with other chemicals.
    - Need for remediation triggered by a harmful level of PCBs is not linearly correlated to amount of PCBs that each PRP discharged.
  - Clean-up costs, on their own, are not exactly equal to harm, but they may be relevant to approximate harm caused by pollution.
- Equitable factors play no role in apportionment. *See Emhart Indus. Inc. v. New England Container Co.*, 130 F. Supp. 3d 534, 604 (D.R.I. 2015).

Insufficient Basis for Apportionment

- In *PCS Nitrogen Inc. v. Ashley II of Charleston, LLC*, 714 F.3d 161 (4th Cir. 2013), the Fourth Circuit upheld the district court's denial of apportionment because PCS did not show the divisibility of secondary disposals.
  - Primary disposals from fertilizer manufacturing and secondary disposals from earth moving and construction.
    - PCS only presented evidence as to initial disposals.

Insufficient Basis for Apportionment

- In *Emhart Industries, Inc. v. New England Container Co., Inc.*, 130 F. Supp. 3d 534 (D.R.I. 2015), there was no support for apportionment based on:
  - Geography – hazardous substances from manufacturing process did not remain in building footprint but instead were in numerous areas throughout the Site.
  - Volume – there were too many uncertainties.
  - Contaminants – where there was no reasonable basis to apportion the harm by geography or volume, no reasonable basis for apportionment based on contaminant type/calculation.
    - No reason why the 6 contaminants of concern should be treated equally.
  - Time – Courts have refused to apportion harm on the basis of temporal considerations where the evidence of one PRP's volumetric contribution in relation to that of other PRPs' contribution is too uncertain.

Insufficient Basis for Apportionment

- *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565 (9th Cir. 2018).
  - Defendant's position was that it only had to demonstrate that the alleged harm could be divided under "any set of facts."
    - The court rejected reliance on hypothetical scenarios. The court emphasized that Defendants must show that the actual harm at the Site is theoretically capable of division.
  - Defendant also argued it had to address only the harm from the specific pollutants that Plaintiffs had alleged it contributed to the Site.
    - The Court disagreed, stating that a divisibility defense required Defendant to show that the entire harm at the Site—that alleged to be caused by Defendant and all other river pollution—was theoretically capable of division.
  - Court found that none of defendants' proposed methods for divisibility addressed the mixing of wastes and how that affected divisibility of the harm.
    - Mixing of pollutants creates a rebuttable presumption of indivisible harm.

Sufficient Basis for Apportionment

Reichhold, Inc. v. United States Metals Refining Co., 655 F. Supp. 2d 400 (D.N.J. June 22, 2009)

- Liability on the southern portion of the parcel was apportioned equally between USMRC (the previous owner of a smelting site on the parcel) and a third party who had deposited contaminated fill on the parcel.
  - Plaintiff, who purchased the parcel from the defendant, was found not liable because it was found to not have contributed to contamination on the parcel.
- Finding the contamination at issue to be "a distinct or single harm that USMRC and a third party caused," the court determined that there was "a reasonable basis for division according to the contribution of each."
  - The basis for apportionment was "not the exact amount of metals contamination for which each was responsible" but the fact that **the metals contamination contributed independently by both parties would have been a "sufficient amount" to require remediation through a cap**. The court apportioned USMRC's liability with respect to the cap at 50%.

Sufficient Basis for Apportionment

Union Pacific Railroad Co. v. Oglebay Norton Minerals, Inc., 2018 WL7352201 (W.D. Tex.)

- District Court determined that harm was capable of apportionment.
- Because the harm was based purely on the physical presence of slag, the Court could determine causation for the harm: whoever owned the slag and failed to remove it caused the damage.
- Each portion of the slag caused a distinct harm.
- There was no evidence that slag leached metals or chemicals that migrated across property or mixed with other ground materials.

Is it Possible to Apply Divisibility to Sediment Sites?

- Unlikely, but geographic divisibility is certainly possible.
  - *U.S. v. NCR Corp.*: "It might be another story if NCR could identify sections of the river into which its PCB discharges simply never flowed at all... In such a case, geographic divisibility could make sense because it is simple enough to measure the costs of cleaning up area A versus area B."
- Could stand-alone cost analysis form the basis for divisibility?
  - *Reichhold* capping example.

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Key Messages

- Burlington Northern did not change the legal landscape much.
- Joint and several liability is a difficult burden but not mandated in every case.
- Best facts make it easy for a court to understand the division.

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Questions?

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CERCLA SECTION 113: EQUITABLE ALLOCATION

January 19, 2023

Jane Borthwick Story

CERCLA SECTION 113(f) – CONTRIBUTION CLAIMS

- CERCLA provides two "clearly distinct" remedies for parties seeking to recover response costs:
  - Section 107(a) cost recovery claims; and
  - Section 113(f) contribution claims.

- Section 113(f) contribution claims are only available after a statutory trigger:
  - During or following any civil action under Section 106 or Section 107(a); or
  - Resolution of liability to the U.S. or a State in an administrative or judicially approved settlement.

CERCLA SECTION 113(f) – EQUITABLE ALLOCATION

- "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1).

- Parties sued under Section 107(a) often file Section 113(f) contribution counterclaims in an effort to blunt the joint and several liability of Section 107(a) and force an equitable allocation.

GORE FACTORS

- Al Gore proposed an amendment to the original Superfund legislation to lay out equitable factors for courts' use in allocating liability.

- The amendment was not included in the final Superfund legislation.

- But the equitable factors set forth in the amendment have been adopted by courts as useful, nonexclusive factors to consider in allocating liability pursuant to Section 113(f), and are known as the Gore Factors.

GORE FACTORS

- The Gore Factors are:
  - The ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished.
  - The amount of the hazardous waste involved.
  - The degree of toxicity of the hazardous waste involved.
  - The degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of hazardous waste.
  - The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste.
  - The degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment.

THE GORE FACTORS IN PRACTICE

- Factor No. 1: The ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished.
  - *Central Maine Power, Co. v. F.J. O'Connor Co.* involved a Site contaminated with PCBs and lead. 838 F. Supp. 641 (D. Maine 1993).
  - The court refused to place much weight on this Gore factor, despite the fact that one arranger appeared to have sent a higher volume of hazardous waste to the Site, assigning shares of 46.5% and 41% respectively to the two arrangers.
  - But one arranger demonstrated that it did not transport lead to the Site, so the court held that party was not responsible for future cleanup costs attributable to lead contamination.

THE GORE FACTORS IN PRACTICE

- Factor No. 2: The amount of the hazardous waste involved.
  - The amount of hazardous waste generated at a given site is an inexact science. Courts may be faced with proposed allocations that do not have matching hazardous waste generation figures.
  - In *Exxon Mobil Corp. v. United States*, Exxon proposed a "production-based model," while the United States proposed a "time-on-the-risk model." 335 F. Supp. 3d 889 (S.D. Tex. 2018). In this instance, the court informed the parties it was selecting the "production-based model," but deferred issuing allocation percentages until after a bench trial.

THE GORE FACTORS IN PRACTICE

- Factor No. 3: The degree of toxicity of the hazardous waste involved.
  - Courts have opined that this factor is most relevant when there are two types of discharges at a site with two distinct actors, and one discharge is more toxic than the other. *See, e.g.*, *Gavora, Inc. v. City of Fairbanks*, 2017 WL 3161626, at *8 (D. Alaska July 25, 2017).
  - In *AlliedSignal, Inc. v. Amcast International Corp.*, the court noted that the plaintiff's waste was far more toxic than the defendant's, which in turn made a per capita allocation of responsibility inequitable. 177 F. Supp. 2d 713 (S.D. Ohio 2001).

THE GORE FACTORS IN PRACTICE

- Factor No. 4: The degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of hazardous waste.
  - The court may analyze each party's role in the activity that led to the contamination, which may result in parties that never had operational control over any of the waste being responsible for a portion of the costs.
  - *El Paso Natural Gas Co., LLC v. United States*, 390 F. Supp. 3d 1025 (D. Ariz. 2019):
    - 5% allocated to the United States under this factor due to trust ownership of the land and approval of permits and leases associated with the uranium mining that led to the contamination.
    - Additional 25% allocated to the United States under this factor due to creating the conditions and market that led to uranium mining (Cold War) and for its limited exploration at the mine sites.

THE GORE FACTORS IN PRACTICE

- Factor No. 5: The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste.
  - Courts will take into account prevailing environmental standards at the time of the release.
  - *TDY Holdings, LLC v. United States*:
    - District court found government contractor solely responsible for costs associated with chromium and chlorinated solvent contamination because it failed to maintain a safe and clean working environment. 122 F. Supp. 3d 998 (S.D. Cal. 2015).
    - Appellate court reversed and remanded, in part because district court's factual finding that government contractor complied with prevailing environmental standards at that time and modified its practices to comply with new environmental regulations undercut the decision to allocate 100% of response costs to the government contractor and 0% to the government. 885 F.3d 1142 (9th Cir. 2018).

THE GORE FACTORS IN PRACTICE

- Factor No. 6: The degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment.
  - Cooperation can be a strong factor in favor of a lower allocation:
    - In *New York v. Westwood-Squibb Pharmaceutical Co., Inc.*, the court contrasted one defendant's cooperation with regulatory authorities as soon as contamination was discovered with another's refusal to participate. 2004 WL 1570261 (W.D.N.Y. May 25, 2004).
  - But not always:
    - In *Halliburton Energy Services, Inc. v. NL Industries*, the court indicated that a defendant's lack of voluntary participation was not a strong factor in allocating responsibility because the defendant did not itself participate in the activities necessitating the cleanup, believed itself indemnified for any potential liability, and was not asked by authorities to participate. 648 F. Supp. 2d. 840 (S.D. Tex. 2009).

TORRES FACTORS

- The Torres Factors were derived from *United States v. Davis*, a 1998 District of Rhode Island case decided by Judge Ernest Torres.
- Judge Torres divided the "critical factors" into four categories:
  - The extent to which cleanup costs are attributable to wastes for which a party is responsible.
  - The party's level of culpability.
  - The degree to which the party benefitted from disposal of the waste.
  - The party's ability to pay its share of the cost.

THE TORRES FACTORS IN PRACTICE

- Torres Factor No. 1: The extent to which cleanup costs are attributable to wastes for which a party is responsible.

  - Courts may analyze the cost of the remedy to address each contaminant and the parties responsible for that contaminant. This may be based on detailed models provided by the parties.

  - For example, in *New York v. Solvent Chemical Co., Inc.*, the court analyzed competing models that laid out the parties' responsibility for contamination and the remedies necessary to clean up the contamination when determining the allocation of costs. 685 F. Supp. 2d 357 (W.D.N.Y 2018), *rev'd on other grounds*, 664 F. 3d 22 (2d Cir. 2011).

THE TORRES FACTORS IN PRACTICE

- Torres Factor No. 2: The party's level of culpability.
  - Courts will evaluate a party's responsibility for proper disposition of the waste, its awareness of the potential harm, the degree of care it exercised in order to avert the harm, and its willingness to accept responsibility for remediating the harm.
  - In *Davis*, the case that established the Torres Factors, the court found that the generators were the most responsible for the waste, followed by the owner/operator of the site. The transporters were also culpable, though to a lesser degree, because they knew the characteristics of the waste and the method of disposition. 31 F. Supp. 2d 45 (D.R.I. 1998).

THE TORRES FACTORS IN PRACTICE

- Torres Factor No. 3: The degree to which the party benefitted from disposal of the waste.
  - Courts view parties who benefit from the disposal of waste as having greater responsibility for mitigating its adverse effects. This may extend beyond directly profiting off of the activity that caused the contamination.
  - *Lockheed Martin Corporation v. United States*, 35 F. Supp. 3d 92 (D.D.C. 2014):
    - Government and government contractor held to have equally benefitted.
    - Government received rockets supporting major Cold War programs.
    - Government contractor received payment, and although it did not generate large profits, it gained an important foothold in the rocket propulsion field.

THE TORRES FACTORS IN PRACTICE

- Torres Factor No. 4: The party's ability to pay its share of the cost.
  - Courts are incentivized to allocate responsibility in a manner that preserves a party's ability to pay, with its excess share equitably allocated among the other parties.
  - In *Davis*, only sparse evidence was presented that EPA had placed a lien on one party's property and that several other parties were no longer in operation.
  - The court stated that "the most that can be inferred is that UTC and the generator defendants have a much greater ability to pay response costs than do the other defendants."
  - The court refused to treat the other defendants' shares as orphan shares, finding insufficient evidence that they were insolvent.

GORE AND TORRES FACTORS – OVERLAP

- The Gore and Torres Factors are not mutually exclusive.
- The Torres Factors take a categorical approach, creating categories which many of the more-specific Gore Factors may fall within.
- For example, the Torres Factor regarding culpability is very similar to the Gore Factors regarding the party's involvement in causing the contamination and whether a party's release can be distinguished.

GORE AND TORRES FACTORS – NOT EXHAUSTIVE

- Courts are in no way limited only to the Gore and/or Torres Factors.
- "Congress intended to grant the district courts significant flexibility in determining equitable allocations of response costs, without requiring the courts to prioritize, much less consider, any specific factor." *Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 446 (3d Cir. 2005).
- Section 113(f) gives courts discretion to use any equitable factor that the court deems appropriate.
- Many courts consider some or all of the Gore and Torres Factors, as well as additional factors relevant to the specific facts before them.

DIVISIBILITY AND APPORTIONMENT v. EQUITABLE ALLOCATION

- Divisibility is a defense to joint and several liability under Section 107(a).
  - If a party can show that the costs attributable to its actions can be apportioned, it may limit its liability.
  - The burden is on the defendant to prove that: (1) the harm is capable of apportionment; and (2) a reasonable basis for apportionment exists.
- Divisibility is not usually a term associated with equitable allocation under Section 113(f).
  - In actions seeking contribution, the burden is initially placed on the plaintiff to establish the defendant's equitable share of response costs.
  - Defendants seeking a smaller equitable share must then prove facts in support.

DIVISIBILITY AND APPORTIONMENT v. EQUITABLE ALLOCATION

- The concept of divisibility does bear a resemblance to the first Gore and Torres Factors.
  - Gore Factor 1: The ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished.
  - Torres Factor 1: The extent to which cleanup costs are attributable to wastes for which a party is responsible.
- Similar facts may be relevant to divisibility arguments and arguments under the first Gore and Torres Factors.
- But the burden of proof (and who initially bears that burden) differs.

DIVISIBILITY AND APPORTIONMENT v. EQUITABLE ALLOCATION

- Apportionment and allocation should not be conflated.
  - In *Von Duprin LLC v. Major Holdings, LLC*, the Seventh Circuit held that the district court erred by treating apportionment and allocation interchangeably. 12 F.4th 751, 767 (7th Cir. 2021).
  - The court noted that apportionment is guided by principles of causation, with the primary guideposts coming from the Restatement (Second) of Torts, while allocation is based on the equitable factors the court determines are appropriate. *Id.* at 762, 767.
  - "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." *Id.* at 767 (quoting *Yankee Gas Servs. Co. v. UGI Utilities, Inc.*, 852 F. Supp. 2d 229, 241–42 (D. Conn. 2012)).

EQUITABLE ALLOCATION – BEST PRACTICES

- If sued by a PRP under Section 107, file a 113 counterclaim to blunt joint and several liability and force equitable allocation.
- Think creatively about the facts of your case and what equitable arguments you can make.
- Consider using experts.


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