CLIMATE JUSTICE AND THE PUBLIC TRUST | PUBLIC NUISANCE AND JUDICIAL DISCRETION | FEDERAL AND TRIBAL RESERVED WATER RIGHTS

VOL 36, NO 3
WINTER 2022

natural resources & environment

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION | SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

INNOVATIONS IN and REVIVAL OF the COMMON LAW

Is CERCLA Joint Liability Still Appropriate in the Era of the Third Restatement?

By Larry Schnapf

Courts have long recognized that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) allows, but does not require, imposing joint and several liability on potentially responsible parties (PRPs) in section 107 cost recovery actions. 42 U.S.C. § 9607. The express language of CERCLA does not address joint liability. Early drafts of CERCLA contained a reference to joint and several liability, but this language was deleted in a last-minute amendment. The bill sponsors said courts should determine the scope of liability using "*traditional and evolving principles of common law*" to avoid harsh results that might come from imposing joint liability in inappropriate circumstances. 126 Cong. Rec. 30,935 (1980) (emphasis added).

Because it reflected the common law at the time of CERCLA's enactment, courts turned to the Restatement (Second) of Torts (Second Restatement) to determine when to hold PRPs jointly liable. Under the Second Restatement, defendants will be jointly and severally liable when their tortious conduct is the legal cause of a single, indivisible harm that is not reasonably capable of apportionment. *See* Restatement (Second) of Torts §§ 433A, 875, 881 (Am. L. Inst.).

Defendants have the burden to establish that their harm is "divisible." In CERCLA parlance, the process of determining if harm is divisible is known as "apportionment." This occurs in the liability phase of a case and is a question of law based on principals of causation. In contrast, "allocation" occurs during the damages phase when the liability of responsible parties is calculated using equitable factors that a court finds appropriate.

Courts employ a two-step apportionment process. First, a defendant has to establish that a harm is theoretically capable of apportionment. Then, the defendant has to establish a factual basis to show that there is a reasonable basis for apportionment.

Avoiding joint liability has proved to be largely a quixotic effort. One study found that defendants were successful in only four out of 160 cases since the seminal *Chem-Dyne* decision in 1983 (discussed below) through the 2009 Supreme Court opinion in *Burlington Northern & Santa Fe Ry. v. United States*, 556 U.S. 599 (2009) (*Burlington*). Martha L. Judy, *Coming Full CERCLA: Why Burlington Northern Is Not the Sword of Damocles for Joint and Several Liability*, 44 New Eng. L. Rev. 249, 283, 283 n.17 (2010).

The Restatement (Third) of Torts, Apportionment of Liability (Third Restatement) was published in 2000 and reflects a dramatic trend away from joint and several liability. The underlying policy of the Third Restatement is that no party should be liable for harm it did not cause and that courts should only apply joint liability as a last resort. It calls for a lower burden of proof to demonstrate divisibility. When referencing the level of proof required to establish divisibility, the Third Restatement only requires that there be a "reasonable basis" to apportion harm.

Yet, federal courts have continued to rely on the Second Restatement for evaluating CERCLA divisibility claims. This article argues it is time for the courts to instead begin applying the Third Restatement for apportionment.

A Brief Review of Joint Liability

Originally, courts imposed joint liability only when defendants acted in concert to impose liability for the entire harm. William L. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 415 (1937). Later, courts expanded the concept of joint liability to circumstances where multiple defendants acting independently combined to cause a single, indivisible injury. When Congress enacted CERCLA, the law on joint liability was undergoing a transformation. One might even suggest that the trend towards joint liability was at its peak.

Published in *Natural Resources & Environment* Volume 36, Number 3, Winter 2022.

For the first half of the twentieth century, courts generally refused to impose joint liability on multiple wrongdoers acting independently to create pollution. This majority rule was reflected in section 881 of the First Restatement, which mandated apportionment in nuisance cases like pollution. Restatement of Torts § 881 (Am. L. Inst.). Interestingly, this rule applied "*whether or not there has been a physical or chemical union of materials and whether or not fumes or polluted matter sent out by the defendant have united with those sent out by others*." *Id*. at cmt. a.

A series of midcentury environmental cases rejected this interpretation, instead imposing joint liability on parties who independently discharged pollutants from their plants that resulted in environmental damage that could not be apportioned to a reasonable certainty. Under such circumstances, these courts concluded it would be manifestly unfair to impose on the injured party a virtually impossible burden of proving the specific shares of harm done by each defendant. *See Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976); *Michie v. Great Lakes Steel Div., Nat'l Steel Corp*., 495 F.2d 213 (6th Cir. 1974); *Landers v. E. Texas Salt Water Disposal Co.*, 151 Tex. 251 (1950). The Second Restatement reflected this growing adoption of joint liability. Among the key changes was section 881, which eliminated proportional liability for nuisance situations. Restatement (Second) of Torts § 881. Section 875 also provided for joint liability where two or more persons cause a single and indivisible harm. *Id.* § 875.

Under new section 433A of the Second Restatement, apportionment for a single harm was appropriate only if there were multiple causes. However, the illustrations still seemed to suggest private nuisances like stream pollution represented examples of divisible harm that could be apportioned based on the volume of pollutants discharged. *Id.* § 433A cmt. d (Am. L. Inst.). In Illustration 5 to this comment, two factories that negligently discharged oil to a stream are proportionally liable based on the volume discharged by each. *Id.* at illus.5. However, comment h to section 433A provided that "justice" may require imposing joint liability if one of the tortfeasors is absent or insolvent even though apportionment is otherwise entirely feasible and reasonable under subsection 433A(1)(b). *Id.* § 433A cmt. h. Moreover, comment i cautioned against making "arbitrary" apportionments. *Id.* § 433A cmt. i.

New section 433B also established a new rule governing the burden of proof, providing that defendants had the burden to establish that the harm was divisible and capable of apportionment. *Id.* § 433B. Interestingly, comment e gives the example of 100 factories that each causes a small but incalculable amount of pollution to a stream where a small contributor could be potentially liable for the entire harm. However, this pre-CERCLA comment went on to note that "[s]uch cases have not arisen, possibly because in such cases some evidence limiting the liability always has been in fact available." *Id.* § 433B cmt. e.

Pre-*Burlington* Case Law

The first court to hold that multiple defendants could be held jointly liable under CERCLA was *United States v. Chem-Dyne Corp*., 572 F. Supp. 802 (1983). This case involved a waste disposal site with 289 PRPs. Twenty-four of the defendants asked the court to rule that they were not jointly liable. After reviewing the legislative history, the court concluded that Congress did not reject joint liability when it deleted the phrase from the proposed statute, and that applying Second Restatement principles would advance the legislative goals of CERCLA.

The federal courts quickly embraced *Chem-Dyne*, creating a strong presumption for joint liability and imposing very stringent standards for proving divisibility. An example was *Centerier Serv. Co. v. Acme Scrap Iron & Metal Cor*p., 153 F.3d 344, 348 (6th Cir. 1998), where the Sixth Circuit said that "rarely if ever will a PRP be able to demonstrate divisibility of harm, and therefore joint and several liability is the norm." Perhaps this attitude towards divisibility was best reflected in *United States v. Township of Brighton*, 153 F.3d 307 (6th Cir. 1998), where the court said, "courts should not settle on a compromise amount that they think best approximates the relative responsibility of the parties. Rather, if they are in doubt, they should impose joint and several liability."

The first crack in the strong presumption of joint liability appeared in two generator cases involving Alcan Aluminum in the early 1990s. The Second and Third Circuits rejected the government's argument that contamination was per se indivisible merely because it was commingled, and remanded the cases back to the district courts to allow the defendant an opportunity to show that the harm was reasonably capable of apportionment. *United States v. Alcan Aluminum Corp*., 964 F.2d 252, 255 (3d Cir. 1992); *United States v. Alcan Aluminum Corp*., 990 F.2d 711 (2d Cir. 1993).

The first court to hold that multiple defendants could be held jointly liable under CERCLA was *United States v. Chem-Dyne Corporation*.

The first circuit court to find a reasonable basis to apportion liability was *In re Bell Petroleum*, 3 F.3d 889 (5th Cir 1993). This case involved a single site with three successive operators of a chrome-plating plant that released chromium into the local water supply. The court said that the facts of this case were analogous to the illustrations in the Second Restatement comments about pollution of a stream by two or more factories because there was only one hazardous substance and no synergistic effects. The court said it was reasonable to assume that the respective harm done by each of the defendants was proportional to the volume of chromium-contaminated water discharged by each defendant. Thus, the court remanded the matter to the district court for apportionment. A handful of courts followed *Bell Petroleum* in single-property,

single-contaminant cases. *See United States v. Broderick Inv. Co.*, 862 F. Supp. 272 (D. Colo. 1994) (wood treatment facility with two distinct groundwater plumes); *Kamb v. U.S. Coast Guard*, 869 F. Supp. 793 (N.D. Cal. 1994) (trap/skeet range and firing range with discrete areas of lead contamination); *Dent v. Beazer Materials & Servs., Inc.*, 156 F.3d 523 (4th Cir. 1998) (wood treatment facility with discrete areas of lead and creosote contamination); *Memphis Zane May Assocs. v. IBC Mfg. Co.*, 952 F. Supp. 541 (W.D. Tenn. 1996) (reasonable basis estimate to "fairly apportion liability" among the defendants for petroleum contamination).

The U.S. Supreme Court took up the CERCLA divisibility issue for the first time in *Burlington Northern & Santa Fe Railway v. United States*.

United States v. Hercules, Inc., 247 F.3d 706 (8th Cir. 2001), involved a facility used to manufacture munitions and a variety of herbicides, including dioxin. Defendant Uniroyal sought apportionment of its arranger liability based on volume. The court said Uniroyal had not produced sufficient evidence on waste production and had not discussed the relative toxicity, migratory potential, or synergistic effects of the commingled hazardous substances at the site. However, the court reversed summary judgment against defendant Hercules, saying the district court had misapplied the Second Restatement test. The court said the proper test was whether there was a "reasonable basis" for apportionment, and that Hercules should have the opportunity to prove divisibility of single harms based on volumetric, chronological, or other types of evidence. *Id.* at 719.

In *Coeur d'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003), the harm arose from mine tailings. Both sides agreed that a "reasonable basis" for apportionment was the amount of mining waste discharged into the waterways. The court acknowledged that volumetric calculations were not a "perfect" divisibility methodology because the exact percentages of lead, cadmium, and zinc in the tailings from each mill differed slightly based on the type of metal being extracted in the milling process. However, the court said the defendants' milling operations were similar enough to allow divisibility based on the volume of tailings generated.

Burlington Lowers the Evidentiary Bar for Apportionment

The U.S. Supreme Court took up the CERCLA divisibility issue for the first time in *Burlington Northern & Santa Fe Ry. v. United States,* 556 U.S. at 617 n.9. Because the parties agreed that the harm was theoretically capable of being divided, the Supreme Court only had to consider the second divisibility step—whether a reasonable factual basis for an apportionment existed.

This case involved a single site where Brown & Bryant, Inc. (B&B) operated an agricultural chemical distribution business. Shell Oil Company delivered pesticides and other chemical products by rail. During product transfers, spills occurred. Following a bench trial, the district court concluded the site contamination created a single harm, but the harm was divisible and capable of apportionment. The court found that the primary source of contamination was an unlined sump and an unlined pond distant from the railroads' parcel, and that the spills that occurred on the railroad parcels contributed no more than 10% of the total site contamination, some of which did not require remediation. The district court apportioned the railroads' liability at 9% based on the percentage of the area owned by the railroads, the duration of B&B's business divided by the term of the railroads' lease, and a finding that two of the hazardous substances spilled on the leased parcel were responsible for roughly two-thirds of the overall site contamination. The 9% figure included a 50% margin of error.

The Ninth Circuit suggested that the Second Restatement was a somewhat poor fit and required slight modifications because of CERCLA's strict liability framework, and because "harm" included both the contamination and the cost of remediation. *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 936 (9th Cir. 2008). Reflecting the hostility that courts have exhibited towards divisibility, the Ninth Circuit said the lower court erred in its approach to apportionment, saying:

> CERCLA is not a statute concerned with allocation of fault. Instead, CERCLA seeks to distribute economic burdens. Joint and several liability, even for PRPs with a minor connection to the contaminated facility, is the norm, designed to assure, as far as possible, that some entity with connection to the contamination picks up the tab. Apportionment is the exception, available only in those circumstances in which adequate records were kept and the harm is meaningfully divisible.

Id. at 945–46.

The appellants briefed and discussed the Third Restatement during oral argument before the Supreme Court. The governments' response, in part, was that the Second Restatement should apply because it was contemporaneous with CERCLA. Justice Steven's majority opinion acknowledged that "*traditional and evolving principles of common law*" control the scope of CERCLA liability. However, he ignored the Third Restatement, writing that "[t]he universal starting point for divisibility of harm analyses in CERCLA cases" was the Second Restatement § 433A.

Maybe the Third Restatement briefing in the case was not for naught, however, because Justice Stevens then essentially applied the relaxed apportionment evidentiary burden favored by the Third Restatement. He found that the record provided a reasonable basis for the district court's apportionment and was

consistent with the apportionment principals of the Second Restatement. Was he perhaps suggesting that the common law had "evolved" to using the "rough justice" approach of the Third Restatement?

Post-*Burlington* Divisibility Cases

Some commentators thought that *Burlington* would lead to the demise of joint liability. See Aaron Gershonowitz, *The End of Joint and Several Liability in Superfund Litigation: From* Chem-Dyne *to* Burlington Northern, 50 Duq. L. Rev. 83, 83–85 (2012). One court seemed to agree, stating that *Burlington* was a "*watershed apportionment case*" that "significantly eases the burden" for defendants seeking to avoid joint liability and allowed courts "more leeway" when deciding if the harm was capable of being apportioned. *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 2009 U.S. Dist. LEXIS 111648 (E.D. Wis. Nov. 18, 2009). Another court found the meaning of *Burlington* was "hotly debated" and opted to hear apportionment arguments at trial. *Evansville Greenway & Remediation Trust v. S. Ind. Gas & Elec. Co.*, 661 F. Supp. 2d 989, 1012 (S.D. Ind. 2009).

On the other hand, the court denied a motion for reconsideration of a 2002 opinion in *United States v. Iron Mountain Mines, Inc.*, 2010 U.S. Dist. LEXIS 44331 (E.D. Cal. May 5, 2010), finding that *Burlington* did not now mandate that district courts must apportion harm but simply applied existing law to resolve a factual question of whether the record supported apportionment. Yet another court interpreted *Burlington* as authorizing courts to apportion liability *sua sponte*. *Reichhold, Inc. v. U.S. Metals Ref. Co.*, 655 F. Supp. 2d 400 (D.N.J. 2009). The trial occurred before the Supreme Court ruling in *Burlington*, but the court apportioned liability, concluding that the metals contamination in question consisted of distinct harms based on historical operations.

But these cases are outliers. The majority of post-*Burlington* cases have continued to be reluctant to apportion liability—even in private cost recovery actions involving single sites and one or two contaminants. A 2018 survey found that only two of 33 opinions involving apportionment found a reasonable basis to apportion harm. Joshua M. Greenberg, *Superfund and Tort Common Law: Why Courts Should Adopt a Contemporary Analytical Framework for Divisibility of Harm*, 103 Minn. L. Rev. 999 (2018). The author's own review of post-2018 publicly available decisions found no change in this pattern.

Two river sediment decisions reflect the confusion that defendants and courts encounter in determining what exactly is the harm that is to be apportioned. In *Pakootas v. Teck Cominco Metals, Ltd.*, 868 F. Supp. 2d 1106 (E.D. Wash. 2012), the plaintiff tribes and State of Washington sought cost recovery and natural resource damages from the defendant for remediation of slag that it allegedly disposed in the Upper Columbia River (UCR). Defendant Teck sought apportionment based on the amount of six metals leaching from slag attributed to its operations. Teck reasoned that sediment contamination was divisible as a matter of law, pointing to illustration 5 in Restatement (Second) § 433A cmt. d.

The court disagreed, saying it was not bound by the "private nuisance" example in illustration 5 and found that illustrations 14 and 15 were more representative of the UCR contamination. These illustrations involve two companies that both discharged oil into a stream. In illustration 14, the floating oil is ignited by an unknown source and a barn owned by property owner C is burned down. In illustration 15, C's cattle drink the oily water and die. In both cases, C may recover judgment for the full amount of its damages against either company or both of them.

Turning to the nature of the harm, the court held that the harm was the cost of remediating all the contamination in the UCR, not simply the six metals. It said that what distinguished *Burlington* from this case was that there was no evidence that the volume of slag was truly proportional to the harm, particularly because Teck's experts failed to address possible synergistic effects of commingled contaminants of various types. Thus, Teck had not presented the requisite evidence that the harm at the UCR site was "theoretically capable of apportionment" and had not presented a reasonable factual basis to apportion liability.

United States v. NCR Corp., 688 F.3d 833 (7th Cir. 2012), involved a series of decisions about polychlorinated biphenyl (PCB) contamination involving the Fox River Superfund site in Wisconsin, where the notion of the harm seemed to shift as much as the PCB-contaminated sediments. The case is also notable because the court expressly declined to follow the Third Restatement. After two trips to the Seventh Circuit, NCR appeared to have won a divisibility apportionment of 28% based on its volume of PCBs discharged to the river. However, the government filed a motion for reconsideration on grounds that NCR's expert's report was unreliable, and the district court reversed itself, holding NCR jointly and severally liable. *United States v. NCR Corp.*, 107 F. Supp. 3d 950 (2015).

The majority of post-*Burlington* cases have continued to be reluctant to apportion liability—even in private cost recovery actions involving single sites and one or two contaminants.

Note that the American Tort Reform Association had filed an amicus brief urging the Seventh Circuit to follow the Third Restatement rules on apportionment. However, the appeals court dismissed this argument in a footnote, suggesting that this was a policy question better left for Congress. *NCR Corp.*, 688 F.3d at 838 n.1. The court also said it was bound by *Burlington* to apply the Second Restatement.

Most recently, the Seventh Circuit vacated a summary judgment ruling finding that the contamination was divisible and apportioning among the responsible parties, and instructed the district court to conduct a harder look at the evidence, taking into account the standards articulated in the Second Restatement. *Von Duprin LLC v. Major Holdings, LLC*, 2021 U.S. App. LEXIS 26726 (7th Cir. Sept. 3, 2021).

The Third Restatement Represents the Evolving Common Law

Since the Second Restatement was published, 40 states have either eliminated or modified their joint liability rules—including incorporating strict liability claims in their apportionment systems. Third Restatement § 1 cmt. b. The Third Restatement mirrors this trend by superseding Second Restatement sections 433A, 433B, 879, 881, and the portion of section 434 that addresses division of damages by causation.

Section 1 of the Third Restatement states:

> This Restatement addresses issues that arise in apportioning liability among two or more persons, including the plaintiff. *Some of its topics, such as comparative responsibility, were not addressed in the Restatement Second of Torts.* Other topics, such as joint and several liability, were addressed in the Restatement Second of Torts. *Even for topics that were addressed in the Restatement Second of Torts, the nearly universal adoption of comparative responsibility by American courts and legislatures has had a dramatic impact.* This Restatement reflects changes in the law since the publication of the Restatement Second of Torts . . . *the impact of comparative responsibility on American tort law is profound.*

(Emphasis added.)

The Third Restatement's underlying policy is that "[n]o party should be liable for harm it did not cause and an injury caused by two or more persons should be apportioned according to their respective shares of comparative responsibility." *Id.* § 26 cmt. a. Section 10 also states that joint liability is no longer the majority rule for independent tortfeasors. *Id.* § 10.

Section 17 of the Third Restatement explains that "joint and several liability has been substantially modified in most jurisdictions both as a result of the adoption of comparative fault and tort reform during the 1980s and 1990s." *Id.* § 17. The Reporter's Note to comment a states: "The clear trend over the past several decades has been a move away from pure joint and several liability." *Id.* at § 17, reporter's note to cmt. a. The Third Restatement also suggests its principles should be applied where statutes (such as CERCLA) expect courts to develop common-law principles to fill in statutory gaps. *Id.* § 1, reporter's note to cmt. e.

The Third Restatement urges courts to instruct factfinders to allocate comparative responsibility in all types of torts—including strict liability cases. *Id.* § 26 cmt. b. Likewise, the Reporter's Note to comment c of section 26 says, "When several persons are legally responsible for an indivisible part, the court instructs the jury to apportion responsibility among those persons for the indivisible part."

The Third Restatement also calls for a lower burden of proof to demonstrate divisibility. When referencing the level of proof required to establish divisibility, section 26 states that all that is required is a "reasonable basis" (comment f), "sufficient evidence" (comments g and h), "relaxing the burden of production" (Reporter's Note to comment h), "some evidence" (Reporter's Note to comment h), and "relaxed burden of proof" (Reporter's Note to comment h).

Federal Courts Should Apply the Third Restatement in CERCLA Liability Cases

Forty years ago, Congress declined to mandate CERCLA joint liability in all situations and asked the courts to apply evolving concepts of common law to prevent harsh results that might come from imposing joint liability in inappropriate circumstances. The common law has undergone a profound change since CERCLA was enacted, as reflected by the Third Restatement. Not only have the courts not honored this request, but by imposing joint liability in virtually every situation, the judiciary has contributed to creating the very harsh outcomes that Congress sought to avoid.

No publicly available apportionment decision issued since 2000 has used the Third Restatement to guide its analysis. Only one apportionment decision, *United States v. NCR Corp.*, even mentions the Third Restatement, and that was in a footnote explaining why it was declining to apply it.

Requiring exceedingly stringent standards for establishing divisibility means that only the deepest of deep pockets—the very parties that the government targets in its cost recovery actions—will have the resources to hire the experts necessary to develop the specialized and sophisticated evidence required to rebut the strong presumption for joint liability.

Burlington should not serve as an obstacle for courts to adopt the Third Restatement and does not stand for the proposition that the Second Restatement is forever the applicable apportionment standard. More importantly, by accepting the geographical and temporal evidence, the Supreme Court essentially adopted the apportionment-friendly approach of the Third Restatement.

Private cost recovery actions involving single sites, one or two contaminants of concern, and a handful of PRPs should reasonably be capable of apportionment. Even a waste disposal site with distinct types of harms (e.g., soils contaminated with metals and groundwater impacted with volatile organic compounds) should be capable of apportionment. It is time for federal judges to apply the Third Restatement to CERCLA cases and bring CERCLA jurisprudence into the twenty-first century.

Mr. Schnapf is the principal of Schnapf LLC and an adjunct professor of environmental law at New York Law School. He may be reached at larry@schnapflaw.com.

Published in *Natural Resources & Environment* Volume 36, Number 3, Winter 2022.