Defending Liberty
Pursuing Justice

ABA SECTION OF ENVIRONMENT ENERGY AND RESOURCES

Superfund and Natural Resource Damages Litigation Committee Newsletter

Vol. 5, No. 1 **March 2010**

MESSAGE FROM THE CHAIR

Connie Sue M. Martin

Welcome to the Superfund and Natural Resource Damages Litigation Committee. Our members include attorneys with a wide variety of practices within the Superfund and natural resource damage (NRD) assessment and restoration arenas: attorneys representing tribal, private, and government parties; regulators and the regulated community; NRD trustees and responsible parties; and law students who are future Superfund and NRD practitioners. The committee is intended to be a comprehensive source of information regarding developments in Superfund and NRD litigation, law, and policy. The committee offers a forum for debate and discussion among its members and with other committees. If you are not yet a member of the committee, we would be glad to include you among our ranks.

It is an interesting time in Superfund and NRD litigation, and we have a number of programs in the works for the 2009–2010 ABA year to keep you informed. We are planning quick teleconferences, brown bags, quarterly newsletters, contributions to *The Year in Review*, and a program at the 39th Annual Conference on Environmental Law in Salt Lake City in March.

The committee supports and endorses the Section of Environment, Energy, and Resources' (SEER's) "One Million Trees Project—Right Tree for the Right Place at the Right Time" nationwide public service project. I rolled up my sleeves and planted trees in Baltimore, Maryland, before the 17th Section Fall Meeting, alongside members of a number of other committees and John Cruden, SEER chair. I encourage committee members to participate in local tree-planting events, including one planned for the 39th Annual Conference on Environmental Law in Salt Lake City, to contribute to the goal of planting one million trees across the United States in the next five years.

Connie Sue M. Martin *is of counsel with the Seattle, Washington, office of Bullivant Houser Bailey PC. Her practice focuses on environmental and natural resource litigation. She may be reached at conniesue.martin@bullivant.com.*

EDITOR'S MESSAGE AND ISSUE OVERVIEW

Kirk T. O'Reilly
Andrew W. Homer

2009 was an exciting year in the field of Superfund litigation as, once again, CERCLA made it to the Supreme Court. Since its release in May, the opinion in *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009), has been the topic of much discussion and debate. Our goal in this issue is to present a variety of perspectives on the case and its implications. Bruce Gelber shares his view that, despite claims to the contrary, *Burlington Northern* does not

Superfund and Natural Resource Damages Litigation Committee Newsletter
Vol. 5, No. 1, March 2010
Kirk T. O'Reilly and Andrew W. Homer, Editors

Inside this issue:

signal a significant change in judicial interpretation of CERCLA. Bernard J. Reilly and Karyllan Dodson Mack discuss remaining hurdles and new opportunities for apportioning liability at sediment "mega-sites" in the wake of *Burlington Northern*. Providing an allocator's perspective, Chris Wittenbrink evaluates the meaning of the Court's "reasonable basis" standard for evaluating apportionment. Continuing on this theme, Kirk O'Reilly introduces technical approaches for apportioning liability. To wrap things up, Averil Edwards and Andrew Homer summarize district and circuit court decisions applying *Burlington Northern*.

Looking forward, we have begun planning for the next newsletter and seek your assistance. Submissions of articles on issues related to Superfund and NRD litigation are always welcome, as are topic requests for focused issues. If you have an idea you would like to discuss, please feel free to contact either of us. Additionally, we hope to increase the opportunity for student publication in future issues, so please pass the word to your alma mater that we welcome student submissions.

Kirk T. O'Reilly *is managing scientist with Exponent's Environmental Science Practice in Bellevue, Washington. He is also a member of the Washington State Bar. He may be reached at koreilly@exponent.com.*

Andrew W. Homer *is an associate in the Los Angeles, California, office of Pillsbury Winthrop Shaw Pittman LLP. His practice is focused on environmental litigation and compliance counseling. He may be reached at andrew.homer@pillsburylaw.com.*

LIKE TO WRITE?

The Superfund and Natural Resource Damages Litigation Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact Kirk T. O'Reilly at koreilly@exponent.com or Andrew W. Homer at w.homer@pillsburylaw.com.

ALIVE AND WELL: CERCLA LIABILITY AFTER *BURLINGTON NORTHERN*

Bruce S. Gelber

Every once in a while an environmental decision comes along that generates a lot of interest and discourse. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009), is one such decision. In this article, I join the debate over the significance and implications of that decision.

Burlington Northern addressed two aspects of the CERCLA (42 U.S.C. §§ 9601, *et seq*.) liability scheme—"arranger" liability under Section 107(a)(3) and the imposition of joint and several liability on parties found liable. On the arranger issue, the Court held that while each case involves a fact-intensive inquiry into the nature of the transaction that goes beyond mere labels and subjective statements of a party's purpose, for a party to be liable as an arranger it must have taken intentional steps to dispose of a hazardous substance. As to divisibility, the Court confirmed the key legal principles that have guided the lower courts for the last 26 years and, applying a clear error standard, upheld the district court's application of those principles to find the harm divisible on the record before the court. On both issues, but especially on divisibility, numerous articles from the defense bar have characterized the decision as a serious blow to CERCLA enforcement. But as Acting Assistant Attorney General John Cruden noted in his May 29, 2009, remarks on the decision, these articles call to mind Mark Twain's famous quote: "The reports of my death are greatly exaggerated." John C. Cruden, Acting Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, *Remarks Before the Environmental Law Institute* 1 (May 29, 2009). In this article I hope to show that the rumors of CERCLA's demise are indeed greatly exaggerated.

Arranger Liability

Any discussion of the significance of *Burlington Northern* for arranger liability must take into account the unusual facts of the case. The disposal there consisted of unintended spills of Shell's unused pesticide product that occurred during the transfer of the product to tanks owned by Shell's customer. Moreover, Shell took steps to minimize the likelihood of spills. These facts make *Burlington Northern* a rare case, at least with respect to government enforcement; the United States almost never brings "arranger" cases involving accidental spills of unused, useful commercial products.

Most arranger cases brought by the government involve very different facts, including transactions whereby the defendant rids itself of industrial by-products or waste materials for which it no longer has any use. *Burlington Northern* offers ample support for the imposition of liability in these cases. For the reasons stated below, I do not believe the decision will impair the government's ability to prevail in typical arranger cases.

First, the Supreme Court in *Burlington Northern* left no doubt that the traditional waste disposal case—in which a party contracts with another party to get rid of its waste—falls within the scope of arranger liability. The Supreme Court began its discussion by noting that "it is plain from the language of the statute that CERCLA liability would attach under § 9607(a)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance." 129 S. Ct. at 1878. The Supreme Court recognized that any necessary "intent to dispose" is satisfied simply by a party's involvement in a transaction specifically designed to discard its waste. This is significant because many cases brought by the United States—such as the typical waste hauler scenario—are ones in which there is no doubt that the arranger's exclusive purpose was to get rid of its waste. *See, e.g., United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988) (affirming liability of chemical waste generators that sent waste to disposal facility); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986) (same).

Second, while the Supreme Court confirmed that an "arrangement for disposal or treatment" involves an element of intentionality—echoing several courts that had previously reached the same conclusion (*see, e.g.*,

United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1231 (6th Cir. 1996); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993))—the Court stopped short of prescribing *how* plaintiffs must prove intent. Having laid out the two "extreme" scenarios under which liability would and would not plainly attach,[1] the Supreme Court proceeded to discuss the many permutations of arrangements in between: "cases in which the seller has some knowledge of the buyer's planned disposal or whose motives for the 'sale' of a hazardous substance are less than clear." 129 S. Ct. at 1879. In such cases, the Court agreed with prior courts that the determination whether a party is an arranger requires a fact-intensive, case-specific inquiry. *Id.* The Court eschewed adopting a single test, leaving room for each case to be developed and decided on its unique facts.

One thing the Court did make clear is that this fact-intensive inquiry looks beyond the parties' characterization of the transaction as a "sale" or "disposal" (*id.* at 1879), and may rest on consideration of circumstantial evidence. *See id.* at 1880 (holding "the evidence does not support an *inference* that Shell intended such spills to occur") (emphasis added). Arranger liability thus does not turn solely on a party's statement about its subjective intent in engaging in the transaction; rather, the necessary intentionality can "be inferred from the indirect action of the parties." *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1233 (6th Cir. 1996).[2] Courts may consider, for example, whether a party's employees treated the material as a valuable commodity or as a waste, whether the party stored the material or sent it to a landfill when it could not find a buyer, and whether or not the party took steps to reduce the likelihood of disposal of the material in connection with the transaction. *See, e.g.*, *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 752 (9th Cir. 1994); *A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1113 (9th Cir. 1998); *United States v. Atlas Lederer Co.*, 282 F. Supp. 2d 687, 715 (S.D. Ohio 2001). Circumstantial evidence of intent thus will continue to be highly relevant to the analysis.

Third, in articulating that a party must act with some intention to dispose, the Supreme Court made clear that a party may be liable if it enters into a transaction with the "intention that *at least a portion* of the product be disposed of." 129 S. Ct. at 1880 (emphasis added). An entity cannot simply claim that it was selling a useful product and avoid liability; courts will look beyond the professed "primary purpose" of a transaction. A single transaction may serve as both the sale of material that has some residual use *and* the arrangement for disposal of a hazardous substance that is no longer useful. Such transactions are not uncommon in arranger cases brought by the United States.[3] To cite a recent example, in *United States v. Atlas Lederer Company*, No. 3:91cv309 (S.D. Ohio Sept. 1, 2009), the defendants sold spent batteries to a reclamation facility. While the facility subsequently recovered the lead plates from the batteries, it also disposed of the lead-contaminated battery casings that were no longer useful. *Id.*, slip op. at 2, 12. Ruling on defendants' motion for reconsideration in light of *Burlington Northern*, the district court refused to set aside its pre-*Burlington Northern* ruling that the defendants had entered into the battery sales with the intent to dispose of the contaminated battery casings. *Id.* at 11–13. After *Burlington Northern*, it is clear that courts are not limited to deciding whether the transaction *as a whole* represents an arrangement for disposal, but rather can look at the party's intentions with respect to each component of a transaction.[4]

Fourth, a word must be said about the role of knowledge. It seems clear that the Supreme Court's statement in *Burlington Northern* that "knowledge alone is insufficient to prove that an entity 'planned for' the disposal," 129 S. Ct. at 1880, did not represent a rejection of the important role knowledge plays in determining a party's intent in arranger cases. For example, it is a well-established principle of common law that where an actor acts with knowledge that a consequence is substantially certain to result from an act, he or she acts with intent to bring about that result. *See Restatement (Second) of Torts* § 8A; *see also Restatement (Third) of Torts: Liab. for Physical Harm* § 1 (Proposed Final Draft No. 1, 2005). The Court has interpreted CERCLA liability standards in accordance with the common law where the statute does not "speak directly to the question addressed by the common law." *United States v. Bestfoods*, 524

U.S. 51, 62–63 (1998). We cannot presume that the Supreme Court meant to reject this long-held common law principle without saying so.

Rather, the Court's statement simply demonstrates its unwillingness to find the requisite intent where knowledge of disposal was the *only* evidence cited by the Court that supported a finding that Shell intended to dispose of its pesticide, and where all other evidence ran counter to such a finding. In this context—unintended spills incidental to the sale of an unused, useful product, where the seller "took numerous steps to encourage its distributors to reduce the likelihood of such spills," 129 S. Ct. at 1880—the Court said it could not infer intent from Shell's knowledge alone. In most cases, however, the defendant's knowledge of disposal is coupled with other facts supporting a finding of intent. For example, in *United States v. General Electric Company*, No. 06-cv-354-PB (D.N.H. Nov. 10, 2008), General Electric sent shipments of "scrap Pyranol," a waste material containing PCBs and other contaminants, to Frederic Fletcher, who initially believed it might be useful as a plasticizer in manufacturing paint, but instead disposed or abandoned the vast majority of it. *Id.* at 137–56 (transcript of oral ruling). In ruling (prior to *Burlington Northern*) that GE was liable as an arranger, the court found not only that GE knew that Fletcher would have to dispose of significant quantities of the Pyranol, but also that GE viewed the Pyranol as a waste, actively sought to get rid of it, and took no steps to prevent its disposal. *Id.* The court held GE liable even though it also found "no evidence to suggest that GE desired that [the Pyranol] be disposed of," and that, instead, GE's "objective was to be rid of what it believed was a waste product and to do it in the most economically viable way." *Id.* at 150. The court subsequently refused to vacate its order in light of *Burlington Northern*, finding it consistent with the Supreme Court's decision. *United States v. General Electric Co.*, No. 06-cv-354-PB, slip op. (D.N.H. Oct. 28, 2009) ("This qualifies as an arrangement for disposal under *Burlington* because GE intended to rid itself of the waste Pyranol by intentionally using Fletcher to dispose of it.").

Finally, it bears noting that Section 107(a)(3) of CERCLA imposes liability on parties that "arranged for disposal *or treatment*" of hazardous substances, 42 U.S.C. § 9607(a)(3) (emphasis added). The statutory term "treatment," incorporated into CERCLA, is broadly defined under the Solid Waste Disposal Act as any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume.

42 U.S.C. § 6903(34). In other words, where a party intended to have its material rendered "amenable for recovery," among other things, it may be liable under Section 107(a)(3)—even where there is no evidence that the party intended the disposal of a hazardous substance. Courts have found parties liable for "arranging for treatment" under Section 107(a)(3) for sending a variety of materials for reclamation or reprocessing. *See, e.g.*, *Cadillac Fairview/ California, Inc. v. United States*, 41 F.3d 562, 565–66 (9th Cir. 1994) (contaminated chemicals); *Cal. Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 298 F. Supp. 2d 930, 962–65 (E.D. Cal. 2003) (battery parts); *Ekotek Site PRP Comm. v. Self*, 881 F. Supp. 1516, 1528 (D. Utah 1995) (used oil); *California v. Summer del Caribe*, 821 F. Supp. 574, 580–82 (N.D. Cal. 1993) (solder dross); *United States v. Pesses*, 794 F. Supp. 151, 155–58 (W.D. Pa. 1992) (spent batteries, scrap metal, and sludge). As a result, I expect that there will be cases in which courts impose liability based on an arrangement to treat a hazardous substance, even where there was no intent to dispose of the substance.

Divisibility

It is likewise clear that the divisibility ruling in *Burlington Northern* will have much less impact on the government's CERCLA practice than some commentators suggest. Because of the case's unique facts, narrow holding, and unusual procedural posture, *Burlington Northern* offers defendants a rather weak post on which to hitch their hopes.

As an initial matter, it is important to note that *Burlington Northern* is at least as important for what it did *not* do as for what it did do. One of the most significant aspects of the decision is that the Supreme

Court did not disturb the body of CERCLA case law on divisibility of harm on which the United States has relied for years. Using the *Restatement (Second) of Torts* Section 433A as a starting point,[5] and citing *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), and the many federal appellate cases that flowed from that decision, the Court confirmed the key principles of apportioning liability under CERCLA:

- "[A]pportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'" "But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm." *Burlington Northern*, 129 S. Ct. at 1881.
- "Not all harms are capable of apportionment, however, and CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists." *Id.*
- "When two or more causes produce a single, indivisible harm, 'courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.'" *Id.*
- Finally, "[e]quitable considerations play no role in the apportionment analysis; rather, apportionment is proper only when the evidence supports the divisibility of the damages jointly caused by the PRPs." *Id.* at 1882 n.9.[6]

Thus, the Supreme Court did not change the law on divisibility.

The other significant thing that the *Burlington Northern* decision did not do is address the first step in what will normally be a two-step analysis. To succeed in apportioning liability for a single harm, a defendant must show *both* that (1) the harm is theoretically capable of apportionment, *and* that (2) there is sufficient evidence in the record to allow a court to apportion liability for such harm and the resulting costs. *See United States v. Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir. 2001) ("The preliminary issue of whether the harm to the environment is capable of apportionment among two or more causes is a question of law. Then, '[o]nce it has been determined that the harm is capable of being apportioned among the various causes of it, the actual apportionment of damages is a question of fact.'" (citations omitted) (quoting *In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 896 (5th Cir. 1993)). The only issue in *Burlington Northern* was the second step: whether there was sufficient evidence in the record to allow the district court to apportion liability for the harm at the Arvin site. The Supreme Court assumed that the harm was capable of apportionment, citing both the district court and the Ninth Circuit opinions. *See Burlington Northern*, 129 S. Ct. at 1881. In many of the cases in which the government seeks to impose joint and several liability, however, both parts of the divisibility analysis will be at issue.

As the Supreme Court recognized, "[n]ot all harms are capable of apportionment," *id.*, and I expect there will be many circumstances in which the harm is incapable of apportionment. For example, in cases involving parties falling within different categories of CERCLA liability, the disparate nature of their connection to the harm will make any causation-based apportionment virtually impossible. Consider, for instance, an attempt to distinguish a current owner share from an operator or generator share. Subject to the limited defenses in Section 107(b) and the liability exclusion in Section 107(r), CERCLA makes current owners strictly liable even if they have had no connection to the contamination-causing activities. *See* 42 U.S.C. § 9607(a)(1). A divisibility defense for current owners arguably nullifies the additional proof requirements imposed by Section 107(b)(3), such as due care and reasonable precautions, and the conditions in Section 101(40). At least some pre-*Burlington Northern* case law recognized this point. *See United States v. Northernaire Plating Co.*, 670 F. Supp. 742, 748 (W.D. Mich. 1987) (noting that "Congress clearly intended that the landowner be considered to have 'caused' part of the harm" and refusing to apportion harm between site owner and operators), *aff'd sub nom. United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989).[7] Nor is the current owner situation the only example of this principle. As one commentator explains:

> If an arranger's hazardous substance travels on a transporter's truck to an operator's disposal business on an owner's property, by what metric can a court compare the extent to which each of those liable parties contributed to the eventual environmental contamination?
>
> Ultimately, a court attempting a quantitative causally based apportionment among parties that contribute to a CERCLA harm in qualitatively different ways must engage in something 'like judging whether a particular line is longer than a particular rock is heavy.'

Steve C. Gold, *Dis-Jointed? Several Approaches to Divisibility After Burlington Northern*, 11 VT. J. ENVTL. L., Section IV.C. (forthcoming 2010) (citation omitted).

Additionally, in cases where each party's contribution to the contamination on its own would have been sufficient to warrant the response action taken by the United States, the harm is not capable of being divided along any rational lines. *Id.* Section IV.B. (citing, *inter alia*, *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45, 46 (Minn. 1920)); *see also RESTATEMENT (SECOND) OF TORTS* § 432 cmt. d, illus. 3; § 433A cmt. i (both citing the "merging fires" example based on the *Anderson* decision). For example, if two parties disposed of waste at a site and each party's contribution, alone, would have required the same remedy—such as a landfill cap or a groundwater pump-and-treat system—then each has caused the need for the response and there is no reasonable basis for apportioning the costs of that response between them. Thus, even if one accepts the view espoused by some that *Burlington Northern* relaxed the proof needed under the second step of the divisibility analysis, many cases will still not be subject to apportionment.[8]

Moreover, I do not believe that proving the second step of the divisibility analysis will necessarily be easier in future cases.[9] To understand what the Supreme Court *did* do in *Burlington Northern*, one must consider the question actually presented to the Court: "The question then is whether the record provided a reasonable basis for the district court's conclusion that the Railroads were liable for only 9% of the harm caused by contamination at the Arvin facility."). *Id.* at 1881. The issue before the Supreme Court was purely a factual question whether the district court's factual findings supported its ultimate apportionment under the "clearly erroneous" standard of review established by Fed. R. Civ. P. 52(a)(6).[10]

When boiled down to this question, the Supreme Court's decision is narrow.[11] Further, the Court's affirmance of the district court's decision was clearly an outgrowth of at least two unusual features of the case: (1) the Arvin site involved relatively simple facts, and (2) the issue of divisibility was never litigated by the parties in the case.

Burlington Northern involved only three defendants and a few relevant products. The site was relatively small and involved a single operator whose operations were fairly consistent over time. The primary focus of EPA's cleanup was a single plume of groundwater contamination. Many CERCLA cases involve far more complicated facts that will make it considerably more challenging for defendants to establish a reasonable basis for apportioning the harm among many causes, both as a theoretical matter and with evidence to support the theoretical basis. For example, the leading court of appeals cases—including several that the Supreme Court cited with approval in *Burlington Northern*—teach that the harm at a site cannot be apportioned where a defendant's total waste contribution is uncertain,[12] where commingled wastes have varying or unknown degrees of toxicity or migratory potential,[13] where different wastes at the site may interact in a synergistic fashion,[14] or where changes in waste-related operations over time preclude a reasonable apportionment of the harm caused by successive site owners.[15] Even if a defendant can prove its contribution to the contamination, it may be difficult to divide the *costs*. For example, defendants will have trouble establishing a reasonable basis for apportioning site-wide costs—such as costs of investigation and remedy development efforts—because such fixed costs normally are not proportionate to the degree of contamination. *See, e.g., United States v. Alcan Alum. Corp.*, 97 F. Supp. 2d 248, 274–75 (N.D.N.Y. 2000), *aff'd*, 315 F.3d 179 (2d Cir. 2003).[16]

The truly unique procedural posture of the case significantly limits the impact of the Court's ruling on divisibility. The defendants pursued a "scorched earth," "all-or-nothing" strategy in which they denied any liability for contamination at the Arvin site, and, therefore, never presented any theory or offered any evidence or expert testimony to support an apportionment of harm. *See Burlington Northern*, 129 S. Ct. at 1881–82. Only after trial did the district court *sua sponte* come up with a theory of apportionment, relying on relative size of the two parcels, relative years of operation, and number of pollutants as a basis for apportioning the harm. Therefore, the governments did not present evidence to demonstrate that the harm was incapable of apportionment or that the court's measures did not provide a reasonable basis for apportioning the harm. The district court's theory of apportionment and the court's application of the evidence to that theory were never the subject of expert testimony, rigorous scientific analysis, or cross-examination. What is likely to distinguish *Burlington Northern* from future cases is that where the United States believes that harm at a site cannot reasonably be apportioned, the government will vigorously defend that position with expert testimony and substantial evidence. The fact that the Supreme Court accepted the district court's conclusions on the record before it does not mean district courts will accept the same kind of proof in the face of countervailing evidence and argument.

Conclusion

As to both arranger liability and divisibility of harm, the *Burlington Northern* decision was borne of atypical facts and an unusual procedural posture. On neither question did the Court break new legal ground. Thus, while the United States will no doubt continue to see *Burlington Northern* issues raised in our cases, for the reasons discussed above, I do not expect to see the decision significantly impacting the government's efforts to enforce CERCLA.

Endnotes

[1] The Court explained that liability would *not* attach where an entity sold a new and useful product and the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination. 129 S. Ct. at 1879.

[2] In *Cello-Foil*, a case cited with approval in *Burlington Northern*, the Sixth Circuit proceeded to explain that "'[f]requently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.'" 100 F.3d at 1233 (quoting *Washington v. Davis*, 426 U.S. 229 (1976) (Stevens, J., concurring)).

[3] Of course, a party otherwise liable as an arranger on this basis may qualify for a statutory exemption under the Superfund Recycling Equity Act if its transaction involves statutorily defined "recyclable material" and satisfies the other criteria for the exemption. *See* CERCLA § 127, 42 U.S.C. § 9627.

[4] In this respect, *Burlington Northern* reinforced prior decisions imposing arranger liability for transactions involving both the recycling of materials that had further use and the disposal of hazardous substances that were no longer useful. *See, e.g.*, *Catellus*, 34 F.3d at 752 (recycling of lead plates in spent batteries involved disposal of contaminated battery casings); *EPA v. TMG Enters., Inc.*, 979 F. Supp. 1110, 1122–24 (W.D. Ky. 1997) (reclamation of scrap copper wire necessitated disposal of hazardous insulation); *California v. Summer del Caribe*, 821 F. Supp. 574, 580–82 (N.D. Cal. 1993) (recovery of metals from solder dross involved disposal of contaminants); *cf. Douglas County v. Gould, Inc.*, 871 F. Supp. 1242, 1245–47 (D. Neb. 1994) (no arranger liability for sale to recycler of lead plates previously removed from spent batteries).

[5] While recognizing Section 433A as the starting point, the Supreme Court cited other sections of the *Restatement* as well, namely Sections 433B, 881, and 875. Other sections of the *Restatement* are also relevant to joint and several liability and the potential divisibility of harm. *See, e.g.*, § 876 ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . does a tortious act in concert with the other or pursuant to a common design with him . . . .") and § 879 ("If the

tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the entire harm, irrespective of whether their conduct is concurring or consecutive.").

[6] *Burlington Northern* thus reinforces the important distinction between "divisibility" and "apportionment," on the one hand, and "allocation," on the other. Unlike apportionment, which must be causation-based, "allocation" under CERCLA § 113 involves an assignment of shares of costs or damages based on a variety of factors that may include equity and fairness considerations. *See United States v. Brighton*, 153 F.3d 307, 319 (6th Cir. 1998) ("We distinguish the divisibility defense to joint and several liability from the equitable allocation principles available to defendants under CERCLA's contribution provision. The former is legal, the latter equitable; the respective tests used to execute them should reflect this distinction.").

[7] Such examples demonstrate the observation by some courts in pre-*Burlington Northern* cases that "the 'fit' between § 433A and CERCLA is actually quite unclear: § 433A focuses on causation while CERCLA is a strict liability statute." *United States v. Capital Tax Corp.*, 545 F.3d 525, 535 (7th Cir. 2008). Those cases have emphasized the need to "follow the Restatement and common law 'only to the extent that [they are] compatible with the provisions of CERCLA.'" *Id.* (quoting *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001)).

[8] Professor Gold notes in his article that CERCLA cases are distinguishable from the many pollution cases cited in *Restatement* Section 433A and should not be presumed to be theoretically capable of apportionment. Gold, *supra*, Section IV.D. He also notes that another independent basis for joint and several liability can be found in *Restatement* Section 876, which addresses "Persons Acting In Concert." *Id.*, Section IV. A. ("Tortfeasors that act in concert are jointly and severally liable for the harm their concerted action causes, even if their individual acts cause only part of that harm.").

[9] As Professor Gold observes, this second step requires evidence sufficient to calculate both a numerator (i.e., defendant's contribution to the harm) and a denominator (i.e., total contributions of all parties), as well as testimony that these measures provide a reasonable proxy for harm. Gold, *supra*, Section III. B.

[10] "Findings of fact . . . must not be set aside unless clearly erroneous" under Fed. R. Civ. P. 52(a)(6). For that reason, the court of appeals in *Burlington Northern* reviewed "for clear error" whether the "evidence [was] sufficient to establish a reasonable basis for the apportionment of liability, taking into account that the burden of proof is on the party seeking allocation, as well as the district court's actual division of liability." *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 942 (9th Cir. 2008). The Supreme Court likewise said: "The question then is whether the record provided a reasonable basis for the District Court's conclusion" that certain defendants in that case were liable to the United States for only a set percentage of the harm. 129 S. Ct. at 1881. While "[t]he Court of Appeals criticized the evidence on which the District Court's conclusions rested," the Supreme Court, "[d]espite these criticisms, . . . conclude[d] that the facts contained in the record reasonably supported the apportionment of liability." *Id.* at 1882–83.

[11] As one court recently noted, *Burlington Northern* involved "largely *evidentiary* issues," and thus the "Court's holding on apportionment was actually quite limited." *Appleton Papers Inc. v. George A. Whiting Paper Co., et al.*, No. 08-C-16, 2009 WL 3931036, at *1 (E.D. Wis. Nov. 18, 2009) (emphasis in original).

[12] *See Chem-Nuclear Systems, Inc. v. Bush*, 292 F.3d 254, 260–61 (D.C. Cir. 2002); *O'Neil v. Picillo*, 883 F.2d 176, 182 (1st Cir. 1989) ("In light of the fact that most of the waste could not be identified, and that the appellants, and not the government, had the burden to account for all of this uncertainty, we think it plain that the district court did not err in holding them jointly and severally liable").

[13] *See Picillo*, 883 F.2d at 182 ("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"); *United States v. Monsanto*, 858 F.2d 160, 172 (4th Cir. 1988).

[14] *See Monsanto*, 858 F.2d at 172 ("the district court could not have reasonably apportioned liability without some evidence disclosing the individual and interactive qualities of the substances deposited there"); *United States v. Alcan Alum. Corp.*, 964 F.2d 252, 269 (3d Cir. 1992); *United States v. Alcan Alum. Corp.*, 990 F.2d 711, 722 (2d Cir. 1993); *United States v. Alcan Alum. Corp.*, 315 F.3d 179, 184–88 (2d Cir. 2003) (a defendant must "account for [its waste's] chemical and physical interaction with other hazardous substances already at the site").

[15] *See United States v. Vertac Chemical Corp.*, 453 F.3d 1031, 1047 (8th Cir. 2006).

[16] There also are forceful arguments against any apportionment that would leave the government bearing costs associated with harm caused by an insolvent party. CERCLA imposes liability for "*all costs* of removal or remedial action incurred by the United States Government," 42 U.S.C. § 9607(a)(4)(A) (emphasis added), and the *Restatement* recognizes that a court can decline to make an apportionment if "injustice to the plaintiff may result from an application of the rule," such as if "one of two tortfeasors is so hopelessly insolvent that the plaintiff will never be able to collect from him the share of the damages allocated to him." *RESTATEMENT (SECOND) OF TORTS* § 433A cmt. h.

Bruce S. Gelber *is Chief of the Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice. The views expressed in this article are those of the author and do not necessarily reflect those of the Department of Justice.* *The author wishes to acknowledge the contributions of Environmental Enforcement Section attorneys Scott Bauer, Karen Dworkin, Peter Flynn, Mark Sabath, and Randall Stone to this article.*

CALL FOR NOMINATIONS

The Section invites nominations for three new awards:

The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.

The Law Student Environment, Energy, and Resources Program of the Year Award will recognize the best student-organized educational program or public service project of the year addressing issues in the field of environmental, energy, or natural resources law. Nominees are likely to be law student societies, groups, or committees focused on these three areas of law.

The State or Local Bar Environment, Energy, and Resources Program of the Year Award will recognize the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. Nominees are likely to be state or local bar sections or committees focused on these practice areas.

Nominations for all three awards are due at the ABA Section office by April 23, 2010. The Award will be presented at the ABA Annual Meeting in San Francisco in August 2010. Award recipients should plan to be present at the award presentation.

For more information, visit www.abanet.org/environ/sectaward/

POST-*BNSF*; APPORTIONMENT ISSUES AT SUPERFUND MEGA-SITES

Bernard J. Reilly
Karyllan Dodson Mack

I. Introduction

The U.S. Supreme Court issued a landmark decision on May 4, 2009, covering two major topics under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. §§ 9601 *et seq*. The first holding addressed the outer limits of liability for "arrangers," one of the four ways a potentially responsible party (PRP) is a "covered person," and thus liable, under the statute, 42 U.S.C. § 9607(a). While the focus of this piece is not on the scope of arranger liability, it is important to note that if a party falls within one of the categories of "covered persons," it may be held liable for cleanup costs, without regard to fault (known as "strict" liability), even if the harm occurred prior to enactment of the statute. Thus, liability under the statute is retroactive and strict.

The second holding addressed the issue of whether the liability of multiple defendants under CERCLA would be several—or joint and several—a question left unanswered by the statute. The legislative history of the statute makes it clear that Congress intended to leave the resolution of that question to evolving principles of common law, and the courts quickly adopted that view. *See United States v. Chem-Dyne Corp*., 572 F. Supp. 802 (S.D. Ohio 1983). Furthermore, the view adopted by most courts was that liability was joint and several, subject to those rare instances when the harm could be proved to be divisible. *Metropolitan Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc*., 473 F.3d 824, 827 (7th Cir. 2007). However, in two consolidated cases decided on May 4, 2009, *Burlington No. & Santa Fe R. Co. v. United States* (No. 07-1601) and *Shell Oil Co. v. United States* (No. 07-1607) (collectively, *BNSF*), the Supreme Court rejected the application of joint and several liability and approved the apportionment of liability among multiple PRPs. *Burlington N. & Santa Fe Ry. Co. v. United States,* 129 S. Ct. 1870 (2009). The Court accepted the district court's finding that, although there was a single harm, there was a reasonable basis for apportioning the harm, such that the defendants were only severally liable. *BNSF* involved an agricultural chemical distribution site, in which the defunct owner/operator used its own land as well as a smaller leased parcel owned by the two railroad defendants (Railroads). Shell delivered chemicals to the site under circumstances in which there were multiple spills of hazardous substances.

The availability of apportionment, and thus several liability in the CERCLA context, is potentially a huge advantage for the regulated community. The principal advantage to severally liable parties is that they are not required to participate in funding the "orphan share," that portion of the cost attributable to parties who cannot be found, who no longer exist, or who are no longer viable. Under several liability, the plaintiff, typically the government, will usually have to fund the orphan share. However, it will clearly take time for the law in this area to develop and for practitioners to better understand how courts will evaluate the types and levels of proofs required to establish a reasonable basis for apportionment. Furthermore, the application of several liability means that parties at so-called Superfund "mega-sites" will likely have to work harder to organize, join new PRPs, "allocate" or "apportion" responsibility, and reach settlements, which may include helping the government solve its orphan share problem. This article will focus on the apportionment hurdles at mega-sites in a post-*BNSF* era.

II. Recap of the Decisions on Apportionment

The district court rejected the EPA and Justice Department's long-standing argument that liability under CERCLA is joint and several (subject to the limited divisibility defense). Instead, the court concluded that joint and several liability was inappropriate, since holding parties that were responsible for only a small amount of the harm to be liable for the entire site, "because no other responsible party is judgment-worthy, takes strict liability beyond any rational limit." 2003 WL 25518047 at 87.

Relying upon the *Restatement (Second) of Torts* § 433A, which provides for apportionment among two or more causes when (1) there are distinct harms *or* (2) there is a reasonable basis for determining the contribution of each cause to a single harm, the district court formulated its own apportionment analysis. The court, *sua sponte*, combed the record to develop its reasonable basis for apportionment, since the defendants, denying their liability altogether, had failed to proffer any divisibility arguments. Following this analysis, the court held that the defendants were only severally liable, apportioning them each a small percentage of the harm (defendant Shell's harm was determined to be 6 percent, while the Railroads were assigned 9 percent), leaving the governments unable to recover 85 percent of their response costs. [See p. 17 for explanation.]

In determining an appropriate apportioned share of responsibility, the court considered what the Ninth Circuit referred to as "the simplest of considerations: percentages of land area, time of ownership and types of hazardous products." 502 F.3d 781 at 943. When the factors were multiplied, the relative responsibility of each defendant was determined, to which the district court added a 50 percent cushion for any error resulting from its estimates.

The Supreme Court, by a vote of 8-1 (Ginsberg, J., dissenting) held that the district court reasonably apportioned the Railroads' share of the site remediation costs at 9 percent; however, Shell was held not to be an arranger under CERCLA; therefore, Shell was not responsible for any of the costs. Again, the court relied upon the *Restatement (Second) of Torts*, focusing on the second prong of the analysis and the question of whether the record provided a reasonable basis for the district court's apportionment of 9 percent of the harm to the Railroads. The court concluded that the evidence need not be precise; there need only be "facts contained in the record reasonably support[ing] the apportionment of liability." 129 S. Ct. at 1882–83. Interestingly, the court does not address the *Restatement (Third) of Torts*, which also addresses divisibility issues. One reason may be due to the more complicated analysis required under the *Restatement (Third)*. However, application of the *Restatement (Third)* probably would not change the outcome of the Supreme Court's decision, as the use of the *Restatement (Third)* could tip the scales in favor of several liability more often than joint and several liability, For example the *Restatement (Third)* does not mandate an automatic finding of joint and several liability if the damages are indivisible. *See* Kevin A. Gaynor and Matthew A. Axtell, *Does CERCLA Contain an Implied Right of Joint and Several Liability in Cost Recovery Actions Brought by PRPs?: An Analysis of Options Following United States v. Atlantic Research Corp. and the Third Restatement of Torts*, ALI-ABA Course Study, April 24–25, 2008 at *192.

The Supreme Court's decision thus approves the use of reasonable approximations supported by evidence in the record to determine a reasonable basis for apportioning harm. A significant issue that is raised by this decision is whether "simple considerations" such as percentage of land area, time of ownership, and types of hazardous products would be deemed "reasonable" methods of approximating harm at a complex site, such as a mega-site.

III. Apportioning Harm at Mega-Sites

What Are Mega-Sites?

CERCLA was designed to deal with discrete sites with definable boundaries; however, over the years, CERCLA has come to be applied to very complicated sites, such as the contaminated sediment sites that are part of the Urban River Restoration Initiative. These mega-sites are not discrete locations with readily discernable borders; instead, they are the products of decades, or even centuries, of degradation caused by human activity.

The major river systems in the United States were the first areas of the country to be settled, the first to be urbanized, and the first to be industrialized. *See* Thomas A. Newlon, *Contaminated Sediments in Urban Waterways and Embayments: How Best to Use Superfund*, ABA Site Remediation Committee Newsletter, January 2007, at 10. To accommodate urban growth, rivers have been subjected to decades of dredging, wholesale destruction of wetlands and

other habitat, hardening of the banks, industrial effluent releases, urban runoff, municipal waste discharges, and agricultural runoff. The typical urban river functioned as a public sewer for decades before the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA), and CERCLA became law. Even after the CWA, many publicly owned treatment works (POTW) have systems that are inadequate to handle their sewage loads or unable to provide a level of treatment needed to protect the rivers into which their effluent is discharged. Over time, these activities have resulted in the widespread degradation of urban rivers. Ecologically, the rivers suffer from contaminated sediments, degraded water quality, lost fish and wildlife habitat, and lost human use,

Moreover, unlike a "typical" upland Superfund site, numerous public entities, hundreds of PRPs (to say nothing of hundreds of others who cannot be found or are no longer in business), and hundreds of thousands of persons throughout a river system may have contributed to its deterioration over hundreds of years. To make matters worse, the costs of remediation are typically much higher, perhaps by orders of magnitude, than at a "typical" upland CERCLA site. As a result, parties who are really responsible for the harm are often long gone, leaving a small group of surviving PRPs potentially liable for conduct they had little to do with, and for hundreds of millions, or even billions, of dollars in cleanup and restoration costs.

Issues with Apportioning Harm

Apportioned liability is several only—meaning that the defendant is only responsible for the share of the harm it caused and for which it was deemed liable. Therefore, unlike the concept of joint and several liability, the defendant cannot be held responsible for damage caused by other defendants, or for an orphan share.

The one obvious lesson from the *BNSF* decision is that prudent practitioners should develop apportionment arguments and should not depend upon the court to perform the critically important task of marshalling the evidence, particularly at a complex site where the defendant will likely be held to a higher standard in proving there is a reasonable basis for divisibility of the harm.

Consider application of the district court's factors (percentages of land area, time of ownership, and types of hazardous products) in the case of a complex urban river mega-site, where the harm is likely to consist of a multitude of injuries to sediments, water quality, and natural resources. In developing a percent share of responsibility based upon land area, the denominator is likely to be a massive number (as many mega-sites consist of entire watersheds that may include multiple waterways). The numerator would be the area of one facility, which when divided by the entire watershed area is likely to result in a minuscule percentage. The same could be true of the time calculation. Even if a facility operated for decades, contamination at the site could go back for hundreds of years. Pinpointing a denominator for this calculation could prove difficult as well. Finally, developing an argument based upon the types of hazardous products generated or handled by a defendant and those found at the site is likely to be a very complicated analysis in the context of mega-sites where almost any contaminant conceivable is likely to be present. While many PRPs may be extremely happy with the apportioned shares that result from these "simple" types of calculations, a district court will likely require something more when dealing with mega-sites. Thus, although the foregoing factors should be considered, more scientific and technical approaches to apportionment will likely be required.

So what might courts require in terms of proving a reasonable basis for apportioning harm at a mega-site? Obviously, we do not yet know, and the Supreme Court provided very little guidance. Most likely, practitioners will want to hire experts in the fields of allocation (or technically, apportionment) (hereinafter, divisibility expert), risk assessment, and the sciences (engineering, hydrogeology, chemistry, etc.). Divisibility experts, while critically important, are not likely to have the technical expertise required. For example, experts in risk assessments may be useful in evaluating remedy drivers and associated costs. Although risk was not directly addressed in the *BNSF* decision, the district court recognized the importance of understanding which chemicals were driving the remedy. Scientists will be needed to opine regarding the presence of chemicals in the system, the geomorphology of a

system, how the chemicals are transported, whether or not the chemicals degrade, etc. Development of systems to model the transport of chemicals will likely be required. Finally, testifying experts will be needed to present the divisibility argument at trial. It may make sense to use separate consulting experts for the detailed evaluation of the science and preparation of the apportionment argument. The information provided to the testifying expert should also be limited to protect materials from discovery.

Practitioners should also consider the evidentiary tools readily available to develop apportionment arguments, including, but not limited to, Sanborn Maps, which provide information on property boundaries, structures (and their functions), and even pipelines, wells, and sumps; the U.S. Geological Service for aerial maps; the U.S. Department of Transportation for transportation facilities and networks; and state and local agency records. *See* M. Misiorowski & J. Eagle, *Toxic Torts and Environmental Law*, August 2009.

Presumably, whatever apportionment arguments are developed and presented to the court will take into consideration the share that should be assigned to orphans. The orphan share could be calculated using a bottom-up or top-down approach. The bottom-up approach would develop a share for each orphan using the same factors and methodologies as were used for developing the share(s) for the defendant(s). If there is little to no information regarding activities of orphans, a top-down approach could look at the total liability and subtract the liability attributable to defendant(s), leaving the rest as an orphan share (which was the approach used in the *BNSF* case). Regardless of the method, it is important that the apportionment argument presented be tied up as tightly as possible so that the court has a high comfort level in the analysis. It is clear from the Supreme Court's decision in *BNSF* that the district court has a significant amount of discretion in apportioning harm. A sloppy apportionment analysis runs the risk of the court assigning a somewhat arbitrary error rate—such as the 50 percent rate applied in *BNSF*, or, worse, rejecting apportionment altogether. Application of a significant error rate means the defendants are paying a percentage of (and potentially a high percentage of) the orphan share. In light of the anticipated technical and factual analysis that will be required to prove apportionment (or to prove that the harm is indivisible), it is likely that courts will no longer grant summary judgment on issues of joint and several liability. At least one court has determined that a trial is necessary to allow "full development of a record and a decision on the basis of real facts rather than the artificial and even hypothetical versions of the facts the court must assume for purposes of deciding summary judgment." *Evansville Greenway and Remediation Trust v. Southern Indiana Gas and Electric Co.*, 2009 WL 3163180 (S.D. Ind. Sept. 29, 2009). Therefore, it may be difficult to resolve issues of joint and several liability without a trial, thus requiring extremely costly and time-consuming endeavors for mega-sites; however, this also means that it will be more difficult for the government to obtain judgments against parties on a joint and several liability basis.

IV. Impacts of Apportionment on Sediment Mega-Sites

The *BNSF* decision has several important implications for CERCLA mega-sites, including PRP organization (and joinder of new parties), internal allocations of responsibility, and settlements, including analysis of the potential orphan share.

PRP Group Formation

Following the *BNSF* decision, more parties may be inclined to "hide in the weeds," hoping to escape liability or to have their liability determined to be several only, rather than stepping forward and risk paying more than their several share of the liability. Therefore, it may become more difficult to organize PRP groups to undertake voluntary cleanup activities at these large sites. Furthermore, once an initial group of PRPs is formed, it may prove even more difficult to join new parties who may later be served with EPA General Notice Letters (GNL) as the threat of joint and several liability may not hold the "teeth" it once did, and if other parties are already performing, the new GNL recipients may feel that there is less pressure to take action.

Internal Allocations

Once a PRP group is formed, the group must decide how to divide group costs among themselves. Since this type of activity is usually conducted at an early stage of the process (i.e., before the Remedial

Investigation/Feasibility Study (RI/FS) or any significant amount of data is available), groups typically look to publicly available information and use equitable factors (also called the "Gore" factors) that courts have used in allocating harm among defendants. *See U.S. v. Colorado & Eastern R. Co*., 50 F.3d 1530, 1536 n.5 (10th Cir. 1995) (setting forth six Gore factors). Although the Supreme Court in *BNSF* stated that equitable factors have no place in determining a reasonable basis for apportioning harm (only evidence can support the apportionment), in reality, the types of factors identified by the district court are the same factors that PRP groups have been using to determine allocation shares.

The issue with preparing an interim allocation for a major activity, such as signing an order to perform an RI/FS or interim remedy, is that the PRP group is signing up to pay the full amount of the activity, and thus to absorb the orphan share since the regulatory agencies will typically not be willing or able to acknowledge, or to measure, the orphan share at an early stage of the process.

Settlements

So when does it make sense for a party to volunteer to incur what might prove to be more than its several share of cleanup costs? The realistic answer is that such a determination will have to be made on a case-by-case basis, but there are a number of factors to be considered when faced with this question.

One factor, which is of primary importance, is whether or not the PRPs can positively impact the overall "size of the pie," i.e., make the work considerably less costly than it would otherwise be if the regulatory agencies were to perform it. This may depend upon how far along the agencies are in their evaluation and decision-making process or whether there appears to be a realistic chance of successfully avoiding an unreasonably costly remedy. Overall, there is still a very strong argument that by at least having a seat at the table with the agencies, and preferably taking the lead on response activities, PRPs have more control over the process and a better likelihood of reducing the overall scope and cost of the remedy while still assuring the remedy is protective of human health and the environment.

Another factor to consider is the number of PRPs willing to come to the table to share the cost. If there are a reasonable number of parties willing to voluntarily undertake cleanup activity (sometimes referred to as a "critical mass"), the risk of a party paying more than its several share is somewhat reduced and the cost of any orphan share is shared among the critical mass of parties, subject to any discounts that may be given at the discretion of EPA and subject to any federal dollars that may be available.

Yet another factor to be considered is the potential magnitude of the orphan share, which may be a disincentive to early settlement at sediment mega-sites where the number is potentially massive. The potential for a massive orphan share can also serve as a distraction for PRP groups, where parties are focused on establishing their several liability (i.e., dividing up the pieces of the pie) instead of working to reduce the overall cost. If possible, the potential orphan share should be estimated. Early settlers are likely to have to depend upon recouping the portion of the orphan share they paid in an early settlement in a final settlement, or persuading the government to pay for the orphan share in a final settlement, making a final settlement, already difficult to achieve, that much more daunting.

At sites where there is a potentially large orphan share, PRPs should evaluate whether or not to work with EPA on a case-by-case basis, depending on the task at hand. PRPs may decide it is wise to conduct an RI/FS that will help to lay the foundation for a reasonable, cost-effective remedy and gather information needed for divisibility advocacy. However, when it comes to conducting the remedy, PRPs may believe that there is a reasonable basis for apportionment and that their share is too small to make such a commitment. Failure to find some path to settlement of course presents risks for both sides. Although the government risks a finding of several liability, PRPs will be faced with 106 Orders and civil actions—high-stakes poker.

All this is further complicated by the fact that whether liability will be joint and several, or only several, is unlikely to be known until, as in *BNSF*, a judge makes a final ruling and all opportunities for appeal have been exhausted. Certainly, the regulatory agencies are unlikely to concede that the harm is divisible or capable

of apportionment because that concession would result in the government becoming responsible for the orphan share. With study costs at urban rivers in the $50 million to $70+ million dollar range and remedial activities in the hundreds of millions or billions of dollars range—these uncertainties are likely to make early settlements even more challenging than they have been in the past, when liability was generally assumed to be joint and several. At an urban river mega-site, with hundreds or even thousands of responsible parties contributing to the condition of the river over hundreds of years, it is safe to assume that a party entering into an early settlement will risk having to pay more than its several share of the liability.

V. Conclusion

Unless the regulatory agencies can devise an approach to deal with these uncertainties (such as by finding a means of funding the orphan share), *BNSF* is likely to be an impediment to early settlements. The government, for its part, should be figuring out how to fund what are likely to be vastly greater orphan shares, both in size and numbers of sites implicated, than in the past. PRPs, for their part, should be fashioning apportionment arguments at the earliest stages of the remediation of a site, and then gathering the evidence and perfecting the administrative record so that a district judge can follow the lead of the trial court in *BNSF* and find a reasonable basis for apportioning a single harm.

Bernard J. Reilly *is corporate counsel for E.I. du Pont de Nemours and Company. He can be reached at Bernard.J.Reilly@usa.dupont.com.*

Karyllan Dodson Mack *is an associate in the Newark, N.J., office of K&L Gates LLP. Her practice is focused on environmental litigation and regulatory compliance. She can be reached at karyllan.mack@klgates.com.*

AN ALLOCATOR'S PERSPECTIVE ON BURLINGTON NORTHERN– THE BROADENING SCOPE OF "REASONABLE BASIS"

Chris Wittenbrink

Burlington Northern & Santa Fe Railway Co. v. United States, et al., 129 S. Ct. 1870 (2009), affirms the CERCLA defendant's burden of showing a reasonable basis for apportionment exists as "not all harms are capable of apportionment." In those instances where apportionment is possible, the Court provides guidance on what constitutes a "reasonable basis." The result is that defendants are more likely to be successful employing *Burlington Northern*'s relaxed evidentiary rules to limit liability in § 107 actions.

Overview

The Supreme Court's May 4, 2009, holding in *Burlington Northern* is the topic of discussion on many points including the question of how the opinion affects allocation issues under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 U.S.C. §§ 9601 *et seq.*). From an allocator's perspective, *Burlington Northern* provides instructive guidance on the standards for conducting an apportionment analysis under CERCLA § 107(a).

Prior to this decision, a defendant in a § 107(a) action commonly operated under the assumption it was strictly and severally liable because the evidentiary burden was too great to show several liability. That is, lacking detailed historical and technical data, a party could not precisely show its liability was capable of apportionment.[1] However, the holding in *Burlington Northern* removes the exacting standard previously required by the U.S. Court of Appeals for the Ninth Circuit, offering parties a road map to successfully apply allocation principles in cost recovery actions.

Although uncertainty abounds, following *Burlington Northern*, CERCLA plaintiffs (both government and private parties) and defendants in § 107(a) actions must carefully consider the application of "reasonable

basis" principles for apportionment. The successful determination of a reasonable basis will limit liability, or where no such reasonable basis is to be found, to default to a strict and several liability scheme. The *Burlington Northern* allocation rule can be used both as a defense to a § 107 claim and, alternatively, by the plaintiff to show the defendant's role in the site cannot be allocated by applying a reasonable basis.

The following is a brief discussion of these allocation issues.

Case Summary

Brown and Bryant, Inc. (B&B), operated an agricultural chemical distribution business beginning in 1960. In 1975, B&B expanded the operations onto an additional parcel of property owned by a predecessor of Burlington Northern and Santa Fe Railway Company. Both properties became contaminated during the course of operations and were subject to remedial activities undertaken by EPA and the California Department of Toxic Substances Control (the Governments), The Governments sought cost recovery from defendants, including the railroads. The U.S. District Court for the Eastern District of California found:

> [T]he site contamination created a single harm but concluded that the harm was divisible and therefore capable of apportionment. Based on three figures—the percentage of total area of the facility that was owned by the Railroads, the duration of B&B's business divided by the term of the Railroads' lease, and the Court's determination that only two of three polluting chemicals spilled on the leased parcel required remediation and that those two chemicals were responsible for roughly two-thirds of the overall site contamination requiring remediation-—the court apportioned the Railroads' liability as 9% of the Governments' total response cost.

Burlington Northern, 129 S. Ct. at 1876. Following cross appeals by the parties, the Ninth Circuit held that the district court erred in finding the record established a reasonable basis for apportionment. *Id*. at 1877. The Supreme Court reversed this decision.

Impact on Allocation

The impact of *Burlington Northern* on allocation matters will be significant, specifically with regard to apportionment analysis. The Supreme Court has now defined, at the one end of the spectrum, the minimum level of scientific certainty or analysis required for the types of factors applicable in apportionment, i.e., volume, time period, and geographic considerations. The question of when the application of more advanced methods in determining a reasonable basis remains unanswered but the possibility remains that some sites may require more detail and analysis than used in *Burlington Northern*. On the other hand, the U.S. Department of Justice (DOJ) has taken the position that the *Burlington Northern* case has no material impact on cost recovery actions. DOJ's position is that it does not change the evidentiary standard and that the applicable rule from *Burlington Northern* is case-specific and limited in its application to other sites. *See, e.g.*, "The Supreme Court's Decision in Burlington Northern & Santa Fe Railway Company v. United States," Speech by John C. Cruden, Acting Assistant Attorney General, Environment and Natural Resources Division, Before the Environmental Law Institute (May 29, 2009), http://www.justice.gov/enrd/1306.htm.

The Court noted the standards for apportionment discussed in *United States v. Chem-Dyne Corp*., 572 F. Supp. 802 (S.D. Ohio 1983). The *Chem-Dyne* court confirmed CERCLA imposed strict liability, but did not mandate joint and several liability in every case. Courts of appeals have followed the *Chem-Dyne* approach using it as the starting point for analysis under § 433A of the *Restatement (Second) of Torts*. The *Restatement* provides:

> [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 has himself caused,

> Restatement (Second) of Torts, §§ 433A, 881 (1976).

The Court in *Burlington Northern* concurred that the district court applied the proper reasonable basis standard for the B&B site. What follows are some of the implications of the standard and examples of how the evidentiary findings of a reasonable basis have been relaxed.

What Is a Reasonable Basis?

Burlington Northern had the effect of relaxing the standards used in the determination of a "reasonable basis." The Court affirmed three factors utilized by the district court as comprising a reasonable basis for apportionment: the percentage of total area owned; the time period of operations; and the percentage of chemicals released that contributed to the site contamination. Despite the court of appeals' criticism of this approach, the appeals court itself cited the same factors as useful in establishing divisibility. 129 S. Ct. at 1883 (quoting *United States v. Burlington Northern and Santa Fe Railway Co*., 520 F.3d at 936 n.18. "We of course agree with our sister circuits that, if adequate information is available, divisibility may be established by 'volumetric, chronological, or other types of evidence,' including appropriate geographic considerations" (citations omitted)). The appeals court further commented that "the [District Court] had relied on estimates rather than specific and detailed records as a basis for its conclusions." *Id*. at 1882. This did not matter to the Court, which found the record supported the apportionment analysis. The utilization of exact and precise reasonable basis determinations is not necessary and requires only a relative comparison of the harm caused by each party.

> Although the evidence adduced by the parties did not allow the court to calculate precisely the amount of hazardous chemicals contributed by the Railroad parcel to the total site contamination or the exact percentage of harm caused by each chemical, the evidence did show that fewer spills occurred on the Railroad parcel . . .

Id. at 1883. One result of the Court's revised standard for exactness is that defendants are now better positioned to successfully bring an apportionment defense. In practice, an apportionment defense analysis will be the same type of allocation analysis made in a contribution action. The predominant body of case law and precedent on allocation matters arise from analyses successfully applied in contribution actions under § 113(f). In a contribution action, parties put forth allocation arguments showing divisibility of harm, i.e., what division of harm is attributable to each party. The allocation positions incorporate equitable factors where appropriate, 42 U.S.C. § 9613(f)(1), "[T]he court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." For example, the frequently cited "Gore" factors have the same factual underpinnings as the reasonable basis factors the Court cited in *Burlington Northern*: (i) the volume of wastes . . . ; (ii) the toxicity of waste . . . ; and (iii) the extent to which a party can distinguish its contribution to environmental risks (e.g., geographic and spatial distribution).

As a result of the *Burlington Northern* decision, the practice of allocation analysis in a cost recovery action will often mirror an equitable factor allocation under § 113. Following *Burlington Northern*, defendants in a § 107 cost recovery action will be well served by conducting an allocation analysis that demonstrates the defendant's liability is capable of apportionment applying a reasonable basis approach.

Conversely, a cost recovery plaintiff should evaluate the strength of apportionment of harm argument a defendant may assert. Prior to bringing a § 107 action, plaintiffs must evaluate the strength of a defendant's potential apportionment defense. *See, e.g.*, Cruden, *supra*, stating "Moreover, unlike *Burlington Northern*, in which, due to the unusual procedural posture of the case, we never had the opportunity to offer proof to the district court of the defendants' joint and several liability, when we make that assertion in future cases, we will be prepared to back up our position with scientific evidence." It is foreseeable that in many instances an assumption by the § 107 plaintiff that the defendant will be jointly and severally liable will prove not to be the case. The obvious result will be a

scenario where the plaintiff recovers only a portion of its costs and must seek other parties to recover additional costs. The best preparation to avoid this outcome is to be fully prepared to rebut an apportionment defense by showing the defendant's liability is not capable of apportionment applying reasonable basis principles.

Conclusion

The *Burlington Northern* rule, application of a reasonable basis for apportionment, even where the approach is seemingly simple to determine, allows defendants in cost recovery actions to limit the scope of their liability. The evidentiary standards required are now less onerous and the likelihood of a successful defense seems more probable. Alternatively, a cost recovery plaintiff can benefit from showing the defendant's liability is not capable of a reasonable basis apportionment, thereby subjecting the defendant to strict and several liability, or avoid this situation by naming additional parties in its cost recovery action.

Endnote

[1] Note that the evidentiary standards for apportionment under § 107 are distinct from the equitable factors used for allocation under § 113 contribution actions. Although, as will be discussed, certain facts may be an allocation factor under both a reasonable basis analysis or an equitable factor under a contribution analysis. For example, percentage of waste volume served as a factor in *Burlington Northern* and is often used as an equitable factor under § 113.

Chris Wittenbrink *is president of CR Consulting, Inc., a consulting firm specializing in environmental liability evaluation and resolution. He also is of counsel to the environmental and natural resource law firm of Baird Hanson & Williams. He can be reached at cwittenbrink@bhwlaw.com.*

RESTATEMENT § 433A AND THE CHEMISTRY OF DIVISIBILITY

Kirk O'Reilly, Ph.D., J.D.

Every whole is built from pieces – Proverb

In *Burlington No. & Santa Fe R. Co. v. United States* (*BNSF)*, the Supreme Court fully supported the concept of divisibility in assigning CERCLA liability. This means that even though CERCLA is considered to impose joint and several liability, such liability can be limited if one provides a reasonable basis for divisibility. Apportioning joint liability requires a defendant to first demonstrate that there are either distinct harms or a reasonable basis for determining the contribution of each cause to single harm. And if so, the defendant must also provide evidence to support its appropriate portion. The goal of this article is to delve into what evidence may be required to answer these questions and to discuss technical approaches for meeting these requirements.

Since the *BNSF* opinion was released, there has been a debate as to how high an evidentiary bar the Court set for demonstrating divisibility, and ultimately, liability. At first reading, it appears that the Court did not provide much clarity as to the "reasonable basis" standard beyond saying it can include volumetric, chronological, and geographic considerations. But the Court stated that § 433A of the *Restatement (Second) of Torts* is the universal starting point for a divisibility analysis. A review of the comments to § 433A indicates that it specifically covers the types of environmental harm at issue under CERCLA. For example, distinct harms can be severable in time, as when "*two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused a separate amount of harm, limited in time, and that neither has any responsibility for the harm caused by the other.*" (§ 433A Comments on Subsection (1) c.) Similarly, there is divisible harm if "*two or more factories independently pollute a stream, [the harm] may be treated as divisible in terms of degree, and may be apportioned among the owners of the factories, on the basis of the respective quantities of pollution discharged into the stream.*"

(§ 433A Comments on Subsection (1) d.) Defendants are not required to produce perfect evidence demonstrating relative causation even if the harm cannot be clearly marked out as severable, if they can provide "reasonable assumptions that the respective harm is proportionate" to the proposed split of liability. *Id.* Ultimately, the court need only "make rough estimates which will fairly apportion" the damages. (§ 433A Comments on Subsection (1) b.)

The comments to § 443A raise two additional important points. The first is that when apportioning liability, it is immaterial whether all potentially responsible parties are joined as defendants, as a party must only separate its contribution to the harm from the sum of the remaining. (§ 433A cmt. a.) Second, the concept of apportionment applies when dividing a defendant's contribution from "*preexisting conditions which the defendant has not caused*." *Id.* This strongly suggests that in cases where a defendant's discharge mixes with historical baseline contamination, the defendant may argue that it is responsible only for the incremental harm.

The following section, § 443B, specifically focuses on the burden of proof required to apportion liability. While the examples cover situations like *BNSF* where there are just a few parties, the comments go on to argue that in a case with numerous potential parties, requiring each to prove its specific contribution to escape joint liability may cause disproportionate hardship. It states that "*if a hundred factories each contributed a small, but still uncertain, amount of pollution to a stream, to hold each of them liable for the entire damages because he cannot show the amount of his contribution may perhaps be unjust*." (§ 443B Comments on Subsection (2) e.)

The language of the comments to § 443A and B suggests that the evidentiary bar to demonstrating that a harm is divisible is low, and that relatively simple evidence may be all that is required to ultimately apportion liability. As noted, the Court found evidence of time, site area, and contaminant volume sufficient in *BNSF*. But given the complexity of many CERCLA sites and the potential response costs involved, the effort of parties to develop technically defensible arguments will continue to raise the technical evidentiary bar.

Technical Approaches to Divisibility

By their very nature, traditional approaches to site assessment, risk assessment, and remediation act to divide a site. The process of determining the nature and extent of contamination identifies the compounds of concern, their concentrations, and their distribution. Answers to the questions of "what, where, and how much" provide evidence that a site is divisible. Risk assessment is another deconstructive process, as it identifies which compounds drive the need for remediation and which areas exceed risk-screening limits. Whether called operable units, areas of concern, or risk-based exposure units, dividing a site into manageable parts is a common step in planning and implementing site remediation. Such divisions suggest that a site may consist of a number of distinct harms. Together, the data generated during the required steps in the remedial process can be used by a defendant to suggest the extent to which its discharge contributed to response and remediation costs.

As the harm claimed in CERCLA cases is typically related to the release of chemicals, continual improvements in sample analysis and data evaluation tools provide numerous methods for developing evidence of divisibility. While a mix of chemicals may be present at a site, they do not all contribute to environmental harm. As different industrial processes result in discharges with different mixtures of compounds, bulk difference in the nature of the compounds present provides an initial basis to distinguish and differentiate contributions. Organic chemicals, such as polychlorinated biphenyls (PCBs), are clearly different from metals, so if PCBs are driving the need for remediation, a party who discharged only metals may argue that it is not liable for remedial costs. Even within a class of compounds, such as PCBs, metals, or polycyclic aromatic hydrocarbons (PAHs), the relative mix of individual chemicals within the class

often differs by source. These differences can be used to identify and quantify the contribution of various sources using a process called "environmental forensics."

A forensic evaluation starts with a thorough understanding of the operational history of a facility. Such information is used to identify the types and amounts of chemicals that may have been released. Similar data on other potential sources should also be obtained. The potential for historical background contamination needs to be considered to determine whether a site-specific release has actually occurred. Depending on the situation, hydrological and atmospheric transport modeling can be used to estimate the likely distribution of a release, and this can be compared to the results of site assessment activities. An increasingly important component of a forensic evaluation is the use of advanced chemical analysis and data evaluation tools that can differentiate and quantify similar sources of contamination.

An example is the evaluation of PAHs in urban river sediments, *Arkema v ASARCO*, LEXIS 45511 (W.D. Wash. 2007). These compounds have a number of natural and man-made sources. As a result of settlement and industrialization, they are ubiquitous in urban river systems. Research over the past 30 years has identified clear relationships between the relative concentrations of individual PAHs and their sources (Boehm 2006). Over the same period, analytical improvements have allowed quantification of a wider range of compounds. Traditional assessments focus on the 16 PAHs identified by the EPA as priority pollutants. These represent the unsubstituted "parent" structures with 2 to 6 fused aromatic rings. While limited source differentiation is possible using only these compounds, forensic evaluations typically use an extended list of analytes that include the parent as well as alkylated PAHs, in which the rings have carbon side chains. Depending on the specific methods, 30 to 50 compounds can be quantified.

There are several types and numerous variations of data evaluation methods that can be used to compare the results of environmental samples to each other and to known sources. These include concentration histograms, diagnostic ratios, double ratio plots, multivariate analyses, and mixing models. Concentration histograms, sometimes called "fingerprints," are bar graphs that show the relative concentrations of individual compounds. As the pattern differs between petroleum sources (petrogenic), and those resulting from combustion sources (pyrogenic), this method can be used to separate impacts caused by industrial processes from those caused by the release of petroleum. Additional interpretation of the results allows the petrogenic and pyrogenic signals to be further divided into specific source types. Diagnostic ratio analysis depends on knowledge of how the relative concentrations of specific PAHs differ depending on their source. There is published information on a wide range of diagnostic ratios for numerous natural and man-made causes of PAHs (Yunker et al. 2002; Boehm 2006). Double ratio plots (DRPs) take this concept a step further. By creating plots graphing one ratio on the X axis and another ratio on the Y axis, the results of entire data sets can be compared to each other. Similar samples group together and are separated from samples with different source ratios. The inclusion of known or potential sources in the plot provides strong visual evidence as to the relationship between the sources and environmental samples.

Multivariate statistical analysis methods mathematically transform data to identify the sources of variability among samples (Sofowote et al. 2008). The output includes information on which specific compounds are most useful to distinguish sources and evidence concerning the relative contribution of these sources to each sample. The results also include plots that group similar samples together, while separating samples impacted by different sources. Advantages of the multivariate method over DRPs include that it uses all the results of all the PAH analytes and is not dependent on preselecting certain ratios. Mixing models seek to further quantify the results of the previous methods. The goal is to estimate the relative contribution of various sources in individual samples (Su et al. 2000). This approach is typically a final step, as the appropriate mixing model depends on the results of source characterization and sample analysis. Once differences between possible sources are identified,

mathematical methods are used to calculate what combination of sources would result in the concentration patterns found in each sample.

These methods work not only to separate identifiable sources, but also to quantify a site's contribution relative to an impacted baseline (Boehm 2006). Sediments in urban rivers and harbors have been exposed to sources of PAHs since the adjacent watersheds were settled. Atmospheric deposition, as well as point and nonpoint sources, continue to contribute to such systems. Urban sediments typically contain a consistent pattern of PAHs called "urban background." While characterizing this background has always been an important step in determining whether a facility has had a release that triggers CERCLA liability, it will also play a role when evaluating divisibility, because the apportionment applies to distinguishing a facility's contribution from "preexisting conditions which the defendant has not caused" (§ 433A cmt. a).

As highlighted in the *Restatements* and supported by the Court in *BNSF*, liability is divisible in time. Sediments act almost as a time machine in some surface water systems. If core samples are properly collected and analyzed, a relationship between the period of deposition and depth may be found. Analysis of isotopic tracers of atmospheric atomic testing can be used to calibrate this relationship. Source dating can sometimes be done based on changes in chemical composition of commercial products that have occurred over time, such as the amount of lead in gasoline, or by assessing the patterns of transformation processes such as biodegradation. Sediment dating methods have been used to apportion sources of contaminants over time (Su et al. 2000) and to evaluate whether specific compounds resulted from a known release or natural sources (Boehm 2006).

The results from a single test or method will rarely be sufficient to definitively demonstrate divisibility, so an approach based on multiple lines of evidence should be considered. Implementing such an approach requires that attorneys and their experts work together to develop site-specific strategies. While the environmental forensic methods discussed above have been peer reviewed and have withstood *Daubert* challenges, they can be subject to oversimplification and misinterpretation. Application of these methods takes more than just cranking through rote steps of data manipulation, it requires an understanding of the underlying environmental processes and analytical chemical issues. If *BNSF* results in an increase in divisibility litigation, the demand for qualified experts may exceed the supply. This problem is compounded at complex multiparty sites, as even more experts will be required. There may be advantages for PRPs to work together to engage the services of qualified practitioners.

References

Boehm, P.D. *Polycyclic Aromatic Hydrocarbons*. Ch. 15 *in* Environmental Forensics: Contaminant Specific Guide (E.F. Morrison & B.L. Murphy eds., 2006).

Sofowote, U.M., McCarry, B.E., Marvin, C.H., *Source Apportionment of PAH in Hamilton Harbour Suspended Sediments: Comparison of Two Factor Analysis Methods*. 42 Env. Sci. Tech. 6007 (2008).

Su, M.C., Christensen, E.R., Karls, J.F., Kosuru, S., *Apportionment of Polycyclic Aromatic Hydrocarbons in Sources in Lower Fox River, USA, Sediment by a Chemical Mass Balance Model*. 19 Env. Tox. & Chem. 1481 (2000).

Yunker, M.B., Macdonald, R.W., Vingarzan, R., Mitchell, R.H., Goyette, D., Sylvestre, S., *PAHs in the Fraser River Basin: A Critical Appraisal of PAH Ratios as Indicators of PAH Source and Composition*. 33 Organic Geochem. 489 (2002).

Kirk O'Reilly, Ph.D., J.D., *is managing scientist with Exponent's Environmental Science Practice in Bellevue, Washington. He is also a member of the Washington State Bar. He may be reached at koreilly@exponent.com.*

DECISIONS CITING *BURLINGTON NORTHERN* FOR ARRANGER LIABILITY AND/OR APPORTIONMENT ANALYSIS THROUGH DECEMBER 31, 2009

Averil M. Edwards
Andrew W. Homer

Since the Supreme Court decided *Burlington Northern* in May 2009, several district and circuit courts have examined or cited the case when deciding CERCLA issues. At press, twenty-one published decisions cite to *Burlington Northern*. Of these, the following nine? decisions referenced *Burlington Northern* for the purpose of CERCLA arranger liability and/or apportionment analysis.

I. Arranger Liability

***United States v. Wash. State Dep't of Transp.*, 2009 WL 2985474 (W.D. Wash. Sept. 15, 2009)**

In *United States v. Wash. State Dep't of Transp.* the district court ruled on the United States' motion for partial judgment on the pleadings, 2009 WL 2985474 (W.D. Wash. Sept. 15, 2009). Among other things, the United States argued that granting and management of dredge permits by the Army Corps of Engineers (USACE) were insufficient to give rise to liability under CERCLA. The Washington State Department of Transportation (WADOT), which counterclaimed against the United States for contribution in the case, argued that USACE was liable as an arranger or an operator because it "exceris[ed] significant authority and control over the [CERCLA facility] during the times when third parties were permitted to dredge." *Id.* at *8. The district court did not consider WADOT's argument that USACE was an operator, finding sufficient basis to defeat the United States' motion under analysis of arranger liability. Citing *Burlington Northern*, the court held that there was a genuine issue of fact as to whether USACE had taken *intentional* steps to dispose of hazardous substances by granting and administering dredge permits at and near the facility. *Id.* Because the issue came before the court on a motion for partial judgment on the pleadings, the court held only that the pleadings were insufficient to disprove the requisite intent. *Id.*

***Bonnieview Homeowners Ass'n v. Woodmont Builders, LLC*, 2009 WL 2999355 (D.N.J. Sept. 22, 2009)**

In *Bonnieview Homeowners Ass'n v. Woodmont Builders, LLC* the district court briefly considered arranger liability with reference to *Burlington Northern*, 2009 WL 2999355 (D.N.J. Sept. 22, 2009). Plaintiff homeowners' association and its members brought an action against a developer, sales agents, and township related to contamination of a residential neighborhood. The parties filed cross motions for summary judgment with respect to various CERCLA claims. On the issue of arranger liability, the district court cited the Supreme Court's decision in *Burlington Northern* and found no evidence that the defendant developer took "intentional steps to dispose of a hazardous substance . . . because it is undisputed that [the developer] was unaware of the contamination in the soils at the time it developed the Residential Lots." *Id.* at *14. Similarly, considering a motion for summary judgment on defendant developer's counterclaims, the court found "no evidence" that "plaintiffs took steps to intentionally dispose of a hazardous substance at the Residential Lots." *Id.* at *19. The court did not undertake a detailed analysis of the facts it considered with respect to the parties' intent.

***Mathes v. Vulcan Materials Co.*, 2009 WL 2614710 (D.V.I. Aug. 21, 2009)**

The scope of arranger liability set forth in *Burlington Northern* was accepted by the parties in *Mathes v. Vulcan Materials Co.*, 2009 WL 2614710 (D.V.I. Aug. 21, 2009). In *Mathes*, the Commissioner of the Virgin Islands Department of Planning and Natural Resources sued Vulcan Materials Co. and the Dow Chemical Co. under negligence, nuisance, and other common law causes of action based on contamination of an aquifer that had been a source of drinking water for St. Thomas, Virgin Islands. *Id.* at *1–2. The aquifer was also subject to a preexisting CERCLA remedial action. The court determined whether it had federal question jurisdiction over the case under 28 U.S.C. § 1331. The complaint did not assert any federal claims, but the defendants argued the case was preempted by CERCLA and therefore subject to the court's

jurisdiction. At the hearing on the jurisdictional issue, the parties all agreed that none of the defendants fit the meaning of an arranger under the test set forth in *Burlington Northern*. *Id.* at *6.

***Frontier Communications Corporation v. Barrett Paving Materials, Inc.*, 631 F. Supp. 2d 110, 114 (D. Me. 2009**)

One court declined to dismiss a plaintiff's CERCLA complaint on the basis of *Burlington Northern*'s arranger liability holding. *Frontier Communications Corporation v. Barrett Paving Materials, Inc.*, 631 F. Supp. 2d 110, 114 (D. Me. 2009). In *Frontier*, a property owner sued prior owners under CERCLA and various common law claims to recover costs for an environmental cleanup. *Id.* at 112. Two defendants filed a motion to dismiss, arguing in part that the plaintiff's complaint did not sufficiently allege a basis of liability under CERCLA. *Id.* at 113. The court held that the complaint contained sufficient factual allegations that, if true, could establish arranger liability. *Id.* at 114. Specifically, the court held that the allegation that defendants disposed of hazardous substances into sewer lines "would fall well within the confines of arranger liability—even after *Burlington*." *Id.*

II. Apportionment

***Evansville Greenway and Remediation Trust v. So. Ind. Gas and Elec. Co.*, 2009 WL 3163180 (S.D. Ind. Sept. 29, 2009)**

The district court in *Evansville Greenway and Remediation Trust v. So. Ind. Gas and Elec. Co.* ruled on cross motions for summary judgment and conducted a brief analysis of apportionment under *Burlington Northern*, 2009 WL 3163180 (S.D. Ind. Sept. 29, 2009). Notably, the court stated that "[p]rior to the Supreme Court's decision in *Burlington Northern* . . . the court would have little difficulty concluding that the harm here is *not divisible* and [PRP defendant] would be jointly and severally liable." *Id.* at *19 (emphasis added). The court noted that the parties strongly disagreed about *Burlington Northern*'s impact on apportionment analysis, but refused to adopt either party's interpretation when deciding at the summary judgment stage. The court stated that "the Supreme Court's new decision [in *Burlington Northern*] has presented what might be called genuine questions of material law" and that the record before it provided an insufficient basis for answering those questions. *Id.* at *21. The court stated in *dicta* that "where the applicable law appears to be in flux like this, perhaps the best role the district court can play in the process is to hold a trial and make the detailed findings of fact needed to inform higher courts as they address the questions of law." *Id.* (citations omitted). Accordingly, the court denied plaintiff's motion for summary judgment to the extent it sought a conclusive determination that defendant was jointly and severally liable for remediation costs at the facility. *Id.*

***Appleton Papers Inc. v. George A. Whiting Paper Co.*, 2009 WL 3931036 (E.D. Wis. Nov. 18, 2009)**

In *Appleton Papers Inc. v. George A. Whiting Paper Co.* the district court denied plaintiffs' motion for leave to file an amended complaint, after previously dismissing plaintiffs' CERCLA cost recovery claims, 2009 WL 3931036 (E.D. Wis. Nov. 18, 2009). Plaintiffs sought leave to amend based on the premise that the Supreme Court's apportionment analysis in *Burlington Northern* undermined the earlier dismissal and presented a new basis for the claims. In denying the motion for leave to amend, the district court analyzed *Burlington Northern*'s impact on apportionment.

The court previously dismissed the Section 107 claims because plaintiffs were subject to a CERCLA enforcement action, and held that the appropriate mechanism for cost recovery in such a situation is the contribution action provided by Section 113, 2009 WL 3931036 at *1. The court noted that contribution actions under Section 113 are governed by equitable principles based on parties' respective *fault*, where apportionment under Section 107 "is strict and . . . asks not about whether parties were at fault but simply about *how much* they contributed to the damage." *Id.* (citing *Burlington Northern*, 129 S. Ct. at 1882). The court stated that while "*Burlington Northern* is a watershed apportionment case [and] significantly eases

the burden on defendants who seek to avoid joint and several liability . . . [the] holding on apportionment was actually quite limited." *Id.* The district court then noted that the Supreme Court decision dealt largely with "evidentiary issues" and held only that a district court "could rightly consider such things as the physical surface areas of the damaged land, the length of time over which the pollution occurred, and the areas where the pollution was released." *Id.* Because the *Burlington Northern* decision did not change the relationship between Sections 107 and 113, the court concluded that "there is nothing in *Burlington Northern* that requires courts to make some sort of threshold determination regarding joint and several liability or allow plaintiffs in a contribution action to make an apportionment action." 2009 WL 3931036 at *4.

***Reichhold, Inc. v. U.S. Metals Refining Co.*, 2009 WL 1806668 (D.N.J. June 22, 2009)**

After conducting a trial on liability of the parties for cleanup of a former smelter site, a district court held that there was a reasonable basis for apportionment based on separate contributions to contamination by the primary defendant and a third party, *Reichhold, Inc. v. U.S. Metals Refining Co.*, 2009 WL 1806668 (D.N.J. June 22, 2009) In *Reichhold*, the purchaser of the CERCLA facility filed suit against the previous owner of the property, who once operated a copper smelter and copper and related refineries at the facility, Plaintiff sought recovery of remediation costs and declaratory relief as to defendant's liability under CERCLA and a related New Jersey statute, 2009 WL 1806668 at *1. After taking evidence on historical operations at the facility, activities contributing to contamination by various entities, and past and future response costs, the court concluded that "each contamination alone would have caused the [response costs]." *Id.* at *49. The court noted that "the recent Supreme Court decision in [*Burlington Northern*] suggests that this situation might be addressed by apportionment rather than equitable principles" and that the "starting point for divisibility of harm analyses in CERCLA cases is § 433A of the Restatement (Second) of Torts." *Id.* (citing *Burlington Northern*, 129 S. Ct. at 1880–81). Considering the evidence taken at trial and the *Restatement* factors, the court determined that "the metals contamination [at the facility] was a distinct and single harm that [defendant] and a third party caused" and "there is a reasonable basis for division according to the contribution of each." 2009 WL 1806668 at *49. However, the court held that the proper measurement of the parties' respective contribution to contamination was not the "exact amount of metals contamination for which each was responsible," because "each was responsible for a sufficient amount of metals contamination [to] require [a particular set of response costs]." *Id.* The reasonable basis for apportionment and subsequent division of responsibility was arrived at by examining each party's behavior that contributed to the need for a *particular* response cost (here, the cost of installing and maintaining a cap over the contaminated portion of the property). *Id.*

***ITT Corp. v. BorgWarner, Inc.*, 2009 WL 2762690 (W.D. Mich. Aug. 25, 2009)**

In *ITT Corp. v. BorgWarner, Inc.* the district court cited to *Burlington Northern* on the affirmative defense of apportionment, but did not conduct any detailed analysis of whether apportionment would be possible based on the facts before it, 2009 WL 2762690 (W.D. Mich. Aug. 25, 2009). The same court had earlier denied a motion for partial summary judgment on response costs attributable to contaminants a particular defendant had neither handled nor produced, *ITT Corp. v. BorgWarner Inc.*, 2009 WL 2356263 (W.D. Mich. July 29, 2009). In deciding that motion, the court found that, while the defendant had "presented a plausible basis for apportionment in this case . . . the Court, in an abundance of caution, will deny [the motion] so that the evidentiary record can be more fully developed." *Id.* at *4.

Denying defendant's motion to exclude evidence related to releases of hazardous substances other than the primary contaminants of concern, the court stated

that defendant "misconstrued the nature of the divisibility [of the harm] defense." *Id.* at *2. The court noted the availability of the affirmative defense of apportionment, and that the Supreme Court had reaffirmed that the "starting point for the divisibility of harm analysis in a CERCLA case is § 433A of the Restatement (Second) of Torts." *Id.* (citing *Burlington Northern*, 129 S. Ct. at 1881). The court held that the evidence defendant sought to exclude was material to divisibility, and that the plaintiff did not bear the burden of proving that defendants *caused* the release of hazardous substances as part of a section 107 claim. *Id.* Rather, the court held that under the *Burlington Northern*/*Restatement* analysis, a defendant bears the burden of proving that it *did not cause* the release of a particular hazardous substance as part of its apportionment defense. *Id.*

***In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 643 F. Supp. 2d 461 (S.D.N.Y. 2009)**

The apportionment holding of the *Burlington Northern* decision was cited by the Southern District of New York in a products liability case involving groundwater contamination allegedly caused by gasoline manufacturers, *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 643 F. Supp. 2d 461 (S.D.N.Y. 2009). The court applied the *Burlington Northern* holding, which is rooted in the *Restatement (Second) of Torts*, outside of the CERCLA context and found that apportionment of liability is proper whenever "'there is a reasonable basis for determining the contribution of each cause to a single harm.'" The court held that liability in the case before it could potentially be divided based on the defendants' proportionate shares of the gasoline market, but that defendants had the burden of proving a reasonable basis for apportionment. *Id.* at 469.

Averil M. Edwards *is an associate in the Chicago, Illinois, office of Winston & Strawn LLP. Her practice is focused on environmental law. She may be reached at AEdwards@winston.com.*

Andrew W. Homer *is an associate in the Los Angeles, California, office of Pillsbury Winthrop Shaw Pittman LLP. His practice is focused on environmental litigation and compliance counseling. He may be reached at andrew.homer@pillsburylaw.com.*