

**American Bar Association
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***Burlington Northern & Santa Fe Railway Co. V. United States*
The New “Classic” Divisibility: Pre-Liability Apportionment by Degree**

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Nothing drives strategy in cost recovery cases more than the words “joint and several liability.” CERCLA does not say that liability must be joint and several. That gap in the statute was filled by the decision in *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Oh. 1983), which drew from § 433A of the Restatement (Second) of Torts. The Restatement says that “where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.” Section 433A also says that liability will be joint except (a) when each injury is distinct from the other injuries; or (b) when there is a reasonable basis for determining the contribution of each cause to a single harm. Findings of distinct injury are rare in CERCLA cases, but on May 4, 2009, the prospects for pre-liability apportionment on “reasonable basis” grounds gained unexpected traction when the United States Supreme Court decided *Burlington Northern & Santa Fe Railway Co. v. U.S.*, 129 S.Ct. 1870, 173 L. Ed. 2d 812. The Supreme Court allowed reasonableness to be shown by evidence of the degree of a party’s contribution to the overall site contamination. By inference, the decision also held that the combined liability awarded in a cost recovery action by a government agency could be much less than 100% of the cost incurred. This paper explores the foundation of that decision and potential consequences for practitioners.

The often-repeated aphorism that “the polluter should pay” begs the question, “pay for what?” Until recently, the ritual invocation of these words, coupled with the routine application of strict, joint and several liability, meant that no matter how small the contribution to pollution of a property owner, operator, arranger or transporter might be to contamination of a property, it was possible to lay the entire cost at the foot of that potentially responsible party or “PRP” when no other solvent PRP was present. This reality, along with strict liability, was the salient factor in litigation strategy. For example, joint and several liability incentivized public agencies to enter into settlements with small contributors because the agencies could assume that anything not paid by the parties to those early settlements would be borne ultimately by the remaining parties. There might be an equitable allocation of the cost among several parties, but if any of those parties failed financially, that share was redistributed among those still in the game.

From the enactment of CERCLA¹ in 1980, low level contributors argued that it would be unfair to hold them jointly and severally liable for all of the costs not recovered in settlements with other parties. With no guidance in the statute, most federal courts adopted rules found in the Restatement (Second) of Torts § 433A (1965)² as reflecting the generally adopted principles for the assignment of liability among multiple parties. One of the prominent early decisions, *O'Neil v. Picillo*³, described this development:

It is by now well settled that Congress intended that the federal courts develop a uniform approach governing the use of joint and several liability in CERCLA actions. The rule adopted by the majority of courts, and the one we adopt, is based on the Restatement (Second) of Torts: damages should be apportioned only if the defendant can demonstrate that the harm is divisible. See, e.g., *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 809-11 (S.D.Ohio 1983); *United States v. Monsanto Co.*, 858 F.2d 160, 171-73 (4th Cir.1988); *United States v. Bliss*, 667 F.Supp. 1298, 1312-13 (E.D.Mo.1987).

The practical effect of placing the burden on defendants has been that responsible parties rarely escape joint and several liability, courts regularly finding that 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. See, e.g., *United States v. Chem-Dyne*, 572 F.Supp. at 811; *Monsanto*, 858 F.2d at 172-73. It has not gone unnoticed that holding defendants jointly and severally liable in such situations may often result in defendants paying for more than their share of the harm. Cf. *United States v. Monsanto*, 858 F.2d at 173. Nevertheless, courts have continued to impose joint and several liability on a regular basis, reasoning that where all of the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty. See, e.g., *United States v. Chem-Dyne*, 572 F.Supp. at 809-810.

The Restatement was credited as a source of "traditional and evolving principles of common law" but it was not definitive authority. It was to be applied only as determined to be appropriate on a case by case basis.⁴

The Restatement allowed for pre-liability apportionment of damages among two or more parties when at least one is able to show either (1) "distinct harms" or (2) a "reasonable basis for determining the contribution of each cause to a single harm." If a liable party could prove that its contribution was divisible from others, the party would be liable only for the costs associated with that divisible portion. Divisibility was generally thought to equate to physical or geographic separation measured by where the contaminants came to rest, such as the presence of separate and

¹ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986.

² The Restatement is not a statute but an attempt to reduce to basic principles the law of torts from decisional law. The Restatement is the work of the American Law Institute, an organization of several thousand lawyers, judges and law professors, which develops, circulates, discusses and ultimately publishes a consensus of its research. It is considered to be more authoritative than treatises by individual authors or small groups of collaborators and is frequently referenced in judicial opinions when statutory or decisional law fails to provide controlling guidance in a particular jurisdiction.

³ *O'Neil v. Picillo*, 883 F.2d 176, 178-179 (1st Cir. 1989), *cert. den.* 493 U.S. 1071 (1990).

⁴ *United States v. Chem-Dyne Corp.*, *supra*, 572 F. Supp. at 807.

distinct plumes⁵ or distinct, non-contiguous areas of soil contamination⁶. A party that could not prove that its waste did not contribute to contamination or cleanup costs faced joint and several liability for the whole. The decision in *O'Neal v. Picillo* accurately observed that under a standard of divisibility, i.e., physical divisibility, apportionment was rarely an option.

On May 4, 2009, the Supreme Court in *Burlington Northern* breathed life into the second alternative, the test which depends not on the existence of “distinct harms” but on finding a “reasonable basis for determining the contribution of each cause to a single harm.” The case arose out of contamination resulting from operations of Brown & Bryant, an agricultural chemical distributor, at Arvin, California.

Brown & Bryant distributed a broad spectrum of pesticides, herbicides and chemical fertilizers for a large number of manufacturers, one of which was Shell Oil Company. Brown & Bryant also provided services as a field applicator and maintained wheeled mobile transfer tanks, field storage tanks and application equipment which it stored, filled and periodically rinsed out on its own property.

Spills occurred during bulk deliveries to storage tanks when transfer hoses were disconnected and the operator failed to capture the residue in the hose. Craft paper bags containing dry powders occasionally tore and spilled their contents. When Brown & Bryant swept or hosed down the interior of its chemical warehouses, product residues spilled onto outside soils. The 5- and 30-gallon containers in which some liquid products were delivered, once emptied, were stored on the property for extended periods of time. The smaller containers were crushed, spilling the remaining contents. Periodically, application equipment and transfer tanks were rinsed with water and the residues were drained onto the soil. Occasionally spills occurred as the result of leaks from corroding or broken equipment, sight glasses and hoses on tanks. Spilled residues might migrate across the property with surface water resulting from washdown or rain.

Brown & Bryant began operations in 1960 on 3.8 acres that it leased and later purchased. In 1975, Brown & Bryant leased an additional 0.9 acres of property (the “Railroad property”) owned jointly by Burlington Northern and Santa Fe Railway Company and Southern Pacific Transportation Company (the “Railroads”). The Railroad property, which was used primarily for equipment storage, ostensibly drained into the parcel owned by Brown & Bryant, including a collection pond, especially during heavy rains. An equipment wash rack and sump also connected to the collection pond.

Operations ceased in 1989. While little question existed that product deliveries, field operations and later clean-out occasioned spills of some degree, there was fundamental disagreement over the frequency and volume of spills and who caused them. Brown & Bryant had wide product offerings, but the specific products purchased, the traffic volume, storage methods and other operational factors had varied considerably over time. Remediation costs, however, were driven by two soil fumigants manufactured by Shell, Nemagon (a dibromochloropropane or DBCP product) and D-D (a mixture primarily of 1,2-dichloropropane and 1,3-dichloropropene), both used for the control of nematodes, and an herbicide manufactured and sold by several companies – not Shell – called dinoseb.

The trial judge, the Hon. Oliver Wanger of the Eastern District of California, concluded in his

⁵ See, *FMC v. Vendo Co.*, 196 F.Supp.2d 1023, 1034 (E.D.Cal. 2002).

⁶ See, *Akzo Coatings Inc. v. Aigner Corp.* 881 F. Supp. 1202, 1210-1219 (N.D. Ind. 1994).

opinion following trial⁷ that the contamination from each parcel could not be quantified with any precision, finding instead that, “the harm is a single harm which consists of contaminated soil at various locations and depths around the Site and one mass (plume) of contaminated groundwater.”⁸ That finding of a “single harm” and the inability to quantify the contribution of each parcel would have condemned the defendants to joint and several liability under most prior decisions. The one exception, he decided using traditional “distinct harm” analysis, was that Shell should not be liable for a dinoseb hotspot that cost \$1.3 million to remove since Shell did not sell dinoseb. That ruling was not appealed.

For Nemagon and D-D contamination, Judge Wanger applied a different standard. For these products, he concluded that the second independent test of the Restatement was satisfied and that a reasonable basis for apportionment existed, apportioning to the Railroads a 9% share and to Shell a 6% share of *liability*. Since Brown & Bryant was defunct and there were no other defendants, EPA and DTSC would have to absorb the remaining 85% of their remediation and oversight costs. The Railroads and Shell also incurred costs, and their respective recoveries against each other were similarly limited by apportionment of liability.

Judge Wanger calculated the Railroads’ contribution by multiplying three factors: (a) the size of the Railroad parcel divided by the entire property at its fullest configuration; (b) the number of years that Brown & Bryant leased the Railroad parcel divided by the length of Brown & Bryant’s operations at Arvin; and (c) the share of contaminants attributable to the Railroad parcel. The latter was based on the finding that two contaminants found on the Railroad parcel, dinoseb and Nemagon, accounted for two-thirds of the contamination requiring remediation. Judge Wanger then boosted (and effectively cancelled) the third factor by 50% to account for any error in his calculation. As for Shell, the apportioned share was calculated as a function of the volume of bulk deliveries by Shell compared to the total amount of D-D spills.

The Ninth Circuit affirmed a finding that Shell was liable as an arranger for disposal, an issue not discussed here, but reversed on the apportionment of costs. Without examining the detail, it is sufficient to observe that the Ninth Circuit fell back on traditional analysis, at least as reflected in the outcome, and ruled that there was insufficient evidence of divisibility of the harm to support pre-liability apportionment.

There were elements of the Ninth Circuit’s decision nonetheless that suggested that physical separation was not the only basis for apportionment. For example:

In a situation in which the several defendants are all polluters themselves, divisibility under the Restatement standard is indeed a relatively straightforward analysis, and one in which causation concepts are useful. If the court can estimate with some confidence the amount of waste that each defendant disposed of and has a basis for determining that the extent of contamination of the site is proportional to the amount of waste disposed of, then the Restatement approach to apportionment works nicely.⁹

The Ninth Circuit was not prepared to introduce an element of causation into liability under CERCLA. The opinion did however allow for consideration of evidence of divisibility based on the extent of contamination and cost of remediation:

⁷ *U.S. v. AT&SF Railway Co.*, 2003 U.S. Dist. LEXIS 23130 (E.D.Cal. 2003).

⁸ *U.S. v. AT&SF Railway Co.*, 2003 U.S. Dist. LEXIS 23130 at 251-253.

⁹ *United States v. Burlington Northern & Santa Fe Railway Co.*, 520 F.3d 918, 937-938 (2007)

[T]here are two areas where the Restatement approach is a somewhat poor fit and requires slight modifications to ensure that its approach comports with the liability and remediation scheme of CERCLA. . . Unlike the Restatement's common law causation, CERCLA affixes liability based upon its PRP provisions, which define classes of liable parties based upon a party's statutorily-defined nexus to the contaminated site. And second, the concept of "harm" in the Restatement as actual injury does not correspond easily to CERCLA's priorities. Contamination and the cost of remediation are both relevant for the "harm" analysis under CERCLA.¹⁰

The trial findings, however, did not meet the required degree of detail to allow for the attribution of cost on a pre-liability basis, according to the Ninth Circuit. But a petition for *en banc* review was filed, and while denied, eight judges dissented, a fact that probably guaranteed Supreme Court review. Judge Carlos Bea, writing the dissent, commented that “[i]f this evidence does not provide a ‘reasonable estimate’ for apportionment liability, I do not see how -- short of ‘perfect information’ sufficient to trace every molecule to the landlord’s parcel -- apportionment could ever be possible.”¹¹

The Supreme Court’s review followed and resulted in a refreshingly direct decision that contains no broad dissertation on the history and application of §433A or the differences between rules of causation under tort law and the policy behind CERCLA liability, as is found in the Ninth Circuit’s opinion. Yes, the majority acknowledged that “[t]he Act was designed to promote the ‘timely cleanup of hazardous waste sites’ and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination” – in other words, “the polluter pays” – but also that cases supporting that principle “raise” – not answer – “the questions whether and to what extent a party associated with a contaminated site may be held responsible for the full costs of remediation.” The court noted that “the Court of Appeals found ‘no dispute’ on the question whether the harm caused by Shell and the Railroads was capable of apportionment” – the parties agreed it was. And the court allowed, contrary to the Ninth Circuit, that §433A of the Restatement provided a proper analytical framework. Rather, it found no barrier to apportionment based on evidence of the degree of contribution of one party to the whole of the contamination:

The District Court’s detailed findings make it abundantly clear that the primary pollution at the Arvin facility was contained in an unlined sump and an unlined pond in the southeastern portion of the facility most distant from the Railroads’ parcel and that the spills of hazardous chemicals that occurred on the Railroad parcel contributed to no more than 10% of the total site contamination . . . some of which did not require remediation. With those background facts in mind, we are persuaded that it was reasonable for the court to use the size of the leased parcel and the duration of the lease as the starting point for its analysis. Although the Court of Appeals faulted the District Court for relying on the “simplest of considerations: percentages of land area, time of ownership, and types of hazardous products,” 520 F. 3d, at 943, these were the same factors the court had earlier acknowledged were relevant to the apportionment analysis.

The opinion acknowledged criticism in the Ninth Circuit opinion of the sufficiency of evidence that spills of Nemagon and dinoseb were responsible for only two-thirds of the chemical spills requiring remediation. It observed, however, that the two-thirds factor was offset by an error assumption in the calculation that bumped up the Railroads’ share by 50%. Any insufficiency of

¹⁰ *United States v. Burlington Northern & Santa Fe Railway Co.*, *supra*, 520 F.3d at 936.

¹¹ 520 F.3d at 953.

evidence was, therefore, harmless error:

Because the District Court's ultimate allocation of liability is supported by the evidence and comports with the apportionment principles outlined above, we reverse the Court of Appeals' conclusion that the Railroads are subject to joint and several liability for all response costs arising out of the contamination of the Arvin facility.

The purpose of this paper is not to examine the pedigree of the Supreme Court's decision. It is, instead, to explore some of the potential and useful consequences. It is enough for immediate purposes to observe that the Supreme Court accepted Judge Wanger's characterization of contamination at the Arvin site as "single harm which consists of contaminated soil at various locations and depths around the Site and one mass (plume) of contaminated groundwater" but still adopted his characterization of the matter as "a classic 'divisible in terms of degree' case."¹² Rather than physical separation, the Supreme Court allowed divisibility to be based, under the extensive findings after trial, on Judge Wanger's three-element formula driven by the proportional share of the surface area owned, the relative number of years during which each of the contaminated properties were used in the contaminating operations, and contribution of each chemical to the overall site contamination requiring remediation. The trial court's pre-liability apportionment was affirmed. As a result of other rulings in the case that relieved Shell of liability altogether, no other solvent liable parties remained, and the remaining 91% falls on the public agencies directing and performing the remediation.

One point that makes the Supreme Court's ruling noteworthy is that there was little in the findings upon which to build a divisibility by degree apportionment. There was almost nothing to correlate cleanup costs with sources of contamination (or more to the point, where contamination came to rest), with a few exceptions. Certainly, some evidence was favorable to the Railroads. For example, there was no evidence that surface releases on the Railroad parcel contributed to groundwater contamination. Judge Wanger had ruled that, "The size and shape of the groundwater plumes indicate the absence of identifiable sources of measurable hazardous release contributions from the Railroad parcel to the mass of chemicals present in the groundwater,"¹³ and that "the pond, the sump, and the dinoseb spill area, all of which are located on the [Brown & Bryant] parcel, were and are the primary sources of the groundwater contamination at the Site."¹⁴ But the volume of contaminants and the mechanism of migration was not well defined.

The Supreme Court did note that, "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'"¹⁵ Yet, with limited evidence, divisibility by degree could be accomplished. This is a patent rejection of the Ninth Circuit's ruling that said:

Where, as here, the pertinent PRP status is as landowner, the landowner can establish divisibility *only by demonstrating that portions of the contamination are in no respect traceable to the portion of the facility that the landowner owned at the time of the disposal*. The arranger nexus is more straightforward, with a focus not on ownership of the facility but rather on the relevant, arranged disposals in light of other contamination at

¹² *Burlington Northern & Santa Fe Railway Co. v. U.S.*, *supra*, 129 S.Ct. at 1882, 173 L. Ed. 2d at 826.

¹³ *U.S. v. AT&SF Railway Co.*, 2003 U.S. Dist. LEXIS 23130 at *34.

¹⁴ *U.S. v. AT&SF Railway Co.*, 2003 U.S. Dist. LEXIS 23130 at *35-36.

¹⁵ *Burlington Northern & Santa Fe Railway Co. v. U.S.*, *supra*, 129 S.Ct. at 1881, 173 L. Ed. 2d at 825.

the facility.¹⁶

Rejecting this “no respect traceable” analysis for divisibility as a question of degree is a principal legacy of *Burlington Northern*.

Practical consequences of broader access to pre-liability apportionment

The potential that an agency or non-liable plaintiff may not be able to shift the entire financial burden of site clean-up onto a proportionately small contributor forces a re-evaluation of both litigation and business strategies. Some of the ways in which this paradigm-shift influences strategy and planning are suggested in the following pages.

1. Expanding opportunities for apportionment will alter settlement strategy

In cost recovery actions before *Burlington Northern*, EPA, bona fide prospective purchasers (BFPP) and other non-liable parties could do fundraising and case simplification by settling with marginal players for any amount sufficient to qualify for a good faith determination in the expectation that joint and several liability imposed upon remaining responsible parties would eventually allow full recovery. Joint and several liability put pressure on defendants to settle early to get the best deal. How that strategy is impacted by the risk of apportionment depends on whether the plaintiff is a public agency or private party, in which case the “pro tanto” rule of CERCLA section 113(f)(2) applies, or a private party in which case decisional law dictates that the court must follow the “proportionate share” regime of the Uniform Comparative Fault Act (“UCFA”)¹⁷ or the “pro tanto” deduction of Uniform Contribution Among Tortfeasors Act (“UCATA”)¹⁸ to determine the effect of the settlement on non-settling parties.

In re Exxon Valdez, 229 F.3d 790 (9th Cir. 2000) describes the differences in approaches:

Under the [pro tanto with contribution] approach, the non-settling defendant pays the entire amount of the award less the actual amount the plaintiff has already received from the settling defendant, even if this total turns out to be in excess of the non-settling defendant’s share of the fault as determined by the [trier of fact]. The non-settling defendant then retains the right to seek contribution from the settling defendant in order to bring total payments in line with allocation of fault. This is called the “pro tanto with contribution” approach, and it creates little incentive for any defendant to settle.

The second approach is known as “pro tanto without contribution.” Under this approach, the non-settling defendant pays the entire amount of the award less the amount of the settlement and does not retain the right to seek contribution. This helps ensure that the plaintiff receives the full amount of damages and maintains incentives to settle, but can result in the non-settling defendant paying more than its share of fault.

Finally, under the “proportionate share” approach, the non-settling defendant pays only the amount of the award that is allocable to its share of the fault, as determined by the jury. The proportionate share approach is the law in the Ninth Circuit, has been adopted by the Supreme Court for use in maritime actions, and is the approach recommended by the American Law Institute.

¹⁶ *United States v. Burlington Northern & Santa Fe Railway Co.*, *supra*, 520 F.3d at 938.

¹⁷ 12 U.L.A. 42 et seq. (Supp. 1993)

¹⁸ 12 U.L.A. 57

For administrative or judicially approved settlements with the United States or a State, CERCLA section 113(f)(2)¹⁹ adopts the *pro tanto* “without contribution” rule, as does the UCATA²⁰. The non-settling party receives a deduction for the actual dollars paid by the settling party and can still argue apportionment to reduce its own exposure to less than 100% of the cost less the *pro tanto* deduction. After *Burlington Northern*, the agency (or settling plaintiff where the *pro tanto* rule is adopted) can be sure of the amount of the deduction but is at greater risk that pre-liability apportionment will prevent full recovery.

The Uniform Comparative Fault Act, by comparison, requires no fairness determination²¹ because the amount of the settlement is of no consequence to non-settling parties. No matter how small a settlement may be under the UCFA, the nonsettling parties will pay no more than the percentage of the total for which they are responsible after trial.²²

Normally, the nonsettling defendants bear the risk under the *pro tanto* rule, whereas settlements with private plaintiffs under the UCFA shift the risk to the settling plaintiff. Under both regimes, where apportionment may further reduce the plaintiff’s recovery, the settling plaintiff needs to be correct in its assessment of the evidence and the court’s likely approach to apportionment, especially when the principal contributors to the release are insolvent PRPs who can be apportioned substantial shares.

2. Summary judgment may become less viable for plaintiffs

Summary judgment or summary adjudication are procedures that allow a party to avoid trial and gain a decision on the merits when no triable issue of fact can be established by the opponent. When liability turns only on whether a defendant is an owner or operator when the release occurs, it may be relatively easy to obtain summary judgment and then leave the defendants to fight among themselves over allocation. Apportionment adds a different element to the evidence that focus on a party’s contribution to contamination and cleanup costs. Evidence of this kind will rarely be certain and undisputed. Disputes of fact previously relegated to the equitable allocation stage after the liability determination become a matter of greater immediacy for the plaintiff, who may have to exert greater energies (and incur greater legal expense) to develop a case that optimizes its recovery and minimizes orphan shares.

Even the Ninth Circuit would have (notionally) accepted apportionment when the record permitted the trial court to “estimate the amount of leakage attributable to activities on the Railroad parcel, how that leakage traveled to and contaminated the soil and groundwater under the Arvin parcel, and the cost of cleaning up that contamination,” or based on a “showing [of] a relationship between waste volume, the release of hazardous substances, and the harm at the site,” “relative toxicity, migratory potential, and synergistic capacity of the hazardous substances,” the “volume of chemicals shipped to B&B every year, [more] precise estimates of the average volume of leaked chemicals during the transfer process” or “[d] connecting the properties of the various chemicals leaked.”²³ Questions of the degree of contribution are far more difficult to reduce to undisputed facts.

¹⁹ 42 USC section 9613(f)(2).

²⁰ The settling party is not prevented from seeking contribution from liable third parties. 42 USC section 9613(f)(3)(B).

²¹ The UCATA depends in all cases on the settling parties obtaining a judicial determination of the fairness of the settlement to the remaining defendants.

²² *American Cyanamid Co. v. King Industries*, 814 F.Supp. 215, 218 (DRI 1993).

²³ *United States v. Burlington Northern & Santa Fe Railway Co.*, *supra*, 520 F.3d at 936, 947.

3. Successful apportionment may depend on the progress of the site investigation.

Practitioners should not overlook the fact that many key facts behind the apportionment approved in the *Burlington Northern* decision were only available because the site investigation had developed information about the location, nature and concentrations of different contaminants and their likely influence on cleanup. With good data and an approved risk assessment or feasibility study, demonstrating the relative contributions of various contaminants and parties is potentially much easier. Some contributors may be “risky” out of the picture, or soil removal plans may be confined to limited cells and only certain products. Some parties may be eliminated or become marginal defendants if the products attributed to them do not contribute appreciably to the cost of cleanup.

The Arvin case began as part of the same lawsuit as a case, later severed, covering Brown & Bryant’s similar operation in Shafter, California. In that case, the parties agreed to a stay of proceedings in 1999, the purpose of which was to get a remedy approved and have a clearer understanding as to which contaminants would be drivers of the remedy. The cost of the stay was an agreement by the named PRPs to perform the work until the feasibility study was approved. There is far more information about the drivers of the cleanup in that case than there was when the Arvin case was tried ten years ago. Parties will perceive that some defendants may benefit at the expense of others from the greater knowledge. Nonetheless, the potential benefits of pre-liability apportionment are not to be ignored, and the lost chance for apportionment raises questions of fairness when the case is pushed to trial too early.

4. Apportionment risks demand greater attention to due diligence.

A good deal of print has been devoted to issues surrounding due diligence requirements and what steps are required to qualify a buyer as a *bona fide* prospective purchaser (BFPP) for the purpose of avoiding CERCLA liability for discovered and undiscovered contamination. Much of the attention was on checklist compliance with early guidance and ultimately with the final regulations, 40 CFR Part 312, issued November 1, 2005.²⁴

While it rarely would be sound business practice to rest financial analysis for acquisition of contaminated property on income projections from cost recovery claims, buyers frequently do rely on indemnity agreements and insurance for protection. But what if the indemnitor or insurer fails as a business? In the past year, vanishing assets, bankruptcies of sellers, and threats to the health of insurance carriers eroded this line of defense. In such a business environment, due diligence takes on added importance for risk managers and is not simply a procedural necessity or a *pro forma* step required to satisfy a lender or insurance carrier. *Burlington Northern* adds a reason to do it well by removing a degree of certainty about the ability to push the full cost of investigation and remediation onto past owners and other contributors holding significant assets if the rest of the safety net collapses. With unexpected environmental costs, no indemnity or insurance, and the prospect that predecessors of the seller may have sound apportionment defenses, based on relative years of operation for example, the purchaser might be hard-pressed to complete the project without committing major additional funds of its own.

5. Environmental risk indemnity agreements may be more difficult to obtain.

Until now, a seller of contaminated real estate could expect to be held liable for the full cost of cleanup on a joint and several basis in a cost recovery action by the buyer or a public agency.

²⁴ 70 FR 66070.

That liability, if in an action by a private purchaser, might be reduced by equitable allocation or contractual agreement, but the risk of orphan shares generally fell on the seller. *Burlington Northern* poses the possibility that the liability risk under an indemnity agreement might be greater than liability after apportionment in an action under CERCLA and something to be avoided when possible.

6. Divisibility by degree may alter strategy in redevelopment disputes.

Consider a scenario where the owner of an industrial facility conveys contaminated property at a steeply-discounted price to a developer. The developer agrees to assume responsibility for remediation and gives the seller an indemnity agreement against future environmental claims. Before the work is completed, the developer loses his financing and files for bankruptcy protection. In the meantime, a local redevelopment agency, eager to expand its tax base and energized by the developer's beautifully-illustrated renditions, tenders a demand to the prior owner to complete the remediation or pay the agency to do it.

Before *Burlington Northern*, the seller might have assumed that it ultimately would be held liable for the entire cleanup anyway and chosen to do the work itself to have more direct control over costs and project supervision. With *Burlington Northern* in mind, the seller might want to balance the risk that the redevelopment agency would do an unnecessarily expensive cleanup against the possibility that after the agency performs the work, the agency may be unable to hold the seller liable for the full expense, leaving the agency rather than the seller to carry the burden of recovering against other PRPs or suffer the orphan shares. This depends on the source of the agency's cost recovery authority, but if it is tied to CERCLA liability, as in California under the Polanco Act²⁵, the prior owner may want to measure its risks differently.

7. Document retention policies may require reexamination in light of the evidence requirements of *Burlington Northern*.

If it were in every case sufficient to apportion on the basis of the relative size of owned property and years of operation, trials on apportionment could be avoided altogether and the fact-finding process could be reduced to a stipulation of a few essential points. Shell and Brown & Bryant possessed a volume of historic sales records, contracts and related documents that allowed some conclusions to be made about the nature and volume of products sold at Arvin, the manner of delivery and the terms of sale. A portion of that information worked its way into the findings, though in this case that level of detail contributed more to the image of having an extensive evidentiary record rather than evidence that had a clear connection to the rationale for the apportionment formula. One can safely doubt that the outcome would have been the same without that information.

Anyone working in this area for very long has heard arguments as to whether records of this nature should be retained indefinitely or placed on a destruction schedule run both ways. Of course, the rub is that whether extensive archival records help or hurt the defense of these cases depends on the content. Nonetheless, the potential for dramatic reductions in liability based on a detailed evidentiary record adds a factor to be considered in favor of retention. As mentioned earlier, the Ninth Circuit opinion in *Burlington Northern* would have allowed pre-liability apportionment based on such considerations as the volume of spills, the volume of product used or volume of purchases or sales – information that cannot generally be found anywhere outside company records. The value of having those records was enhanced by the Supreme Court's

²⁵ See, California Health & Safety Code sections 33459.4 and 25363(a)-(c).

decision.

A final reflection

That too much can be read into any decision of the Supreme Court on CERCLA liability is well-illustrated by the wreckage of improvident lower court decisions and rejected briefs strewn along the path from *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004) to *U.S. v. Atlantic Research*, 127 S.Ct. 2331 (2007). Some reliable principles, nonetheless, are more likely to emerge from *Burlington Northern* than occurred with *Aviall*. Apportionment can be accomplished on fairly rough data, and liability even against owners cannot always be reduced to a simple status test. Molecule tracing has a role in apportionment, while the “no respect traceable” standard was (deservedly) short-lived. Causation could enjoy new life as an element relevant to apportionment, though not as an affirmative defense *per se*. Additionally, old strategies and assumptions will require reexamination.

We are living with a new paradigm, and it is the “**classic** ‘divisible in terms of degree’” case.