ABA Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Superfund and Natural Resource Damages Litigation Committee Newsletter

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EDITORS' NOTE

Ashley A. Peck and Andrew W. Homer

We are pleased to bring you another issue of the ABA SEER Superfund and Natural Resource Damages Litigation Committee Newsletter. In this issue, we feature four timely articles that we believe will be useful to Superfund and NRD practitioners.

The first two articles were presented as part of a panel discussion at the ABA SEER Spring Conference in Salt Lake City, and will allow those who could not make the meeting to enjoy some of the content. These articles provide different perspectives on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) allocation and apportionment in the current legal setting. The next article revisits the Supreme Court's 2012 decision in *Sackett v. EPA*, and analyzes whether the Court's holding regarding pre-enforcement review of EPA orders issued under the Clean Water Act could extend to similar orders issued under CERCLA. The final article discusses the split between circuits on the issue of whether declaratory relief should be available for future response costs where the expenditure of past response costs has not been proven, and offers the author's opinion on which is the better approach.

As always, we would like to extend thanks to this issue's contributors on behalf of the entire committee membership and ourselves as newsletter vice chairs. Contributions help increase thoughtful dialogue among the Superfund and NRD bar and our committee members. We welcome submissions from members and practitioners of all stripes, and would be pleased to discuss proposed topics with anyone who is interested. Please spread the word, and feel free to contact either of us using the e-mail addresses below.

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Ashley A. Peck and Andrew W. Homer, Editors

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For full details, please visit www.ambar.org/EnvironCalendar

MESSAGE FROM THE CHAIR

Kirk T. O'Reilly

Like many of you, I receive daily updates of what's new in environmental law. It's clear that the field of Superfund and natural resource damages (NRD) litigation continues to evolve. This newsletter, along with sponsored conference sessions and webinars, list serve news flashes, and the annual year in review serve as tools to help committee members keep informed. They also provide a forum for you to share with your peers. Feel free to contact me or any of our vice chairs to discuss how you can get more involved. Looking ahead, I'd like to remind members that our committee is sponsoring a session entitled "CERCLA Case Studies and Lessons Learned—Novel Approaches and Noteworthy Outcomes" at the SEER meeting this October in Baltimore. Hope to see you there.

Kirk T. O'Reilly is senior managing scientist with Exponent's Environmental Sciences Practice in Bellevue, Washington, and is a member of the Washington State Bar.

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CERCLA ALLOCATION AND APPORTIONMENT

David R. Erickson and Vanessa D. Dittman

Under the Comprehensive Environmental Response, Compensation, and Liability Act, parties are often held jointly and severally liable for response costs related to the clean up of contaminated sites. However, courts may instead apportion liability if there is a reasonable basis for division of a distinct or single harm. This article will explore cost recovery by potentially responsible parties under section 107 or section 113 after *Atlantic Research* as well as recent case law on apportionment of liability, including a discussion of the pivotal *Burlington Northern* case on divisibility, and how courts have responded.

CERCLA Apportionment and Allocation Background

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 to address the threat of hazardous waste sites nationwide. Courts generally agree that CERCLA imposes strict retroactive liability on potentially responsible parties (PRPs) for releases of hazardous substances as they are defined under the act. PRPs that have incurred response costs related to contaminated sites may be able to recover costs from other PRPs through a cost recovery claim under section 107 of CERCLA or a contribution claim under section 113. 42 U.S.C. §§ 9607, 9613. Section 107 allows any party who voluntarily cleans up a site to recover "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe . . ." and "any other necessary costs of response incurred by any other person . . . " from PRPs. 42 U.S.C. § 9607. Section 113 provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [CERCLA § 107(a)] . . . during or following any civil action under [CERCLA § 106] or under [CERCLA § 107(a)] . . . ." 42 U.S.C. § 9613(f)(1).

CERCLA does not explicitly state that liability under its section 106/107 cost recovery provisions is joint and several, but courts have often held that such is the

case. *United States v. Chem-Dyne Corp*., 572 F.2d 802, 808 (S.D. Ohio 1983); *United States v. Monsanto Co*., 858 F.2d 160, 172 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). Indeed, early drafts of the CERCLA statute included joint and several liability language, but the language was removed before the legislation was passed. *Chem-Dyne Corp.*, 572 F.2d at 806 (citing 126 CONG. REC. S14964 (Nov. 24, 1980)). Thus, when liability under CERCLA involves multiple parties, all parties may be jointly and severally liable to parties who conduct response activities. However, as this section will explain, parties may be able to divide the harm and apportion the costs when "there is a reasonable basis for determining the contribution of each cause to a single harm." *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1881 (2009). As a preliminary note, under CERCLA, "apportionment" is the term to describe the process by which courts determine whether a PRP is jointly and severally liable for an entire site or, instead, severally liable for a portion of the site. Indeed, "[a]pportionment is a way of avoiding the joint and several liability that would otherwise result from a successful § 107(a) claim." *Yankee Gas Services v. UGI Utilities, Inc.*, 852 F. Supp. 2d 229, 241 (D. Conn. 2012). In contrast, allocation is performed after apportionment to decide a PRP's share of liability after joint and several liability of the defendant has been established. Thus, "allocation, under § 113(f), is the equitable division of costs among liable parties." *Id.* Section 113 contribution actions allow courts to take equitable factors into account when allocating costs after liability has been determined. As one court described it, "[t]o apportion is to request separate checks, with each party paying only for its own meal. To allocate is to take an unitemized bill and ask everyone to pay what is fair." *Id.* at 241–42. The following sections discuss the evolution of cost recovery and contribution before and after Atlantic Research, as well as apportionment and the impacts that the Burlington Northern decision had on lower courts' application of apportionment.

Atlantic Research and Contribution/Cost Recovery

The question of how PRPs can sue to seek cost recovery or contribution under sections 107 and 113 is the source of many contradicting and convoluted cases. In *Cooper Industries, Inc. v. Aviall Services, Inc.*, the Court held that contribution under section 113(f) is available to a PRP only "during or following" a suit under sections 106 or 107. 543 U.S. 157 (2004). However, the Court did not address whether a PRP that had not been subject to a section 106 or 107 cost recovery action itself had a cost recovery right against other PRPs under section 107.

Atlantic Research addressed the question of whether a PRP could bring a cost recovery action under section 107(a)(4) where contribution was unavailable under the holding in *Cooper Industries*. In *Atlantic Research*, the owner of a facility that retrofitted rocket motors for the United States sued the government for partial reimbursement of costs incurred in cleaning up contamination at the facility. *United States v. Atlantic Research*, 551 U.S. 128, 133 (2007). The company sought reimbursement under section 107. *Id.* The Supreme Court held that "[b]ecause the plain terms of § 107(a)(4)(B) allow a PRP to recover costs from other PRPs, the statute provides Atlantic Research with a cause of action." *Id.* at 141. Thus, a party that voluntarily cleans up a CERCLA site is not confined solely to sue for contribution under section 113. However, the Court left unanswered whether a party that is forced to incur response costs, such as pursuant to a consent decree, may recover costs under section 107. *Id.* at 139, n.6 ("We do not decide whether [consent decree costs] of response are recoverable under § 113(f), § 107(a), or both").

More recently, on October 9, 2012, the Supreme Court denied a petition for certiorari in *Solutia, Inc. v. McWane, Inc*., declining to clarify the question left unanswered post-*Atlantic Research*, whether, under CERCLA, a party who incurs response costs pursuant to a consent decree may pursue a cost recovery claim under section 107 or is limited to a contribution claim under section 113 as its exclusive remedy. Thus, this issue remains unresolved and will likely continue to be a source of litigation in the circuit courts.

Pre-*Burlington Northern* Apportionment

Prior to the seminal *Burlington Northern* opinion, courts applied apportionment differently and caused

much confusion. Apportionment discussions tended to focus on simplistic, single-factor analyses, with a focus on only one factor, such as volume of waste, amount of time PRP spent associated with the site, or geographical location of waste at the site. Before *Burlington Northern* was decided, *United States v. Chem-Dyne Co.*, 572 F. Supp. 802 (S.D. Ohio 1983), operated as the "seminal opinion on the subject of apportionment." *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 613. *Chem-Dyne* determined that CERCLA did not mandate joint and several liability in every case, and the scope of liability instead should be determined using principles of common law. *Chem-Dyne Co.*, 572 F. Supp. at 807–08.

Following the *Chem-Dyne* decision, courts of appeals acknowledged that "'[t]he universal starting point for divisibility of harm analyses in CERCLA cases is § 433A of the Restatement (Second) of Torts." *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 614. Under the Restatement, "when 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." *Chem-Dyne Co.*, 572 F. Supp. at 810 (citing Restatement (Second) of Torts, §§ 433A, 881 (1976); Prosser, Law of Torts, at 313–14 (4th ed. 1971)). However, "where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm." *Id.* (citing Restatement (Second) of Torts, § 875; Prosser, at 315–16). Thus, "apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'" *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 614 (quoting Restatement (Second) of Torts § 433A(1)(b)(1963–1964)). Despite *Chem-Dyne*'s acknowledg ment and explanation of the application of apportionment principles, courts rarely apportioned liability. *See, e.g.*, *Metropolitan Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 n.3 (7th Cir. 2007) ("The only exception to joint liability is when the harm is divisible, but this is a rare scenario").

Burlington Northern and Apportionment

Burlington Northern was decided amidst the confusion of the circuit courts' varying application of apportionment under CERCLA and gave PRPs hope by suggesting that it might be easier to raise a divisibility defense under CERCLA than before. Similar to many CERCLA sites, *Burlington Northern* involved a complicated fact pattern that led to the contamination at issue. The owners of a business (B&B) on a 3.8 acre parcel of land were adjoining to a .9 acre parcel owned by two railroad companies. *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 603–04. B&B and the railroad companies both spilled hazardous substances onto the land, and Shell Oil sold a soil fumigant to B&B along the way that also got spilled during and after delivery. *Id.* B&B went bankrupt and the government sought to hold Shell and the railroads jointly and severally liable for the response costs. *Id.* at 605. After an in-depth discussion, the Supreme Court found Shell not liable as an "arranger" because "knowledge alone is insufficient to prove that an entity 'planned for' the disposal. . ." *Id.* at 612.

Shell and the railroads argued that the harm was capable of apportionment amongst the PRPs. The Court cited to *Chem-Dyne* for the concept that joint and severability is not mandated in every CERCLA cost-recovery action and that Congress intended the scope of liability to "'be determined from traditional and evolving principles of common law[.]'" *Id.* at 613. However, the Court noted that the burden is on defendants to prove there is a reasonable basis for the divisibility of harm. *Id.* at 614. The Court further noted that equitable considerations only play a role in contribution analysis (§ 113(f)) and not in apportionment analysis. *Id.* at 615 n.9. The Court affirmed the district court's findings of divisibility based on geography, time, and volume of the waste. *Id.* at 616– 17. The district court had determined divisibility by taking the railroad's percentage of the entire site (19 percent) and multiplying it by the time period that the railroad parcel was used in relation to the entire time period of site operations (45 percent) to get 9 percent. *Id.* It multiplied that by 2/3 to get the contamination represented by the companies and

applied a 50 percent margin of error to get back to 9 percent again for the RR liability. *Id.*

After *Burlington Northern* and the long line of cases before and subsequent to it, the test used for apportionment of liability is whether there is "a reasonable basis for division" of a distinct or single harm." *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 615. First, courts must determine whether the harm at issue is theoretically "capable of apportionment." *Id.* at 614. This is a question of law for the court to decide. *United States v. NCR Corporation*, 688 F.3d 833, 838 (7th Cir. 2012). Factors to determine this include "what type of pollution is at issue, who contributed to that pollution, how the pollutant presents itself in the environment after discharge, and similar questions." *Id.* Second, if the court finds that the harm is capable of apportionment "the fact-finder must determine how actually to apportion the damages, which is a question of fact." *Id.*

Case law prior to *Burlington Northern* tended to rely upon more simplistic theories of apportionment. *See, e.g.*, *In re Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993) (finding apportionment where only one contaminant was at issue and the three PRPs had operated on the site at mutually exclusive times); *United States v. Broderick Investment Co.*, 862 F. Supp. 272 (D. Colo. 1994) (holding apportionment was proper where the site simply consisted of two lots that had distinct contamination). Departing from this trend, the *Burlington Northern* decision granted apportionment based on a complex apportionment scheme. The Court's approval of an apportionment scheme based on multiple factors that involved diverse contaminants and several PRPs made PRPs optimistic that lower courts would be more receptive to apportionment schemes under CERCLA.

Apportionment Post-*Burlington Northern*

Despite PRP hope that *Burlington Northern* would pave the way for a more liberal application of apportionment, cases since the decision have essentially limited the application of apportionment and established *Burlington Northern* as an outlier. Indeed, approximately 40 cases have discussed apportionment since *Burlington Northern* was decided, and none have apportioned liability.

For example, in *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, PCS offered five methods for apportionment, but the district court determined that none of the suggested bases for apportionment were reasonable. 791 F. Supp. 2d 431, 489 (D.S.C. 2011), *motion to certify appeal granted*, CIV.A. 2:05-2782-MBS, 2011 WL 5827786 (D.S.C. Nov. 17, 2011). Although the court determined that the harm at the s ite was theoretically divisible based upon how much contamination each party contributed to the s ite, and how much soil each party caused to be included in the remediation area, the court still found no reasonable basis to apportion the harm because it found no method sufficient to account for each PRP's contribution to the spread of contamination across the site. *Id.* The Fourth Circuit recently upheld the district court's denial of apportionment, stating that the district court properly refused to make an arbitrary apportionment, as any apportionment without adequate evidence as to the harm caused by secondary disposals necessarily would have been arbitrary. *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, No. 11-1662, 2013 WL 1340018, at *16 (4th Cir. Apr. 4, 2013). Similarly, in *Pakootas v. Teck Cominco Metals, Ltd.*, Teck "failed to establish as a matter of law that the relevant harm is a single harm divisible in terms of degree." 868 F. Supp. 2d 1106, 1117 (E.D. Wash. 2012). The court noted that "[n]one of Teck's apportionment theories address the entirety of the contamination. Instead, they begin with the assumption that the only harm at issue is whatever metals were released from Teck's slag and/or liquid effluent and the same metals which were released from non-Teck sources." *Id.* By failing to account for all harm at the site, the court reasoned that Teck could not prove the harm was divisible. *Id.*; *see also United States v. Saporito*, 684 F. Supp. 2d 1043 (N.D. Ill 2010) (apportionment was not applied where PRPs who caused the harm owned separate pieces of equipment that caused the harm; ownership of the equipment was more comparable to being a joint venturer than as an owner of a discrete portion of contaminated land).

Lastly, in *United States v. NCR Corporation*, the Seventh Circuit held that NCR could not prove that its costs were reasonably capable of apportionment. 688 F.3d 833, 838 (7th Cir. 2012). *NCR* involved CERCLA efforts to clean up the Fox River in Wisconsin. NCR admitted in this case that it was a liable party under CERCLA because of PCB discharges from two plants located alongside Fox River. Throughout the cleanup process, NCR maintained that it was not 100 percent liable for the remediation work. The district court ruled adversely to NCR on several occasions regarding its contribution actions, so NCR notified EPA that it would no longer comply with EPA's order because NCR performed more than its fair share of remedial work. *Id.* at 837. EPA then filed a preliminary injunction against NCR to require it to finish the remediation. *Id.* Citing *Burlington Northern*, NCR argued that the harm to Fox River was divisible and that remediation costs should be apportioned to all of the potentially responsible parties.

The Seventh Circuit agreed with the district court and found that NCR failed to meets its burden of showing that the harm was capable of apportionment. *Id.* at 839. The Seventh Circuit stated it was guided by the commentary to Restatement § 433A(2) which reasoned "[a]pportionment is improper 'where either cause would have been sufficient in itself to bring about the result, as in the case of merging fires which burn a building." *Id.* (citing Restatement § 433A(2) cmt.i). The Seventh Circuit was convinced this reasoning applied to this case because, although NCR's expert testified that NCR's discharge of PCBs into the Lower Fox River contributed about 9 percent of the PCBs, the Seventh Circuit reasoned that this testimony did not automatically mean that NCR was only responsible for 9 percent of the cleanup. Instead, because the river would still need be dredged and capped due to EPA's maximum safety threshold of 1 ppm for PCBs, the remediation would have been required even if only NCR's contamination had been present. *Id.* Quoting the district court, the Seventh Circuit noted that "'[t]he overwhelming point is that the expense of cleaning up the Lower Fox River is only weakly correlated with the mass of PCBs discharged by the parties.'" *Id.* at 839–40 (the court further clarified: "Put another way, the need for cleanup triggered by the presence of a harmful level of PCBs in the River is not linearly correlated to the amount of PCBs that each paper mill discharged. Instead, once the PCBs rise above a threshold level, their presence is harmful and the River must be cleaned."). "The details of that cleanup may vary depending on exactly how much PCB is present, but not in any way that suggests that the underlying harm caused—the creation of a hazardous, polluted condition—is divisible." *Id.* Thus, the volume of a contaminant, alone, was not a good measure of apportionment in this case because this situation involved a chemical that is harmful when it surpasses a certain amount. *Id.* at 841.

Further, the Seventh Circuit refused to take into account equitable considerations, because *Burlington Northern* held that equitable considerations can only be considered in contribution actions and not in the apportionment analysis. *Id.* at 842. The Seventh Circuit also distinguished *Burlington Northern* because there multiple entities did not independently contribute amounts of pollutants sufficient to require remediation. *Id.* After a trial in December 2012 on the issue of whether the defendants must comply with the unilateral administrative order and continue cleaning up the Fox River, the district court essentially affirmed the ruling on divisibility by finding each defendant (except for Appleton Papers Inc.) to be jointly and severally liable for the harm resulting from the PCB contamination in the Lower Fox River and ordering each defendant to comply with the remedial measures in the unilateral administrative order. *See* Order, *United States v. NCR Corp*., No. 10-C-910 (May 1, 2013).

Thus, courts are essentially applying apportionment as they did pre-*Burlington Northern*, shying away from complicated, multi factor apportionment theories and instead imposing joint and several liability. As in *Ashley II* and *Pakootas*, some courts have found that proffered methods of apportionment do not account for all of the harm at a site, while others, as in *NCR Corporation*, have found that the proffered method (i.e., volume) does not correlate with the harm caused at the site. Regardless, it remains difficult for PRPs to prove to courts a reasonable basis for division of harm.

Conclusion

In conclusion, *Atlantic Research* brought some clarity to cost recovery actions by holding that a PRP could bring a cost recovery action under section 107(a)(4) where contribution was unavailable under the holding in *Cooper Industries*. However, there is still some uncertainty in the field because it is still unclear whether a PRP who incurs response costs pursuant to a consent decree may pursue a cost recovery claim under section 107 or is limited to a contribution claim under section 113 as its exclusive remedy.

Additionally, although *Burlington Northern* gave defendants hope that the divisibility analysis would be more available under CERCLA, this has not played out in the cases following the decision. Instead, courts have narrowly interpreted *Burlington Northern* and continued to deny apportionment. In the future, it is unclear what potential factual scenarios would allow for application of divisibility.

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SUPERFUND COST ALLOCATION—AN ECONOMIC PERSPECTIVE

Joseph J. Egan and Dayna Anderson

Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601, et seq. (CERCLA or Superfund)), was enacted by Congress in December 1980. According to the U.S. Environmental Protection Agency (EPA), CERCLA:

- Established prohibitions and requirements concerning closed and abandoned hazardous waste sites;
- Provided for liability of persons responsible for releases of hazardous waste at these sites; and
- Established a trust fund to provide for cleanup when no responsible party could be identified.

Under CERCLA, potentially responsible parties (PRPs) responsible for the release of hazardous substances may be liable for the investigation and remediation costs associated with cleaning up the site, among other costs. This paper discusses apportionment of liability and allocation of these costs amongst the PRPs from an economic perspective, as well as some recent court decisions addressing these issues.

Superfund Cost Recovery and Contribution

Pursuant to CERCLA section 107(a), liable PRPs include (1) current owners and operators of a facility; (2) past owners and operators of a facility at the time hazardous wastes were disposed; (3) generators and parties that arranged for the disposal or transport of the hazardous substances; and (4) transporters of hazardous waste that selected the site where the hazardous substances were brought. The issue of allocating cleanup costs between PRPs is addressed under CERCLA sections 107 (cost recovery claims) and 113 (contribution claims).

Numerous factors can impact the analysis of the apportionment of liability for a PRP at a Superfund site, including the amount of waste contributed by the PRP, the limited hazard posed by the waste the PRP contributed, the PRP's status as a municipality, private homeowner, handler of municipal solid waste, or owner of property above contaminated aquifers, and/or the inability of the PRP to pay for the cleanup. If a PRP is insolvent or defunct and unable to pay for its portion of the cleanup costs, the PRP is assigned an orphan share, and other viable PRPs could be liable for these costs if they are determined to be jointly and severally liable.

Cost Allocation and Apportionment Methodologies from an Economic Perspective

For purposes of this paper, we have assumed that the legal issue of whether a PRP has at least some liability for some or all of the cleanup costs under a cost recovery or cost contribution claim has been established. Therefore, we focus on the factors that can be used to apportion liability or allocate cleanup costs amongst the PRPs. Oftentimes courts consider equitable factors when allocating costs under section 113 that are not considered when apportioning costs under section 107. Under CERCLA section 113, courts have allocated costs amongst the liable parties for their respective equitable share of the costs based on the court's discretionary selection of appropriate equitable factors. Under CERCLA section 107, courts generally determine whether or not the harm is divisible and whether or not there is a reasonable basis to apportion the harm. Unlike cost allocation for a contribution claim, apportionment under a cost recovery claim does not take into consideration equitable factors.

In the cost allocation process, the "cost" component is the cost to implement the chosen remedy to investigate and remediate the site. The allocation analysis typically reviews the chosen remedy to evaluate the materials or hazardous substances that caused the costs to be incurred to remediate the site (often referred to as the "cost drivers"), identifies the parties that likely contributed the hazardous materials, and then allocates the costs to the responsible parties based on the various factors to consider. To the extent the costs to remediate the site are driven by more than one factor or cause, the allocation should address these separate factors or causes, if possible. For example, a site may have several distinct areas to be cleaned up, each with a separate remedy and cost. Each area may also have different parties that contributed hazardous substances to the distinct areas. As such, to the extent possible, the costs are separated between the distinct areas, and then the separate costs are allocated to the parties who contributed to each respective area. Often, the lack of available documentation and information makes separating cleanup cost drivers and the PRPs responsible for the cost drivers difficult, imprecise, or not possible.

The process of allocating the cleanup costs at a particular site to the various parties that contributed to the contamination is typically multi-stepped and varies depending on the site-specific facts and circumstances. There can be numerous factors considered in allocating or apportioning remediation costs, some of which are considered in both cost recovery and contribution matters and some of which are only considered as equitable factors in contribution matters. The list below is a combination of factors various courts have considered, among others, that may impact the cost allocation process. Some of these factors have been referred to as the "Gore factors" and the remaining are other factors courts have considered:

The impact each contaminant has on the cost of a cleanup;

- Volume of hazardous waste contributed;
- Number and types of contaminants;
- Area(s) of contamination;
- Years of operation and/or ownership;
- Level or degree of toxicity of the hazardous waste;
- Degree of involvement by the parties in generation, transportation, treatment, storage, or disposal of the hazardous waste;
- Degree of cooperation with regulatory agencies related to the cleanup efforts; and/or
- Degree of care the party exercised in managing the hazardous waste.

See Yankee Gas Services, Co. v. UGI Utilities, Inc., 852 F. Supp. 2d 229, 247 (D. Conn. 2012).

One of the main cost drivers for the cleanup costs can be the volume of waste that requires remediation. For example, the chosen remedy may be to remove and properly dispose of contaminated soil. Therefore, the volume of the contaminated soil to be removed is one of the main drivers of the cost of the cleanup. As such, the cost increases as the volume of soil to be disposed of increases. If the soil contained numerous hazardous substances, but the remedy is to dispose of the soil at the same type of landfill regardless of the individual hazardous substances, then which PRP brought which type of substance is less relevant to the cost allocation process. In this circumstance, if documents or data exist showing the volume of waste contributed by each party, then the volume of material contributed by each of the parties can be used to form a basis for allocating the costs. In many instances, site documents may not exist identifying the exact volume contributed or the records may be incomplete. In such cases other methods may be used to quantify the volume of contaminant contributed by the various parties.

At many sites, limited documentation often necessitates the use of other metrics or methods to estimate the quantity of material contributed to a site. These other methods may include interviews and depositions, extrapolation of known information, results of site investigations and technical methods of identifying and dating contaminants, aerial photography, industry data, time spent operating a facility, and professional judgment, among others.

Cost Allocation and Apportionment in Recent Court Decisions

In recent years, a number of Superfund cases have been decided in courts throughout the country. Many of these decisions contain rulings related to cost allocation and apportionment methodologies and factors used to allocate costs or apportion liability. The following are summaries of some of these recent decisions. The focus of the following summaries is on what factors and approaches the courts considered.

Burlington Northern & Santa Fe Railway Co. v. United States

On May 4, 2009, the United States Supreme Court ruled in *Burlington Northern & Santa Fe Railway Co.* [BNSF] *v. United States. Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009). This was an apportionment matter that stemmed from contamination of a site due to operations of Brown & Bryant, Inc. (B&B), an agricultural chemical distributor who purchased and stored chemical products from suppliers including Shell Oil Company. *Id*. at 602–0 4. B&B operated its business on 4.7 acres of land, 3.8 acres of which it owned and 0.9 acres of which it leased from BNSF and Union Pacific Railroad Company (the railroads). *Id*. at 602–0 3. B&B went out of business prior to EPA listing the site on the National Priority List and naming Shell and BNSF as PRPs. *Id*. at 605. EPA and California Department of Toxic Substances Control filed a cost recovery action against Shell and the railroads for $8 million in response costs. *Id*.

The Ninth Circuit Court of Appeals ruled that it could not reasonably apportion the response costs among the parties, and therefore, the r ailroads and Shell were jointly and severally liable and liable for 100 percent of the costs claimed by EPA and California. *Id*. at 606–08. The Supreme Court reversed this decision and instead ruled that the PRPs showed a reasonable basis for apportionment, and therefore, there was no joint and several liability. *Id*. at 614–19. As such, the railroads were apportioned 9 percent of the response costs based on the percentage of property leased, the percentage of time leased, and the percentage of chemicals spilled on the leased land. *Id*. at 616–17. EPA and California were responsible for the orphan share of 91 percent of the response costs since B&B was insolvent. *Id*. at 599– 600, 605. Further, the Supreme Court ruled that Shell was not liable as an arranger for the contamination at the site since it did not intend to dispose of the waste. *Id*. at 612–13.

In summary, the Supreme Court's ruling indicates that factors including area of contamination, years of operation and/or ownership, and the volume of hazardous waste can be acceptable factors to rely on when apportioning liability among PRPs.

United States v. NCR Corporation

On August 3, 2012, the U.S. Court of Appeals for the Seventh Circuit issued its decision on apportionment in the *United States v. NCR Corp*. This matter relates to the cleanup of contamination from polychlorinated biphenyls (PCBs) allegedly discharged into the Fox River in Wisconsin by various companies that primarily produced carbonless copy paper. EPA and the Wisconsin Department of Natural Resources (WDNR) are currently overseeing the cleanup of PCBs in portions of the Lower and Upper Fox River. The cleanup is divided into five operable units as shown in table 1 below with operable unit 1 located upstream of operable unit 5:

Table 1: Fox River Operable Units

Operable Unit	Location
1	Little Lake Butte des Morts
2	From Appleton to Little Rapids
3	From Little Rapids to De Pere
4	From De Pere to Green Bay
5	Green Bay

In 2011, one of the companies allegedly responsible for contributing to the PCB contamination, NCR Corporation (NCR) announced that it had performed its share of the cleanup and would no longer comply with the administrative orders issued by EPA and the WDNR. *United States v. NCR Corporation*, 688 F.3d 833, 838 (7th Cir. 2012). The United States and the state of Wisconsin in turn sought a preliminary injunction compelling NCR to complete the remediation work. *Id*. (The United States also filed a preliminary injunction against Appleton Paper Inc. (API), which was denied by the district court on the grounds that the government was not likely to show that API was a liable party. *Id.* at 837.)

In its ruling, the court of appeals referred to section 433A of the Restatement (Second) of Torts which states:

> [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 . . . But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.
> *Id*. at 838.

Using this standard, the court of appeals held that NCR failed to show that the harm caused by pollution in the Lower Fox River was divisible and thus the harm could not be apportioned. *Id*. at 839. The court determined that although NCR's expert testified that NCR discharged PCBs into the second operable unit which then contributed downstream approximately 9 percent of the PCBs in the fourth operable unit's upper half and 6 percent of the PCBs in the lower half, it did "not necessarily follow that NCR was responsible for only 9% or 6% of the cleanup costs." *Id*. The court ruled that if NCR were the only contributor of PCBs, the Lower Fox River would still need to be dredged and capped in order to meet EPA's safety threshold. *Id*. The court cited the government's expert who testified that " [a] cubic yard of sediment costs the same to dredge or cap whether it contains 10 ppm or 100 ppm. " In other words, the volume of PCBs discharged did not drive the cleanup costs at this site. *Id*. The court further ruled that under the Restatement (Second) of Torts, "both polluters are liable because either discharge of PCB was sufficient to create a condition that is hazardous to human health under EPA guidelines." *Id*. The court went on to state that ""contamination traceable to each defendant' is a proper measure of harm" and that in other cases with simple facts, "it is reasonable to assume that the respective harm done by each of the defendants is proportionate to the volume of [contaminant] each discharged into the environment." *Id*. at 841. In other words, the court of appeals ruled that the cleanup would have been performed even if NCR were the only contributor of the waste, and therefore, the cleanup costs are not dependent on the percentage of PCBs contributed by each party.

Lyondell Chemical Company v. Occidental Chemical Corporation

A recent case involving cost contribution and equitable factors in an allocation of remediation costs was *Lyondell Chemical Company*, *et al. v. Occidental Chemical Corporation*, *et al*. This matter arose out of contamination of a site in Texas due to disposal of hazardous waste from petrochemical facilities by French Limited. *Lyondell Chemical Co. v. Occidental Chemical Corp.*, 608 F.3d 284, 289 (5th Cir. 2010). Lyondell and El Paso Tennessee Pipeline Co. (El Paso), customers of French Limited and generators of the waste, agreed to remediate the site and reimburse the United States for certain past costs. *Id*. at 289– 91. In an attempt to recover some of the investigation and remediation costs, Lyondell and El Paso brought actions under CERCLA sections 107 and 113 against others who they believed shared responsibility of the cleanup of their respective areas, including Occidental, another generator of waste sent to the site. *Id*. at 290–91.

The U.S. District Court for the Eastern District of Texas determined that remediation costs at the site could not be divided by geographic area. *Id*. at 291. Therefore, the district court appointed an environmental engineering expert to allocate the cleanup costs among the liable parties through the application of other factors. *Id*. at 291–92. Using waste volume estimates assigned by the district court as inputs into his model, the expert used a Monte Carlo[1] analysis to estimate the disposal volumes for each party. *Id*. at 291–94. This estimate, along with chemical analyses of the disposal volumes, was used by the district court to allocate the cleanup costs. *Id*. at 292.

However, on appeal the U.S. Court of Appeals for the Fifth Circuit held that the allocation of costs by the district court resulted in harmful error. *Id*. at 300. Before reaching that conclusion, the Fifth Circuit notably determined that the expert's use of Monte Carlo statistical analysis was an acceptable cost allocation methodology and that cost allocation based on the quantity of waste contributed by each party was also acceptable in contribution claim situations. *Id*. at 293–94, 300–01. However, the court of appeals ruled that the reports used by the district court to assign one of three waste volume inputs for the Monte Carlo analysis should have been excluded from evidence since these reports were settlement communications related to a different site. *Id*. at 299–300. The Fifth Circuit declined to average the remaining two waste volume inputs, and instead, remanded the matter to the district court for further proceedings. *Id*. at 300.

In January 2011, the district court issued an Amended Findings of Fact and Conclusions of Law that reflected aspects of the Fifth Circuit's decision. *Lyondell Chemical Co. v. Albemarle Corp.* (No. 1:01-CV-890), Second Amended Findings of Fact and Conclusions of Law (Mar. 2, 2011). The district court adjusted the percentage of cleanup costs allocated to Occidental down from 15.96 percent to 15.86 percent. *Id*. In March 2011, the district court issued an Amended Final Judgment at that time, which ordered Occidental to pay El Paso over $1.7 million for past response costs incurred by El Paso, in addition to prejudgment interest, as well as a portion of future remediation costs. *Lyondell Chemical Co. v. Albemarle Corp.* (No. 1:01-CV-890), Amended Final Judgment (Mar. 2, 2011). The district court also applied a 3 percent "equitable reduction" to El Paso's share for its cooperation with the government. Occidental appealed the district court's January 2011 judgment, but this time the Fifth Circuit affirmed. *Lyondell Chemical Co. v. Albermarle Corp.* (No. 11-40218), 464 Fed. Appx. 295 (5th Cir. Mar. 12, 2012); *Lyondell Chemical Co. v. Albemarle Corp.* (No. 1:01-CV-890), Second Amended Findings of Fact and Conclusions of Law (Mar. 2, 2011).

In this matter, the Fifth Circuit accepted the use of Monte Carlo statistical analysis as an acceptable method to allocate costs in a contribution action based on volumetric estimates of the parties' respective wastes, where the inputs into the Monte Carlo model were reasonable.

Conclusion

From an economic perspective, whether determining how to apportion liability or allocate the cleanup costs

between PRPs at Superfund sites, one should remain cognizant of what is ultimately being determined: responsibility for the costs to perform the cleanup. As such, factors that influence or drive the cleanup costs should be evaluated and to the extent possible, used as part of the apportionment or allocation methodology. Courts have come to recognize this concept based on recent rulings.

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End Note:

[1] Monte Carlo analyses are used in multiple ways in a variety of fields including finance, project management, energy, manufacturing, engineering, research and development, insurance, oil and gas, transportation and others. Monte Carlo is a computerized statistical analysis that simulates the possible results by substituting a range of values—a *probability distribution*—for any factor that has inherent uncertainty. Monte Carlo simulation produces distributions of possible outcome values. The method was developed during World War II at Los Alamos, and the name comes from the Monaco resort town (www.palisade.com/risk/monte_carlo_simulation.asp).

NOT SO FAST: THE U.S. SUPREME COURT ALLOWS PRE-ENFORCEMENT REVIEW UNDER THE CLEAN WATER ACT. COULD CERCLA BE NEXT?

Thomas Braun

Introduction/Background

On March 21, 2012, the Supreme Court of the United States handed down a decision in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), a case that had caught the attention of the entire environmental law community. In 2007, the Sacketts filled a portion of their residential lot with dirt and rocks in preparation for building a house. After filling the lot, the Sacketts received an administrative compliance order from the U.S. Environmental Protection Agency (EPA), alleging that the Sacketts had violated the Clean Water Act (CWA) by filling a wetland without a permit. The Sacketts sought a hearing in which they could challenge EPA's determination that their property, which is separated from a lake by several lots, fell under the jurisdiction of the CWA, but were denied. Following the denial of their request for an evidentiary hearing, the Sacketts filed a complaint in the U.S. District Court for the District of Idaho in which they sought declaratory judgment and injunctive relief, claiming that EPA's compliance order was "arbitrary and capricious" under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and issued in violation of their procedural due process rights under the Fifth Amendment. After concluding that the CWA bars judicial review of compliance orders prior to EPA initiating an enforcement or reimbursement action in federal court, the district court dismissed the Sacketts' claims. The U.S. Court of Appeals for the Ninth Circuit affirmed, *Sackett v. EPA*, 622 F.3d 1139 (2010), and on June 28, 2011, the U.S. Supreme Court granted certiorari.

The Court unanimously held that the Sacketts could bring a civil action under APA prior to an EPA enforcement or reimbursement action. This ruling potentially opens the door to pre-enforcement challenges to the administrative orders issued by EPA under numerous other environmental statutes. Could the Comprehensive Environmental Response,

Compensation, and Liability Act's (CERCLA), 42 U.S.C. § 9601, et seq., compliance order provision be subject to such a challenge?

Impact of *Sackett*

The potential impact of *Sackett* depends on the way in which the lower courts view the scope of the Court's decision. There are two likely options: First, the courts could read the decision narrowly, as applying only to jurisdictional challenges of administrative compliance orders issued by EPA under the CWA. Alternatively, the courts could read the decision broadly, as establishing the principle that recipients of administrative compliance orders can challenge the terms and conditions of the orders as well. Although Justice Scalia did not attempt to limit the decision in his majority opinion, Justice Ginsburg, in a concurring opinion, stated that the question of whether recipients could bring not only jurisdictional challenges at the pre-enforcement stage but also a challenge to the terms and conditions of the compliance order, was "a question [the *Sackett*] opinion does not reach out to resolve." *Sackett*, 132 S. Ct. at 1375. Despite leaving this question unresolved, the decision clearly established a two-part test to determine whether pre-enforcement review of an EPA administrative action is prohibited: (1) does the applicable statute expressly preclude pre-enforcement review, and, if not, (2) is the administrative action a "final agency action for which there is no other adequate remedy in court" under the *Bennett v. Spear* standard? *See* Leslie Garrett Allen & Chris Carron, Sackett v. EPA: *Implications for Administrative Compliance*, Trends, Vol. 44, No. 1 (ABA 2012), *available at* http://www.balch.com/files/Publication/21f22d6d-96fc-4e66-a04f-ca398df92b79/Presentation/PublicationAttachment/244c6aa0-0b6d-4fd1-995b-fb334e47d501/Sackett%20v%20EPA%20-%20Implications%20for%20Administrative%20Compliance.pdf. If the relevant statute does not preclude pre-enforcement review and the court determines the administrative action is a final agency action under the *Bennett v. Spear* standard, recipients may bring a pre-enforcement civil action under the APA.

Applying the *Sackett* Standard to CERCLA

When EPA determines that an environmental cleanup is necessary at a contaminated site, CERCLA provides the agency four options: (1) it may negotiate a settlement with the potentially responsible parties (PRPs), 42 U.S.C. § 9622; (2) it may conduct the cleanup with Superfund money and then seek reimbursement from PRPs by filing suit, *id*. §§ 9604(a), 9607(a)(4)(A); (3) it may file an abatement action in federal district court to compel PRPs to conduct the cleanup, *id.* § 9606; or (4) it may issue a unilateral administrative order (UAO) instructing PRPs to clean the site, *id*. The last option presents a similar enforcement scheme as the one challenged by the Sacketts.

Similar to the CWA, CERCLA section 106(a) provides EPA with the power to issue a UAO that compels a party to clean up contamination at a site upon a determination "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." *Id*. § 9606(a). Once EPA issues a UAO, the PRP has two choices: First, the PRP may comply and, after completing the cleanup, seek reimbursement from EPA. *Id*. § 9606(b)(2)(A). If EPA refuses reimbursement, the PRP may sue EPA in federal district court to recover its costs on the grounds that (1) it was not liable for the cleanup, *id*. § 9606(b)(2)(B)(C); or (2) it was liable but EPA's selected response action (or some portion thereof) was "arbitrary and capricious or . . . otherwise not in accordance with law," *id*. § 9606(b)(2)(D). Alternatively, the PRP may refuse to comply with the UAO, in which case EPA may either bring an action in federal district court to enforce the UAO, *id*. § 9606(b)(1), or clean the site itself and then sue the recipient to recover its costs, *id*. § 9607(c)(3). Under either option, if the district court finds that the PRP "fail[ed] without sufficient cause" to comply with the UAO, the court may impose punitive damages of up to "three times [ ] the amount of any costs" that the agency incurs. *Id*.

The Pre-Enforcement Bar

As originally enacted, CERCLA did not contain a bar on pre-enforcement review. Nevertheless, courts consistently refused to grant pre-enforcement review of UAOs. *See, e.g.*, *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315 (2d Cir. 1986); *Barnes v. United* States, 800 F.2d 822, 828 (9th Cir. 1986); *Aminoil, Inc. v. EPA*, 599 F. Supp. 69, 71 (C.D. Cal. 1984). Only once did a court grant pre-enforcement review, and in that case the court strictly limited review to where EPA had no rational basis for commencing a response action and no preliminary assessment was made. *Lone Pine Steering Comm. v. EPA*, 600 F. Supp. 1487 (D.N.J. 1985), *aff'' d*, 777 F.2d 882 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986).

In 1986, Congress explicitly codified the bar on pre-enforcement review in the Superfund Amendments and Reauthorization Act (SARA). Section 113(h) provides that "[n]o Federal court shall have jurisdiction . . . to review any order issued under section [106]" until the PRP completes the work and seeks reimbursement, 42 U.S.C. § 9613(h)(3), or until EPA brings an enforcement action or seeks to recover fines and damages for noncompliance, *id*. § 9613(h)(1)(2). The bar works to further CERCLA's purpose of quickly responding to environmental emergencies since review of the UAOs would prolong response actions. *Aminoil, Inc.*, 599 F. Supp. at 71 ("Allowing an alleged responsible party to challenge the merits of the § 106(a) administrative order prior to an enforcement or recovery action would handcuff the [EPA] by delaying effective responses to emergency situations.").

Congress did not make the bar on pre-enforcement review universal, however. As the court in *General Elec. Co. v. Jackson*, 610 F.3d 110, 25 (D.D.C. 2010), stated, section 113(h) "only prohibits district courts from reviewing UAOs before enforcement or reimbursement proceedings have been initiated." This limitation would not benefit a PRP in the Sacketts' position, however. A challenge to a UAO under similar facts as those in *Sackett*, would be precluded because EPA had not begun an enforcement or reimbursement proceeding, and the analysis would never make it to the *Bennett v. Spear* standard.

Conclusion

Although the Supreme Court's decision in *Sackett* avoided discussing some of the broader issues surrounding pre-enforcement review for administrative compliance orders, the decision did leave practitioners and jurists a standard by which we can attempt to determine whether pre-enforcement review is available for other EPA administrative actions. Because CERCLA contains an explicit bar on immediate pre-enforcement review, a pre-enforcement challenge to a UAO would fail the first prong of the *Sackett* test and never make it to the *Bennet v. Spear* analysis. Thus, it appears that the decision in *Sackett* will not have a great impact on the way in which EPA administers UAOs under CERCLA.

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DECLARATORY RELIEF UNDER CERCLA: SHOULD FUTURE LIABILITY DEPEND ON *RECOVERABLE* PAST RESPONSE COSTS?

Andrew J. Fiore

Introduction

The federal courts of appeals are currently divided over the extent to which declaratory relief is available in cases where future response cost liability is litigated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 42 U.S.C. §§ 9601– 9675 (2006). Consistent with earlier decisions by the courts of appeals for the Second, Third, and Eighth Circuits, the Ninth Circuit recently held that declaratory relief imposing future response cost liability should only be available where recoverable past response costs have been demonstrated. *City of Colton v. American Promotional Events, Inc.*, 614 F.3d 998, 1008 (9th Cir. 2010), *cert. denied*, 131 S. Ct. (2010); *see also Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85 (2d Cir. 2000) (per curiam); *United States v. Occidental Chem. Co.*, 200 F.3d 143 (3d Cir. 1999); *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000), *overruled on other grounds by* Exxon Mobil Corp. v. Allapattah Serv., Inc., 545 U.S. 546 (2005). In contrast, the courts of appeals for the First and Tenth Circuits have instead held that such relief may be available even in the absence of recoverable past response costs. *See United States v. Davis*, 261 F.3d 1, 46 (1st Cir. 2001); *Cnty. Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991) (per curiam).

After highlighting relevant background information, this article briefly discusses the reasoning behind these different approaches, and then offers the author's conclusion as to which approach is most appropriate based on consideration of several factors, including key provisions of both CERCLA and the Declaratory Judgment Act, 28 U.S.C. §§ 2201– 2202 (2006); the objectives that Congress had when it enacted CERCLA in 1980; traditional concepts of statutory interpretation; and corresponding environmental policy goals. On the basis of these factors, the author believes that the First and Tenth Circuits have taken the better approach.

CERCLA, Generally

Congress designed CERCLA to achieve two primary goals: (1) to encourage the timely cleanup of hazardous waste sites; and (2) to place the cost of cleanup on those responsible for creating or maintaining the hazardous conditions found at these sites. *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935– 36 (8th Cir. 1995) (quoting *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 486 (8th Cir. 1992)). To help accomplish these objectives, CERCLA section 107(a) provides individuals, corporations, and municipalities with the ability to recoup their site investigation and cleanup costs (" response costs") in situations that meet certain statutory criteria. *See* 42 U.S.C. § 9607(a) (2006). Such parties can recover their response costs under section 107(a) whenever there has been a "release or threatened release" of a "hazardous substance" from a "facility," and where the potentially responsible parties (PRPs) in question fall into at least one of four categories identified in the statute. *Id.* Where these criteria are satisfied, PRPs are then exposed to strict joint and several liability for the response costs incurred. *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1990 (10th Cir. 1997).

Despite the broad reach of section 107(a) liability, not all response costs are recoverable. In order to be recoverable, such response costs must be "necessary" and "consistent with the national contingency plan [(NCP)]." 42 U.S.C. § 9607(a)(4)(B). Response costs are "necessary" when "an actual and real threat to human health or the environment exist[s.]" *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001). Moreover, response costs are "consistent with the NCP" where "the [response] action, when evaluated as a whole, is in substantial compliance" with it. 40 C.F.R. § 300.700(c)(3)(i) (2010). Any response costs not satisfying these two threshold requirements cannot be recovered under section 107(a).

Declaratory Relief, Generally

Declaratory relief is a judicial remedy available in the form of a binding judgment—known as a "declaratory judgment"—that establishes the rights and other legal relations of parties, but which does not provide for or

order enforcement. BLACK'S LAW DICTIONARY 918 (9th ed. 2009). Instead of awarding damages, *Hansen v. Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975), such judgments simply announce the rights of parties or express the opinion of the court on a specific question of law, but without ordering that anything be done. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). Declaratory judgments are particularly valuable in that they help avoid piecemeal litigation, *Hogan v. Lukhard*, 351 F. Supp. 1112 (E.D. Va. 1972), and the long delays that can arise before the merits of a specific case are fully adjudicated. *Smith v. Transit Cas. Co.*, 281 F. Supp. 661 (E.D. Tex. 1968). These judgments also provide useful guidance with which parties can evaluate and determine future courses of conduct. Declaratory judgments are statutory remedies available only where legislatures provide for their existence. *England v. United States*, 164 F. Supp. 322 (E.D. Ill. 1958).

Declaratory Relief Under the Declaratory Judgment Act

The Declaratory Judgment Act of 1934 (DJA) made declaratory relief universally available in the federal district courts. The DJA, now codified at 28 U.S.C. §§ 2201–2202, provides, in relevant part:

> In a *case of actual controversy within its jurisdiction* . . . any court of the United States, upon the filing of an appropriate pleading, *may declare the rights and other legal relations of any interested party*, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such. 28 U.S.C. § 2201(a) (emphasis added).

Three categories of requirements must be met in order to obtain declaratory relief under the DJA. First, a party must satisfy the "actual case or controversy" requirement within the meaning of article III, section 2 of the Constitution. U.S. CONST. art. III, § 2. Accordingly, there must be a controversy that is definite and concrete, touching the legal relations of parties with adverse interests, and which admits of specific relief through a decree of conclusive character. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937). To meet this requirement, a party must satisfy the three "irreducible" elements needed for constitutional standing: (1) injury in fact; (2) causal connection; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). In the context of the DJA, this first overall requirement—i.e., "actual case or controversy"—is known as the "constitutional" inquiry. *White v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 913 F.2d 165, 167 (4th Cir. 1990).

Second, as with all federal lawsuits, a court must have adequate subject matter jurisdiction (SMJ) to hear the case before it. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Although the DJA effectively added to the scope of remedies available in federal court, it did not expand federal SMJ. *Id.* As a practical matter, federal district courts will nearly always have "federal question" SMJ in cases where response costs are incurred and where liability is then contested under CERCLA, a federal statute.

Third, because the DJA is an "authorization" instead of a "command," *Pub. Affairs Assocs. v. Rickover*, 369 U.S. 111, 112 (1962)—i.e., "any court . . . *may* declare the rights and other legal relations of any interested party," 28 U.S.C. § 2201(a) (emphasis added)—federal district courts have substantial discretion with which to decide whether to declare the rights of litigants. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). According to the Supreme Court, this exercise of discretion should be based primarily on "considerations of practicality and wise judicial administration." *Id.* at 288. As a result, many federal courts rely on a number of "prudential" factors when exercising this discretion. These "prudential" factors focus predominantly on (1) whether the declaratory judgment will serve a useful purpose; and (2) whether the declaratory judgment will resolve the controversy between the parties. *White v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 913 F.2d 165, 168 (4th Cir. 1990).

Declaratory Relief Under CERCLA Section 113(g)(2)

As part of its comprehensive statutory approach to addressing nationwide industrial pollution, Congress

incorporated a declaratory judgment provision into CERCLA through the Superfund Amendments and Reauthorization Act of 1986. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 113(g)(2), 100 Stat. 1613 (1986). This provision—CERCLA § 113(g)(2)—provides that, "*[i]n any such action described in this subsection*, the court *shall* enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2) (2006) (emphasis added). Because it incorporates the word "shall," some courts have interpreted section 113(g)(2) as creating an automatic mechanism through which declaratory judgments on future liability are to be issued whenever findings of liability are made under section 107(a) for already incurred response costs. *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 844 (6th Cir. 1994).

City of Colton v. American Promotional Events, Inc.

In a matter of first impression, the Ninth Circuit recently decided *City of Colton v. American Promotional Events, Inc.*, a cost recovery case involving, at least in part, the question of whether a CERCLA plaintiff's failure to establish liability for its past response costs necessarily dooms its bid to obtain a declaratory judgment as to liability for its future costs. 614 F.3d 998, 1006 (9th Cir. 2010), *cert. denied*, 131 S. Ct. (2010). The case began when the city of Colton (Colton) filed suit in federal district court seeking recovery under section 107(a) for the $4 million in past costs it had incurred while responding to perchlorate contamination discovered in several of its municipal water supply wells. *Id.* at 1003. The industrial defendants targeted by Colton had been active for many years in the area where the groundwater contamination was identified. *Id.* Besides seeking to recover its past response costs, Colton also sought declaratory relief under the DJA for its future costs. *Id.*

The district court denied Colton's section 107(a) claim after finding that it had failed to show that its groundwater response costs were "necessary" and "consistent with the NCP." *City of Colton v. Am. Promotional Events, Inc.*, No. CV 05-1479-JFW (SSx), 2006 WL 5939684 (C.D. Cal. Oct. 31, 2006). The court based this finding on the fact that the concentrations of perchlorate in Colton's supply wells had only reached state "advisory action levels" generally considered to be unenforceable, and also on Colton's concession that its treatment program failed to comply with the NCP. *Id.* The district court also denied Colton's claim for declaratory relief since Colton was unable to show that it was entitled to recover any of its past response costs. *Id.*

Colton appealed to the Ninth Circuit on two grounds. First, it challenged the district court's conclusion that its groundwater treatment program was "unnecessary." *Colton*, 614 F.3d at 1004. Second, Colton argued that the district court had erred in denying its claim for declaratory relief under the DJA. *Id.* As to Colton's first argument, the Ninth Circuit held that Colton's concession—i.e., that its treatment program failed to comply with the NCP—was sufficient ground upon which to affirm the district court's denial of its section 107(a) claim. *Id.* With respect to Colton's second argument, the Ninth Circuit held that, although Colton's claim for declaratory relief was ripe under the DJA, the declaratory judgment provision of CERCLA—i.e., section 113(g)(2)—instead controlled the outcome of the case because of the well-established Supreme Court doctrine that "a precisely drawn, detailed statute pre-empts more general remedies[.]" *Id.* at 1005, 1007 (quoting *Hink v. United States*, 550 U.S. 501, 506 (2007)) (internal quotation marks omitted). The Ninth Circuit then reached the substantive conclusion that section 113(g)(2) (i.e., the more precisely drawn, detailed statute) necessarily pre empts the DJA (i.e., the more general remedy) in the context of CERCLA cases. *Id.* On this basis, the Ninth Circuit affirmed the district court's denial of Colton's claim for declaratory relief since Colton had been unable to demonstrate recoverable past response costs under section 113(g)(2). *Id.* at 1008. Colton was later denied certiorari by the U.S. Supreme Court. Petition for Writ of Certiorari at 15, *City of Colton v. Am. Promotional Events, Inc.* (No. 10-284), 2010 WL 3391765, *cert. denied*, 131 S. Ct. 646 (2010).

Discussion

The central question in *Colton* is whether declaratory relief for future response costs is available in situations where recoverable past response costs are absent.

Colton, 614 F.3d at 1006. Three other circuit courts have answered this question consistent with the Ninth Circuit's holding in *Colton*. In *Gussack Realty Co. v. Xerox Corp.*, several plaintiffs filed suit against the operator of a nearby industrial facility that had released solvent waste onto the plaintiffs' property. 224 F.3d 85 (2d Cir. 2000) (per curiam). There, the Second Circuit held that the plaintiffs' claim for declaratory relief must fail "as a matter of law" under section 113(g)(2) since the plaintiffs had "not [yet] incurred any compensable expenses under CERCLA [section 107(a).]" *Id.* at 89, 92.

Similarly, in *United States v. Occidental Chemical Co.*, the Third Circuit held that the plaintiff's claim for a declaratory judgment finding the defendant liable for future cleanup costs at "Operable Unit (OU)-2" was not properly before the district court where the plaintiff's cost recovery claim had been focused only on response costs previously incurred at "OU-1" on the same site. 200 F.3d 143, 153–54 (3d Cir. 1999). In support of this holding, the Third Circuit emphasized that section 113(g)(2) "explicitly requires a trial court to enter a declaratory judgment on liability for future response costs *if* liability is found for past response costs." *Id.* at 153 (emphasis added).

Lastly, in *Trimble v. Asarco, Inc.*, a case decided by the Eighth Circuit, numerous residents brought a class action seeking cost recovery and a declaratory judgment against the owner and former operator of a nearby lead smelting plant. 232 F.3d 946, 950 (8th Cir. 2000), *overruled on other grounds by* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005). After explaining how declaratory relief operates under section 113(g)(2), the Eighth Circuit held that the plaintiffs "cannot obtain declaratory relief pursuant to [section 113(g)(2)] without having incurred response costs within the meaning of [section 107(a)]." *Id.* at 958.

All of these decisions, including *Colton*, rest largely on a narrow interpretation and rigid application of section 113(g)(2). In each case, significant weight is placed on section 113(g)(2), which is viewed by the court as creating a "one way" obligation—i.e., to enter a declaratory judgment binding on future liability—triggered only where recoverable past response costs are first established under section 107(a). This view is evident in *Colton*, where the Ninth Circuit concluded that "declaratory relief is available *only if* liability for past costs has been established under [section] 107." *City of Colton v. Am. Promotional Events, Inc.*, 614 F.3d 998, 1008 (9th Cir. 2010) (emphasis added). This type of mechanical approach is problematic because it disregards other considerations important in the context of CERCLA.

In contrast, two circuit courts have held that declaratory relief as to future liability may be available even in the absence of recoverable past response costs. *Id.* at 1007. Instead of focusing on the syntax of section 113(g)(2), these circuit courts have taken a different route that incorporates greater consideration of the objectives that Congress had when it enacted CERCLA in 1980. For instance, in *United States v. Davis*, the First Circuit held that the lower district court's grant of declaratory relief in the absence of recoverable past response costs was proper because declaratory relief is "consistent with the broader purposes of CERCLA." 261 F.3d 1, 47 (1st Cir. 2001) (quoting *Boeing v. Cascade*, 207 F. 3d 1177, 1191 (9th Cir. 2000)). In *Davis*, the First Circuit was faced with sorting out CERCLA liability in the context of an appeal stemming from a complex cleanup at a former industrial landfill at which "hundreds of thousands of gallons of hazardous waste" were disposed in the late 1970s. *Id.* at 14.

Similarly, in *County Line Investment Co. v. Tinney*, the Tenth Circuit recognized that "there are some circumstances in which a CERCLA plaintiff may be entitled to a declaration of the defendant's liability[,]" despite an inability on the part of the plaintiff to recover past costs due to a failure to comply with the NCP, because allowing such relief "can speed up the settlement process and thus promote Congress' goal of encouraging private parties to undertake and fund expedited CERCLA cleanups." 933 F.2d 1508, 1513 n.9 (10th Cir. 1991) (per curiam). The plaintiffs in *Tinney* consisted of new property owners that had undertaken formal closure/post-closure activities at a landfill where drums of hazardous waste had been accepted and buried. *Id.* at 1510. The site in question was previously owned and operated by the defendants, all of whom refused to take action. *Id.* As

in *Colton*, the plaintiffs in *Tinney* were unable to recover their past response costs because they did not follow the NCP. *Id.* at 1512.

CERCLA was intended to encourage the timely cleanup of hazardous waste sites and to place the costs of cleanup on those responsible for creating or maintaining such sites. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). Declaratory relief serves these purposes by not only assigning liability, but also by helping to move the overall process forward by saving litigants and courts the substantial time and money otherwise needed to relitigate liability at a later date. In this way, declaratory relief leaves for the future only the need to fix the amount owed and affords courts flexibility with respect to the time and manner for doing so. *New York v. Solvent Chem. Co., Inc.*, 664 F.3d 22, 27 (2d Cir. 2011).

Allowing declaratory relief as to future liability without requiring recoverable past response costs is also consistent with an important environmental policy goal: that of encouraging the cleanup of contaminated sites by private parties not responsible for causing the contamination. This follows from the simple fact that innocent parties who are unable to establish liability of actual PRPs for past response costs under section 107(a)—for whatever the reason may be—will be much more hesitant to continue performing cleanup if they cannot obtain a declaratory judgment on the question of future liability. Put another way, without such relief, would innocent parties like Colton (that have just had substantial cost recovery claims denied) be comfortable spending millions more cleaning up contamination caused by someone else?

Perhaps the federal District Court for the District of Columbia captured the nature of the problem best when it stated that, "because a claim for declaratory relief seeks to fix liability for *future* costs, it is nonsensical to require that the plaintiff demonstrate that he has already incurred such costs. While a claim for recovery of past costs is logically antecedent to a claim for future costs, it is not a prerequisite." *Foster v. United States*, 922 F. Supp. 663, 664 (D.D.C. 1996). The approach taken by the Ninth Circuit in *Colton* is equally difficult to reconcile when considering that the ultimate recoverability of future response costs always remains dependent on whether those costs are "necessary" and "consistent with the NCP." 42 U.S.C. § 9607(a)(4)(B) (2006). For this reason, judicial restrictions that allow declaratory relief only when coupled with recoverable past response costs seem sharply misplaced.

Finally, in situations where declaratory relief is not available under section 113(g)(2), such relief should nonetheless remain available under the DJA where the "constitutional," SMJ, and "prudential" inquiries are satisfied. After all, traditional concepts of statutory interpretation tell us that "[w]hen two statutes are *capable of co-existence*, it is the *duty of the courts*, absent a clearly expressed congressional intent to the contrary, *to regard each as effective*. When there are two acts upon the same subject, *the rule is to give effect to both if possible*[.]" *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (emphasis added) (citations and quotation marks omitted). Because Congress has expressed no intention of restricting the DJA in the context of CERCLA, it should be more than possible for courts to give the DJA effect in situations where section 113(g)(2) does not apply.

Conclusion

CERCLA litigation is tremendously complex, lengthy, and expensive. *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1046 (E.D. Wis. 2008). For this reason, parties should be allowed to pursue and obtain declaratory judgments on future liability even in the absence of liability for past response costs under section 107(a). This approach can be effectively and adequately managed by the fact that future response costs—just like all response costs—still need to be "necessary" and "consistent with the NCP" in order to be recoverable.

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