



The Supreme Court's Landmark Decision in *Burlington Northern*:

Demystifying the CERCLA Defense of Divisibility

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Superfund liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is typically joint and several, so Potentially Responsible Parties (PRPs) with even minimal contributions may be



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held liable for all response costs associated with remediating a contaminated facility. For those identified as PRPs in hazardous waste cleanup actions under CERCLA, the specter of joint and several liability is, understandably, unnerving. In *Burlington Northern & Santa Fe Railway Co. v. United States*, the U.S. Supreme Court ruled on an important issue of divisibility of harm in multiparty contamination cases, reversing a Ninth Circuit opinion that overturned the Eastern District of California's decision to divide liability between defendants partially responsible for the contamination and associated response costs at a Superfund site. 129 S Ct 1870, 2009 US LEXIS 3306 (2009) ("*Burlington Northern*").¹

Joint and several liability, however, is not mandated under CERCLA, and Courts of Appeals have consistently held that CERCLA liability is subject to the



"traditional and evolving principles of common law." Thus, to the extent a PRP can carry its burden to show that, despite the singular nature of the harm caused by environmental contamination, there is a reasonable basis for which to apportion liability, a PRP may avoid joint and several liability in favor of liability for only its divisible share. Yet for this defense of "divisibility,"² the devil is in the details. Courts and parties alike have struggled to define the contours of the PRP's burden to prove a reasonable basis for divisibility, and trial courts have routinely rejected

divisibility arguments in favor of joint and several liability.

In *Burlington Northern*, lacking any dispute over the first element of the two-part divisibility test (whether the harm, though singular, "is theoretically capable of apportionment"), the Court directly addressed the second element, whether there was a sufficient trial court record to provide a reasonable basis for apportioning liability. The District Court concluded the record was adequate to provide a reasonable basis for apportioning liability and assigned 9 percent of the liability to

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the two defendant Railroads. The basis for the District Court's division of liability was quite simple, relying on three factors: a comparison of the Railroads' property to the total area of the facility; a comparison of the length of operations on the Railroads' parcel to the total of operations at the facility; and the finding that only two of the three chemicals driving the remediation were spilled on the Railroads' property. The court multiplied these three factors and arrived at roughly 6 percent. The District Court added a factor of 50 percent to allow for calculation errors, arriving at a total Railroad share of 9 percent, thus relieving the Railroads of joint and several liability that would have included the large share of the defunct agricultural chemical owner and operator primarily responsible for the contamination of the site.

On appeal, the Ninth Circuit reversed and held the defendants jointly and severally liable, holding the record was inadequate to support a reasonable basis for apportioning liability and describing the District Court's conclusion as based on the "simplest of considerations." After a detailed discussion of the District Court's calculations, the Supreme Court reversed the Court of Appeals and held that the District Court reasonably apportioned liability on the basis of a sufficient record. Despite the Ninth Circuit's criticisms about the District Court's lack of accuracy, the Court found that the District Court's use of two factors that were well supported in the record, plus a margin of error to account for any miscalculations, were sufficient to support a 9 percent allocation to the Railroads.

Tips for Practitioners After *Burlington Northern*

1. It is unclear how much *Burlington Northern* will change the divisibility landscape. Commentators have predicted

the changes will range from drastic to negligible. However, we will certainly see a revived interest in the divisibility defense as litigants argue the meaning of *Burlington Northern* in trial and appellate courts and raise the issue in consent decree negotiations with agencies.

2. Common factors used to establish a reasonable basis for apportioning liability include comparisons of: the area of ownership, the length of time a PRP owned or operated at the site, the volume of contamination a PRP contributed to the total contamination, and the relative toxicity of contaminants. Both the Supreme Court and Ninth Circuit held that several of these factors are relevant to the apportionment of liability. In its discussion of the trial record as to the District Court's third factor, the Court in *Burlington Northern* appears to conclude that two factors (proportional acreage and time of ownership) in combination with the margin of error would have been sufficient to support a reasonable basis to apportion. However, additional factors in the record would be helpful for persuading a trial court to apportion liability and for defending a good result on appeal.

3. Practitioners should retain an expert early on to develop scientific and/or technical bases for apportioning liability for the site in question. It may make sense to use a separate consulting expert to avoid issues of discoverability of a testifying expert's file. A testifying expert should develop models for apportioning liability at the site by comparative assessment of as many of the above factors as is appropriate and will have to defend the basis for divisibility on cross-examination. Although a testifying expert need only establish a reasonable basis for divisibility, the more persuasive the opinion, the better the chances of prevailing at trial and on appeal.

4. Practitioners should analyze the potential defense sooner rather than later, and press divisibility as early as possible in litigation and negotiations. A favorable ruling could alleviate the need for other stages in the litigation, including contribution actions.

5. The Court in *Burlington Northern* approved of the District Court's use of a margin of error to account for any miscalculation. The Court overlooked a slim record on the District Court's finding relating to the relative contributions of the chemicals at the site to the response costs, because the District Court accounted for possible miscalculation by including a 50 percent margin of error. While a small margin of error could translate into considerable expense at a complicated site, including such a "fudge factor" could increase the chances of prevailing on a divisibility defense and, depending on the site, might be less expensive than receiving an "orphan share" allocation. *

Endnotes

1 In addition to the ruling on divisibility, the Court also held that arranger liability under CERCLA requires intentional steps by a PRP to dispose of hazardous substances. Although not discussed here, that portion of the Court's decision should be considered when defending or prosecuting CERCLA claims based on arranger liability, or analogous state law claims such as under MTCA.

2 Divisibility and "apportionment" refer to the affirmative defense raised in an attempt to defeat the application of joint and several liability. Contribution and allocation refer to efforts by defendants who are jointly and severally liable to collect equitable shares from other jointly and severally liable defendants who have not paid their fair shares of the response costs.