Appraising the Apportionment Doctrine: Did the Supreme Court Switch the Tracks in *Burlington Northern*?

Thomas Braun*

The idea that an injured party is entitled to recover the full cost of her injury exists as an axiom in the American justice system. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides for such relief via a section 107 cost recovery action. In a section 107 cost recovery action, the plaintiff can impose joint and several liability for the entire cost of its cleanup on the defendant. This "polluter pays" scheme acts as the muscle in Congress' attempt to ensure that the ultimate responsibility for the cleanup of hazardous waste is placed on those responsible for the original contamination. For years, the courts strictly adhered to this scheme; that is, until the U.S. Supreme Court decided the Burlington Northern *case, wherein the Court appeared to lower the evidentiary bar that defendants must meet in order to qualify for the apportionment of costs. Legal commentators and scholars posit that this case will inevitably upset CERCLA's joint and several liability scheme and result in increased cases with leftover orphan shares. This article examines* Burlington Northern's *effect on the scheme in an effort to discover whether the case has indeed upset CERCLA's joint and several liability scheme.*

I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 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."[1] CERCLA provides a cause of action against liable

* Thomas Braun received his law degree from the University of Minnesota in 2012. He is a member of Stoel Rives, LLP's Litigation Group in Minneapolis, Minnesota and assists clients on a wide range of environmental, natural resources, and energy development issues.

[1] Burlington Northern and Santa Fe Railway Co. v. United States, 129 S.Ct 1870, 1874 (2009) (quoting Consolidated Edison Co. v. UGI Util. Inc., 423 F.3d 90, 94 (C.A.2 2005));. *See* Robert L. Bronston, Note, *The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste*, 93 Mich. L. Rev. 609, 609 (1994).

parties in order to recover cleanup costs incurred in remediating a contaminated site.[2] In addition, CERCLA allows parties found liable for cleanup costs to seek contribution from other liable parties.[3] The difference between a cost recovery action under section 107 and a contribution claim under section 113, is that in a section 107 cost recovery action a party can impose joint and several liability for the entire cost of its cleanup on the defendant.[4] This liability scheme is known as a "polluter pays" scheme, the goal of which is to "place the ultimate responsibility for the clean-up of hazardous waste on those responsible for problems caused by the disposal of chemical poison."[5] The U.S. Supreme Court recently decided a case that many scholars posited would greatly upset CERCLA's joint and several liability scheme by making it easier to divide and apportion liability between parties, which would result in the government picking up the tab for a higher proportion of remediation costs. This paper reviews the effect of *Burlington Northern and Santa Fe Railway Co. v. United States*[6] on this scheme and concludes that, although the Supreme Court's decision could result in an increase in defendants utilizing the theory of apportionment in order to pay a smaller share of the total remediation cost, the district courts have distinguished the case and continued to find joint and several liability. Part II of this paper explains the liability scheme set forth in CERCLA, including joint and several liability and potential defenses. Part III outlines divisibility and apportionment as an alternative to joint and several liability as it existed pre-*Burlington Northern* in addition to examining the *Burlington Northern* decision itself.

---

[2] 42 U.S.C. § 9607 (2008).
[3] *Id.* at § 9613(f).
[4] Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc., 191 F.3d 409, 415 (4th Cir.1999).
[5] Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990).
[6] *Burlington Northern*, 128 S.Ct. 1870 (2009).

Part IV theorizes the ways in which *Burlington Northern* could affect subsequent cases involving divisibility and apportionment. Part V analyzes post-*Burlington Northern* cases and explains how the district courts have distinguished *Burlington Northern* and continued to impose joint and several liability. Part VI concludes this paper.

II. CERCLA

In order for a plaintiff to establish CERCLA liability, he must prove four elements:

> (1) hazardous substances were disposed of at a "facility";
> (2) there has been a "release" or "threatened release" of hazardous substances from the facility into the environment;
> (3) the release or threatened release has required or will require the expenditure of "response costs" consistent with the National Contingency Plan; and
> (4) the defendant falls within one of four categories of responsible parties.[7]

Despite the numerous requirements to prove a prima facie case, perhaps the most important, and most often litigated, element is the establishment of the defendant as a potentially responsible party (PRP).

A. Joint and Several Liability

Under its "polluter pays" scheme, CERCLA imposes strict liability for environmental contamination on four categories of potentially responsible parties.[8] While CERCLA's text does not mention joint and several liability, the federal courts imposed the doctrine of joint and several based on the principles of the Restatement.[9] In fact, a reference to joint and several liability was removed from the bill, most likely to "avoid a mandatory legislative standard applicable in all situations which might produce

[7] 42 U.S.C. § 9607(a).
[8] Bronston, *supra* note 1, at 609.
[9] *See* 42 U.S.C. § 9607(a) (2010); *see also* In the Matter of Bell Petroleum, 3 F.3d 889, 894 (1993).

inequitable results in some cases."[10] This judicial determination came with the tacit approval of Congress in 1986, when CERCLA was assessed and amended by the Superfund Amendments and Reauthorization Act (SARA) and Congress declined to mandate joint and several liability.[11] However, during the debate on the bill, Representative John Dingell stated that nothing in the bill was intended to change the current scheme.[12] Under that scheme, the four categories of potentially responsible parties (PRP) are:

> (1) the owner and operator of a vessel or a facility;
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity, and containing such hazardous substances; and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.[13]

---

[10] United States v. Chem-Dyne Corp., 572 F. Supp. 802, 806, 808 (S.D. Ohio 1983).
[11] United States v. Brighton, 153 F.3d 307, 329 (6th Cir. 1998).
[12] *See* 132 Cong. Rec. 29,716, 29,737 (daily ed. Oct. 8, 1986) (statement of Representative Dingell, explaining that "nothing in this legislation is intended to change the application of the uniform Federal rule of joint and several liability enunciated in the Chem-Dyne case" and that "the standard of potentially responsible parties at Superfund sites is strict, joint and several, unless the responsible parties can demonstrate that the harm is divisible," and statement of Representative Glickman indicating that SARA follows the result in Chem-Dyne and "traditional and evolving principles of common law").
[13] 42 U.S.C. § 9607(a)(1)-(4) (2008).

Once a person or entity is found to be a PRP, he may be compelled to cleanup a contaminated site or reimburse another party who undertakes the action.[14] A PRP may be liable for these costs even if he is not at fault.[15] In addition, the statutes of limitations on these claims do not begin to run until response actions are underway, thus rendering parties potentially liable for contamination that occurred decades in the past.[16]

B. DEFENSES TO LIABILITY UNDER CERCLA

The heavy consequences of liability under CERCLA provide a strong incentive for parties to try and avoid liability; however, CERCLA includes few defenses. The original legislation included only limited defenses; that is, that a PRP may escape liability if he can prove that the disposal of a hazardous substance was caused by an act of God, by war, by a third party other than an employee or agent of the defendant, or one whose act or omission occurs in connection with a contractual relationship with the defendant, or by some combination thereof.[17] In 1986, however, SARA added another defense - the innocent purchaser defense.[18] SARA amended the definition of "contractual relationship" in § 9607(b) to exclude contracts for the acquisition of real property where the buyer can establish that (a) it acquired the property after the

---

[14] Cooper Industries, Inc. v. Aviall Services Inc., 543 U.S. 157, 161 (2004).

[15] The statute adopts the strict liability standard of 33 U.S.C. §1321, the Clean Water Act. 42 U.S.C. § 9601(32). *See* New York v. Shore Realty Corp., 759 F.2d 1042 (2d Cir. 1985).

[16] 42 U.S.C. §9613(g) (2008).

[17] *Id.* at § 9607(b)(1)-(4).

[18] Eva Fromm O'Brien & Carol R. Boman, *The Due Diligence Dilemma: How Much is Enough?*, 3 A.B.A. SEC. ENV'T, ENERGY, & RESOURCES L. 155, 155 (2004). Innocence was not a defense until the SARA in 1986. *See* Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Prot., 474 U.S. 494 (3d Cir.1986); Phila. Elec. Co. v. Hercules, 762 F.2d 303 (3d Cir.1985).

hazardous substance release occurred and (b) before the acquisition, it had no knowledge and no reason to know of the contamination.[19]

More recently, the bona fide prospective purchaser defense is available to purchasers who bought property after the adoption of the Small Business Liability Relief and Brownfields Revitalization Act in 2002.[20] Congress inserted this defense because at the time of its adoption, numerous brownfields remained vacant because potential buyers feared acquiring liability under CERCLA along with the property.[21] The innocent purchaser defense did not protect a knowing buyer of a contaminated brownfield site.[22] The bona fide prospective purchaser defense protects a purchaser who acquired contaminated property after the January 11, 2002 enactment of the law and who can prove:

> VI. All disposal of hazardous substances occurred prior to that purchaser's acquisition of the property;
> VII. Prior to acquiring the property the purchaser made "all appropriate inquiries" about the ownership and uses of the property in accordance with "generally accepted good commercial and customary standards;"
> VIII. The purchaser provided all legally required notices with respect to the discovery or release of hazardous substances at the facility;
> IX. The purchaser exercised appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to: (1) stop continuing releases; (2) prevent any threatened future release; and (3) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances;
> X. The purchaser provided full cooperation, assistance, and access to governmental or private parties authorized to perform response actions or natural resource restoration at the facility;
> XI. The purchaser complied with any land-use restrictions established or relied on in connection with a response action, and does not impede the effectiveness of any institutional controls;

---

[19] *Id.*
[20] 42 U.S.C. § 9601(40) (2008).
[21] David B. Hird, *Federal Brownfields Legislation*, 3 A.B.A. SEC. ENV'T, ENERGY, & RESOURCES L. 40, 43 (2010).
[22] *Id.* (citing 42 U.S.C. §§ 9601(40), 9607(r)(1)).

XII. The purchaser complied with any government request for information or subpoena issued under CERCLA; and
XIII. The purchaser has no corporate affiliation or family relationship with another person who would otherwise be liable.[23]

III. Divisibility and Apportionment as an Alternative

As mentioned above, PRPs can be held jointly and severally liable for the entire cost of the environmental cleanup. In addition to the aforementioned defenses, PRPs can avoid joint and several liability by arguing for apportioned liability.

A. Pre-Burlington Northern Apportionment/Divisibility

In pre-Burlington cases, apportionment of a single harm was only held appropriate in a few, isolated instances.[24] The ad hoc approach to the evaluation of apportionment claims was unified for the first time in *United States v. Chem-Dyne Corp*.[25]

1. *United States v. Chem-Dyne, Corp.*

In this case, the United States sued 24 defendants under arranger and transporter liability for the reimbursement of the superfund money used to remediate the site.[26] The United States alleged that the defendants were jointly and severally liable.[27] The defendants, however, moved for partial summary judgment on the grounds that

---

[23] *Id.*
[24] *See* In re Bell Petroleum Servs., Inc., 3 F.3d 889, 894 (5th Cir. 1993); Coeur d'Alene Tribe v. Asarco, Inc., 280 F. Supp. 2d 1094, 1120 (D. Idaho 2003); United States v. Broderick Inv. Co., 862 F. Supp. 272, 276 (D. Colo. 1994); Hatco Corp. v. W.R. Grace & Co., 836 F. Supp. 1049, 1087-88 (D.N.J. 1993); rev'd on other grounds, 59 F.3d 400 (3d Cir. 1995).
[25] United States v. Chem-Dyne Corp, 572 F. Supp. 802. (S.D. Ohio 1983).
[26] *Id.* at 804.
[27] *Id.*

they were not jointly and severally liable for the cleanup costs.[28] In writing for the court, Chief Judge Rubin observed that the determination of joint and several liability under § 9607 of CERCLA was a matter of first impression in both the Southern District of Ohio and the federal courts as a whole.[29]

The court first examined the language of CERCLA itself.[30] The court noted that CERCLA defines liability by referencing the Federal Water Pollution Control Act (FWPCA). The pertinent language in the FWPCA provides that "when the owner or operator of a vessel from which oil or hazardous substances is discharged in violation of § 1321(b)(3), he shall be liable to the United States Government for the actual costs ... 33 U.S.C. § 1321(f)(1)."[31] The United States argued that this language clearly imposed joint and several liability, but the court found the language ambiguous.[32] Therefore, the court found it necessary to examine the legislative history of the act to determine Congress' intent.[33]

The court stated that CERCLA was enacted for two purposes: (1) to provide quick responses to the nationwide threats posed by improperly managed hazardous waste sites, and (2) to induce voluntary responses to those sites.[34] These purposes are accomplished by establishing a superfund to finance cleanup and containment actions.[35] After expending these funds, the state or federal government may pursue

---

[28] *Id.*
[29] *Id.*
[30] *Chem-Dyne Corp.*, 572 F. Supp. at 805 (citing Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983)).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

recovery of the costs from persons responsible for the contamination.[36] The court observed, though, that the recovery task often proves difficult when "several companies used a site, when dumped chemicals react with others to form new or more toxic substances, or when records are unavailable."[37] Despite this difficulty, the court found that those who were responsible for the problems caused by environmental contamination were intended to bear the cost for remedying the property.[38]

When determining legislative intent, the court looked to the final bills working their way through the House and Senate.[39] The court noted that the Senate made a final amendment shortly before enactment that eliminated the term "strict, joint and several liability" from the bill.[40] Similarly, the House struck the language in its bill and adopted the language of the Senate bill, which was later enacted.[41] The court then examined the congressional record for statements from supporters and detractors on the effect of the amendment. The defendants pointed to Senator Helm's remarks in opposition; however, the court noted, that because Senator Helms was an opponent of the bill, his statements are entitled to little weight.[42] In contrast, the statements of supporters were given substantial weight.[43] Based on the supporters' statements, the court found that "[t]he fact that the term joint and several liability was deleted from a prior draft of the bill or that the term liability refers to the standard under 33 U.S.C. § 1321, in and of itself, is

---

[36] *Id.*
[37] *Id.* at 805-06.
[38] *Id.* at 806.
[39] *Id.*
[40] *Chem-Dyne Corp.*, 572 F. Supp. at 806 (citing 126 Cong.Rec. S14,964 (Nov. 24, 1980)).
[41] *Id.*
[42] *Id.*
[43] *Id.*

not dispositive of the scope of liability under CERCLA"[44] despite the theory that when Congress deletes specific language from a bill it "strongly militates against a judgment that Congress intended a result that it expressly declined to enact."[45] The court said that this instance is an exceptional situation because:

> A reading of the entire legislative history in context reveals that the scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases.[46] The deletion was not intended as a rejection of joint and several liability.[47] Rather, the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.[48]

Next, the court considered whether state or federal common law should determine the scope of liability.[49] The court decided that in the instant case the *Erie* doctrine did not compel the application of state law because it falls within the exception provided for federal laws.[50] Although the federal courts are prohibited from creating federal general common law under *Erie*, the court came to this conclusion because the federal courts retain the power to create "federal specialized common law when it is 'necessary to protect uniquely federal

---

[44] *Id.* at 807-08 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 382 n. 11 (1969)).
[45] Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974).
[46] 126 Cong.Rec. at S14,964, S15,004, H11,787, H11,799; 126 Cong.Rec. H9465 (Sept. 23, 1980) (remarks of Rep. Madigan), H9466 (remarks of Rep. Stockman).
[47] 126 Cong.Rec. S14,964, H11,787, H11,799 (Nov. 24, 1980).
[48] *Chem-Dyne Corp.*, 572 F. Supp. at 808.
[49] *Id.*
[50] *Id.* (citing 28 U.S.C. § 1652 (1948); Erie v. Tompkins, 304 U.S. 64 (1938)).

interests.'"[51] The contamination of property by hazardous substances is a uniquely federal interest because (1) the typical contaminated property contains waste generated from multiple companies located in several states, (2) the pollution from contaminated properties creates potential interstate problems, (3) CERCLA was enacted because of a lackluster response by states to the hazardous waste problem, (4) CERCLA's subject matter is such that national uniformity is critical, and (5) the superfund itself is funded by the revenues and taxes of the United States.[52]

The last step in the court's examination was to define the content of the federal common law rule of liability to apply in the case.[53] The court first considered the scope of liability under § 1321 of the FWCPA because the statute's subject matter is similar to that of CERCLA.[54] Under § 1321, the owner or operator of a vessel that discharges oil or hazardous substances may be jointly and severally liable for the cost of cleaning up the contamination.[55] However, the court distinguished the statutes because Congress, in enacting CERCLA, had not intended a "blanket adoption" of joint and several liability like it had in the FWCPA.[56]

After dispensing with the scope of liability from the FWCPA, the court examined three principles of common law it believed were applicable when multiple parties contributed to a single harm: (1) "when two or more persons acting independently

---

[51] *Id.* (citing Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).
[52] *Id.* at 808-09.
[53] *Chem-Dyne Corp.*, 572 F. Supp. at 809.
[54] *Id.*
[55] Federa; Water Pollution Control Act, 33 U.S.C. § 1321(b)(2)(B)(ii) (2006).
[56] *Chem-Dyne Corp.*, 572 F. Supp. at 810.

caused 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,"[57] (2) "where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm,"[58] and (3) "where the conduct of two or more persons liable under §9607 ha[ve] combined to violate the statute, and one or more of the defendants seeks to limit his liability on the ground that the entire harm is capable of apportionment, the burden of proof as to apportionment is upon each defendant."[59] The court found these rules to clearly enumerate the necessary analysis when determining liability under §9607 because they properly advance CERCLA's policies and objectives.[60]

After the aforementioned analysis of apportionment under CERCLA, the court applied the reasoning to the case before it. The defendants argued that, because CERCLA does not expressly provide for joint and several liability, there is no basis for imposing such liability on them.[61] The court disagreed and continued with its determination on the motion for summary judgment.[62] The court held that the defendants had not met their burden of showing that the harm was divisible and the extent to which each party was liable.[63] Thus, because the issues of material fact still existed, the court refused to grant summary judgment.[64]

---

[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 811.
[64] *Id.*

Overall, in *Chem-Dyne* the United States District Court for the Southern District of Ohio established the rule that multiple defendants, potentially liable under CERCLA for the cost of an environmental cleanup, could be held jointly and severally liable. In addition, the court in *Chem-Dyne* settled on the Second Restatement of Torts as the rule interpreting joint and several liability under CERCLA.

2. Restatement (Second) of Torts

The Restatement (Second) of Torts § 433A states:

> (1) damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm; (2) damages for any other harm cannot be apportioned among two or more causes.[65]

Following the *Chem-Dyne* decision, federal courts have held that apportionment of harm is proper when "there is a reasonable basis for determining the contribution of each cause to a single harm."[66] Despite its seemingly innocuous character, defining the phrase "reasonable basis" has been difficult for the courts. *Burlington Northern* is the most recent case to address what constitutes a "reasonable basis" for apportioning costs.

3. *Burlington Northern v. United States*

In 1960, Brown & Bryant (B&B), a chemical distribution company, began work on a 3.9-acre parcel of former farmland in Arvin, California.[67] B&B later expanded its operations onto an adjacent .9-acre parcel of land owned jointly with Burlington

---

[65] Restatement (Second) of Torts, § 433A (1976).
[66] Restatement (Second) of Torts § 433A(1)(b) (1977).
[67] Burlington Northern and Santa Fe Railway Co. v. United States, 129 S. Ct. 1870, 1874 (2009).

Northern, a railroad company.[68] During its years of operation, B&B purchased chemicals and when they would arrive, the product was transferred from tanker trucks to bulk storage tanks located on B&B's primary parcel.[69] During these transfers leaks would occur, causing the chemicals to spill onto the ground.[70] In 1983, The California Department of Toxic Substances Control (DTSC) and the U.S. Environmental Protection Agency (EPA) started investigating B&B's alleged violation of hazardous waste laws and discovered significant contamination of soil and ground water.[71] B&B began some efforts at remediation, but by 1989 the company had become insolvent and ceased all operations.[72] At this time the Arvin facility was added to the National Priority list and DTSC and EPA exercised their authority to undertake cleanup efforts at the site.[73]

In 1991, EPA issued an administrative order to Burlington Northern directing them, as owners of the .9-acre portion of the B&B site, to perform some remedial tasks.[74] The railroad did so and subsequently sought to recover some of the more than $3 million it had spent in response costs.[75] In 1992, the railroad brought suit against B&B in the U.S. District Court for the Eastern District of California.[76] The lawsuit was consolidated with two other recovery actions initiated by DTSC and EPA against the railroad and Shell, who had sold the chemicals to B&B.[77]

---

[68] *Id.*
[69] *Id.* at 1875.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 1876.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

a) UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

The district court eventually entered a judgment in favor of the DTSC and EPA, holding that both Burlington Northern and Shell were PRPs.[78] Despite finding both Burlington Northern and Shell liable, the district court did not impose joint and several liability for the entire response cost incurred by DTSC and EPA on the parties because the court found that the contamination at the site created a single harm but the single harm was divisible and therefore capable of apportionment.[79] The district court apportioned Burlington Northern's liability as 9% of DTSC and EPA's total response cost based on:

> the percentage of the total area of the facility that was owned by the Railroads, the duration of B & B's business divided by the term of the Railroads' lease, and the Court's determination that only two of three polluting chemicals spilled on the leased parcel required remediation and that those two chemicals were responsible for roughly two-thirds of the overall site contamination requiring remediation.[80]

b) NINTH CIRCUIT COURT OF APPEALS

Following the district court's decision, DTSC and EPA appealed. The court of appeals held that there was no dispute on the question of whether the harm caused by Shell and Burlington Northern was capable of apportionment.[81] Based on the fact that some of the site contamination occurred before Burlington Northern's .9-acre parcel became part of the facility, not all of the hazardous substances were stored on Burlington Northern's parcel, and only some water washed over Burlington Northern's

---

[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* at 1877.

site, the court concluded that the contamination caused by Burlington Northern, with adequate information, would be allocable, as would the cost of the cleanup.[82] Despite this conclusion, the court of appeals held that the district court erred in finding that the record established a reasonable basis for apportionment.[83] The court of appeals stated that the burden of proof on the question of apportionment rested with the PRPs and therefore held Shell and Burlington Northern joint and severally liable for the entire cost of DTSC and EPA's cleanup.[84]

c) U.S. SUPREME COURT

In addressing the issue of apportionment, the U.S. Supreme Court noted that neither party nor the lower courts disputed that CERCLA cases are capable of apportionment when two independently acting parties cause a single divisible harm and there is a reasonable basis on which to apportion each party's liability contribution.[85] The Court stated that the "question then is whether the record provided a reasonable basis for the District Court's conclusion that [Burlington Northern was] liable for only 9% of the harm caused by contamination at the Arvin facility."[86]

Despite some criticisms from the lower courts, the Supreme Court concluded that record reasonably supported the apportionment of liability.[87] The Court based its decision on the fact that the district court's findings made it "abundantly clear" that the primary pollution at the facility was located in the part farthest away from Burlington Northern's .9-acre parcel and that the spills that actually occurred on Burlington

---

[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 1881.
[86] *Id.*
[87] *Id.* at 1882-83.

Northern's parcel contributed, at most, 10% of the total site contamination.[88] The Court also stated that although the court of appeals faulted the district court for relying on the percentages of land area, time of ownership, and types of hazardous products, these were the same aspects that the court had earlier acknowledged were relevant to the apportionment inquiry.[89]

Lastly, the Court found the district court's conclusion that Nemagon and Dinoseb accounted for only two-thirds of the contamination that required remediation was problematic.[90] The Court overlooked this, however, because the Court believed any miscalculation by district court was harmless in light of the amount of liability ultimately imposed on Burlington Northern, which included a 50% margin of error equal to the 3% reduction in liability the district court administered based on its assessment of the Nemagon and Dinoseb contamination.[91] Therefore, because the 3% reduction in liability led to the appropriate allocation of liability, the result was supported by the evidence and comports with the Court's apportionment principles.[92] Thus, the Court reversed the court of appeals and held that the district court reasonably apportioned Burlington Northern's share of the site remediation costs.[93]

IV. APPORTIONMENT POST-*BURLINGTON NORTHERN*

Prior to *Burlington Northern*, the courts acted on the notion that CERCLA intended to impose strict liability to provide an incentive for better hazardous waste

---

[88] *Id.* at 1883.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.* at 1884.

disposal practices and to ensure that polluters paid for past contamination.[94] The case may prove to be the catalyst for a sea change moment in CERCLA jurisprudence because of: (1) the way in which the Supreme Court lowered the evidentiary bar necessary to show a reasonable basis for apportionment and (2) the resultant expansion in the number of situations in which apportionment will provide a meaningful opportunity for PRPs to avoid joint and several liability.

A. LOWERING THE EVIDENTIARY BAR

In *Burlington Northern*, the Supreme Court lowered the evidentiary bar that is necessary to show a reasonable basis for apportionment in numerous ways. First, the Supreme Court overruled the Ninth Circuit and accepted the district court's holding that because most of the contamination came from B&B's main site, rather than Burlington's .9-acre parcel, and Burlington only leased the land to B&B for a short period of time, Burlington should not be held jointly and severally liable. The Ninth Circuit had rightly criticized the district court's reliance on "the simplest of considerations."[95] The Third Circuit, in *United States v. Rohm and Haas Co.*,[96] had already held that "simply showing that one owns only a portion of the facility is [not] sufficient to warrant apportionment."[97] This case exemplifies the hesitancy in the courts to apportion landowner liability based on land boundaries. The amount of land and a parcel's boundaries do not provide a

---

[94] David Terry, *Burlington Northern & Santa Fe Railway Co. v. United States: Receding the Scope of CERCLA Liability*, 5 ENVT'L & ENERGY L. & POL'Y J. 158, 164 (2010).
[95] United States v. Burlington Northern & Santa Fe Ry. Co., 520 F.3d 918, 943 (2007).
[96] United States v. Rohm & Haas Co., 2 F.3d 1265 (3d Cir. 1993).
[97] *Id.* at 1280.

sufficiently reliable basis for tracing the proportion of cause and contents of a spill, and the Supreme Court should have recognized and followed the Third Circuit's precedent.

In addition, the Supreme Court's acceptance of the district court's calculation of liability based on land boundaries was flawed because the operations on the site were never limited to one area; contaminants were stored on every part of the parcel. Thus, it would be more pertinent to examine the proportion of the amount of chemicals stored on each parcel. The simple calculation of proportion of land ownership does not adequately reflect the complexity of all the moving parts on a parcel like that in *Burlington Northern*.

Second, the Supreme Court lowered the evidentiary bar by allowing the district court to apportion liability based on the length of the period of ownership. This is illogical because the length of the period of ownership does not correspond to the harms present in this type of case. The district court used a simple fraction based on the time that Burlington Northern jointly owned the .9-acre parcel with B&B. That fraction assumes there was a steady rate of contamination throughout that time period even though none of that information was in the record. If this information were available, it would be easy to assess the amount of time Burlington Northern could possibly be implicated with B&B based on joint ownership. However, when the Supreme Court accepted the use of this fraction as a part of the calculation of liability without adequate evidence regarding the rate of contamination, it lowered the evidentiary bar defendants must meet in order to prove a reasonable basis for apportionment.

It is generally accepted that the *Chem-Dyne* court created an extremely strong presumption against divisibility. However, even those cases that occurred after *Chem-*

Dyne, which began to back off from the strong presumption, required a much more sophisticated level of evidence than the Supreme Court required in *Burlington Northern*. For example, the U.S. District Court for the District of South Carolina required a more sophisticated level of evidence in *United States v. South Carolina Recycling and Disposal, Inc.*[98] In this case, the court found no reasonable basis for apportionment because "[t]here were thousands of corroded, leaking drums at the site not segregated by source or waste type," and "[u]nknown, incompatible materials comingled [sic] to cause fires, fumes, and explosions."[99] Therefore, it was "impossible to divide the harm in any meaningful way."[100] The court even went so far as to reject apportionment based on the volumetric contributions listed in shipping documents.[101] The Fourth Circuit affirmed the district court's holding in *United States v. Monsanto*.[102] The Fourth Circuit agreed that there was no reasonable basis for apportionment based on volumetric contributions where the PRPs "presented no evidence . . . showing a relationship between waste volume, the release of hazardous substances, and the harm at the site."[103]

As evidenced by prior case law, the *Burlington Northern* Court's acceptance of the district court's use of simple calculations and the district court's failure to develop a sufficient record starkly contrasts the standard developed since *Chem-Dyne*. Because

---

[98] United States v. South Carolina Recycling & Disposal, Inc., 653 F.Supp 984 (1986).
[99] *Id.* at 944.
[100] *Id.*
[101] *See id.*
[102] United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988).
[103] *Id.* at 172.

of this, the evidentiary bar necessary to establish a reasonable basis for apportionment sits much lower post-*Burlington Northern*.

B. Apportionment as an Opportunity to Avoid Joint and Several Liability

As a result of the lower evidentiary bar necessary to establish a reasonable basis for the apportionment of cleanup costs, the goals of CERCLA may be compromised because: (1) PRPs have been provided a greater opportunity to avoid joint and several liability through arguing for the apportionment of costs, which leads to a decrease in the availability of funds to finance future cleanups, (2) PRPs have less incentive to settle, (3) PRPs are signaled that other defenses to CERCLA liability may be available, and (4) PRPs have less incentive to protect against contamination.

1. Greater Incentive to Argue for Apportionment of Costs

The Supreme Court's decision in *Burlington Northern* provides PRPs with a greater opportunity to avoid joint and several liability. This is counter to CERCLA's stated intent: "to place the cost of remediation on persons whose activities contributed to the contamination rather than on the taxpaying public."[104] As the Ninth Circuit said in its opinion in *Burlington Northern*:

> Joint and several liability, even for PRPs with a minor connection to the contaminated facility, is the norm, designed to assure, as far as possible, that some entity with connection to the contamination picks up the tab. Apportionment is the exception, available only in those circumstances in which adequate records *were* kept and the harm *is* meaningfully divisible.[105]

---

[104] Burlington Northern & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1885 (2009) (Ginsburg, J., dissenting).

[105] United States v. Burlington Northern & Santa Fe Ry. Co., 520 F.3d 918, 945-46 (2007) (emphasis in original).

As the Ninth Circuit stated, CERCLA's scheme is to ensure that the government is the first to recover the full costs of response from any *potentially* responsible party so that the government may continue to fund the remediation of contaminated property.[106] The disputes over the percentage of liability to each party would then be left for contribution actions under § 113.[107] This scheme is even more important in cases where some PRPs are insolvent, unavailable, or have an affirmative defense to liability. In these cases, if harm were apportioned, the government would have to bear the response costs attributable to those PRPs. The more the government must argue against apportionment in lieu of seeking joint and severability, the greater the possibility the government will not recover the full cost of the cleanup. This, in turn, depletes the funds available to the government to continue to pursue the cleanup of contaminated sites. The possibility of not recovering the full amount of the response costs is especially glaring in the face of the expiration in 1995 of the tax on the petroleum and chemical companies that had previously provided for the Superfund.[108] Without the replenishment of Superfund monies from PRPs, the EPA would have to rely on general appropriations from Congress, an uncertain source at best.

2. LESS INCENTIVE TO SETTLE

One of the biggest benefits of CERCLA's liability scheme is the threat of joint and several liability. Indeed, some scholars suggest that the threat of joint and several

---

[106] *See* United States v. Kramer, 953 F. Supp. 592, 614 (D.N.J. 1997).
[107] United States v. Alcan Aluminum Corp., 964 F.2d 252, 263-64 (3d Cir. 1992).
[108] *See* U.S. Gen. Acct. Office, GAO-03-850, Superfund Program Current Status and Future Fiscal Challenges 2 (2003).

liability is "indispensible to CERCLA's successful operation."[109] In response to contamination, CERCLA provides the EPA with three response options: (1) the EPA can cleanup the site and then institute cost recovery actions; (2) the EPA can order the PRP(s) to cleanup the site; and (3) the EPA can induce a settlement with or between PRPs.[110] Without cooperation from PRPs in the form of orders or settlements, the EPA would be forced to remediate the contaminated sites itself; something it does not have the funding to do. Congress recognized the importance of negotiated cleanups, both between PRPs and between the government and PRPs, when it included the settlement provisions in the Superfund Amendments and Reauthorization Act (SARA) of 1986.[111] The Report of the House Committee on Energy and Commerce stated:

> This section established a series of provisions designed to encourage and facilitate negotiated private party cleanup of hazardous substances in those situations where negotiations have a realistic chance of success. The Committee believes that encouraging such negotiated cleanups will accelerate the rate of cleanup and reduce its expense by tapping the technical and financial resources of the private sector.[112]

Congress followed through on this intention by including § 113(f), which allows the EPA to offer rewards to PRPs who settle.[113] Section 113(f)(2) rewards PRPs who settle by prohibiting another party from seeking contribution from them.[114] Furthermore, § 113(f)(2) also provides that a settlement "does not discharge any of the other potentially

---

[109] John M. Hyson, *"Fairness" and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA*, 21 HARV. ENVTL. L. REV. 137, 144 (1997).
[110] *Id.* at 144-45.
[111] *Id.* at n. 31.
[112] H.R. Rep. No. 99-253, pt. 1 at 100 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2882.
[113] *See* 42 U.S.C. § 9613(f)(2) (2010).
[114] *Id.*

liable persons unless its terms so provide, but it reduces the potential liability of the other by the amount of the settlement."[115] Thus, this section gives the EPA authority to settle with cooperating PRPs for less than the amount of their liability, while also insulating them from contribution claims from other PRPs who may face disproportionate liability.

For these settlements to be successful, the EPA must have the threat of joint and several liability at its disposal; for only when the stakes of litigation are high will PRPs look to avoid litigation.[116] When CERCLA works most effectively, the EPA is able to settle with PRPs in all three situations, thus avoiding lengthy and costly litigation that takes more Superfund money away from remediating contaminated sites. For this reason, it must be clear to PRPs that if they choose to challenge their joint and several liability, they will lose.

3. New Defenses to Joint and Several Liability

One of the unforeseeable consequences of apportioned liability is the signal it sends to PRPs; that is, it may be advantageous to challenge joint and several liability under CERCLA because there is no longer a strong presumption in favor of it. One potential way in which this may come to fruition is through the invocation of apportionment as a defense to a unilateral administrative order (UAO). Section 106 states that a PRP can avoid complying with a UAO if he has "sufficient cause."[117] While apportionment has been considered as a defense in § 107 cost recovery actions, it has not been tested in the courts as a defense against a UAO.

---

[115] *Id.*

[116] The average cost of Superfund litigation has been calculated at $30 million, although other estimations go as high as $50 million. *See* Hyson, *supra* note 110 at 32.

[117] 42 U.S.C. §9606(b)(1) (2010).

The general standard for "sufficient cause" is that the party receiving the UAO must have a good faith belief that: (1) the party is not a liable party under CERCLA; (2) the government's order is inconsistent with the National Contingency Plan; and (3) the EPA's actions in issuing the order are arbitrary and capricious.[118] Based on the Supreme Court's expansive reading of apportionment in *Burlington Northern*, a case in which the PRP had a sufficiently strong argument for apportionment could give the PRP an objectively reasonable belief that he is not liable under CERCLA for some or all of the cleanup that he is being asked to fund. The PRP may then choose to not comply with the UAO based on his idea of "sufficient cause." Such a situation appears to have been considered by Congress during discussion of the CERCLA bill. Senator Robert Stafford (R-Vt.) said:

> We intend that the phrase "sufficient cause" would encompass defenses such as the defense that the person who was the subject of the order was not the party responsible under the act for the release of the hazardous substance. It would certainly be unfair to assess punitive damages against a party who for good reason believed himself not to be the responsible party. For example, if there were, at the time of the order, substantial facts in question, or if the party subject to the order was not a substantial contributor to the release or the threatened release, no [sic] punitive damages should either not be assessed or should be reduced in the interest of the equity.[119]

Based on these comments, a small PRP may be able to avoid any CERCLA liability in a case where his contribution to the contamination is minimal compared to the whole.

Lastly, why would the courts allow PRPs to escape joint and several liability by invocation of an apportionment defense if the EPA could turn around and secure the

---

[118] *See* General Elec. Co. v. Jackson, 595 F. Supp. 2d 8 (D.D.C. 2009).
[119] 126 Cong. Rec. 30,986 (Nov. 24, 1980).

same result using a UAO? This could be a great development for PRPs, as the penalties for non-compliance include treble damages and a $25,000 fine per day.[120]

4. LESS DISINCENTIVE TO POLLUTE

Similar to the reasoning behind the incentive to settle, CERCLA's joint and several liability scheme provides a great incentive for companies to follow safe practices with their hazardous substances so as to avoid contamination and the resultant cost of remediation. With the potential for liability for the entire cost of a site remediation, companies will be more likely to develop procedures for dealing with hazardous substances (before and after contamination), train staff in the handling and disposal of hazardous substances, and cooperate with the EPA in order to avoid disproportionate liability.[121]

Overall, when the *Burlington Northern* court lowered the evidentiary bar necessary to show a reasonable basis for apportionment, it increased the likelihood that PRPs will argue apportionment as a defense to joint and several liability. This will negatively affect the CERCLA scheme as a whole by increasing the amount of funds expended on litigation, providing a disincentive to settle, and creating an incentive to challenge joint and several liability in other areas. Despite the *Burlington Northern* court potentially upsetting CERCLA's joint and several liability scheme, the district courts have held the line by distinguishing the case and continuing to impose joint and several liability.

---

[120] *Id.*

[121] Lauren Stiller Rikleen, *Negotiating Superfund Settlement Agreements*, 10 B.C. ENVTL. AFF. L. REV. 697, 697-98 (1983).

V. RECENT DEVELOPMENTS

Since the Court's decision in *Burlington Northern*, it appears that the lower courts are holding the line and refusing to apportion liability in such a way that the full cost of remediation is collected and orphan shares are not left behind to be added to the government's tab. For example, in *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*,[122] the U.S. District Court for the District of South Carolina held that liability for the cost of remediation at the contaminated site was not divisible.[123] In asking for reconsideration, PCS argued that the court's ruling was contrary to the Supreme Court's analysis in *Burlington Northern*.[124]

PCS contended that the holding in *Burlington Northern* "cannot be separated from the facts of the case, which demonstrate 'beyond question' that only a 'rough calculation' is needed to prove divisibility."[125] While agreeing "with the basic premise that a rough calculation is all that is required to prove divisibility,"[126] the court stated that such a premise is only acceptable "so long as any rough calculation is a reasonable basis for apportioning harm."[127] The court concluded that PCS's rough calculation did not constitute a reasonable basis for apportioning harm because it only took into account the volume of contaminants released.[128] While PCS argued that this was exactly what the Supreme Court considered a reasonable basis for apportionment in *Burlington Northern*, the court in the instant case distinguished *Burlington Northern*

---

[122] Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 2011 WL 2119234 (D.S.C. May 27, 2011).
[123] *Id.*
[124] *Id.* at 8.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*

based on the fact that "the record in this case makes clear that the spread of contamination through earth moving activities was a significant factor affecting the cost of the remediation while in *Burlington Northern*, there was no evidence that earth moving activities had significantly contributed to the extent of the contamination."[129] Therefore, because PCS did not consider the full range of factors contributing to the cost of remediation at the contaminated site, it did not advance a rough calculation that provided a reasonable basis for apportionment.[130]

Similarly, in *3000 E. Imperial LLC v. Robertshaw Controls Co*.,[131] the court held that the defendant did not meet its burden of proving that harm was divisible and capable of apportionment.[132] In this case, the court reiterated that to prove harm is divisible and capable of apportionment, a defendant must do two things: (1) "identify and prove some definite proportion which can be used to apportion liability"[133] and (2) "provide evidence supporting a relationship between the proportion it has proposed and the amount of harm that is attributable to the defendant."[134] In this case, the defendant proposed two figures in an effort to establish that the harm was divisible:" the relative sizes of Area 1 and Area 2, and the number of years it owned the land."[135] The defendant correctly pointed out that these were the same figures the Supreme Court used to find the harm divisible in *Burlington Northern*.[136] However, the court distinguished *Burlington Northern* from the case at hand. The court stated that

---

[129] *Id.*
[130] *Id.*
[131] 3000 E. Imperial, LLC v. Robertshaw Controls Co., 2010 WL 5464296 (C.D. Cal. Dec. 29, 2010).
[132] *Id.*
[133] *Id.* at 9.
[134] *Id.*
[135] *Id.* at 10.
[136] *Id.*

"*Burlington* did not relieve Defendant from supporting its divisibility arguments with evidence that these figures bear a relationship to amount of harm it caused."[137] Rather, "the facts and reasoning of *Burlington* demonstrate that the Court was concerned with finding evidence to support a relationship between these figures and the amount of harm caused by the defendants . . . ."[138] The defendant first proposed using the sizes of Area 1 and Area 2 (the defendant's piece) as a basis for divisibility, which comprise 55% and 45% of the contaminated area respectively.[139] Based on these figures, the defendant argued that its liability should be limited to 45%, since there was no evidence the contaminants had been used on its piece.[140] The court disagreed, however, and found that unlike in *Burlington*, where the evidence showed the defendant's use of the land only contributed a small portion of the contamination, there was no evidence indicating defendant's proportion of the contamination in Area 2 relative to the other parties.[141]

The defendant in this case also advocated using the number of years of its ownership as a basis for apportioning liability.[142] The tanks that were leaking contamination in this case were in the ground for 67 years.[143] Based on defendant's eight years of ownership, it argued its liability should be apportioned by 12%.[144] The court agreed such an apportionment might be reasonable provided there was some

---

137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id* at 11.
143 *Id.*
144 *Id.*

evidence the tanks leaked at a constant rate for the 67 years they were in the ground.[145] Since there was no evidence this was the case, the court could not find that defendant was entitled to divisibility.[146] Because of the lack of evidence to substantiate defendant's two figures on which it bases divisibility, the court concluded the requisite relationship between the proposed figures and the amount of harm caused by the defendant was lacking in the defendant's argument.[147]

As these cases show, despite the Supreme Court lowering the evidentiary bar for showing a reasonable basis for apportionment and increasing the opportunities to avoid joint and several liability, the district courts have so far been hesitant to apply the principles of *Burlington Northern* that would eviscerate the ability of CERCLA to continue to reclaim the full cost of remediation. Rather than bowing to the Court's assertion that only a "rough calculation" is needed to prove divisibility, the district courts have made sure that PRPs prove the relationship between their figures alleging divisibility and the amount of harm caused by the defendants. Whether this trend will continue once these issues reach the higher courts is unclear but the decisions will be integral to the future viability of CERCLA.

VI. Conclusion

Overall, in *Burlington Northern* the Supreme Court lowered the evidentiary bar that PRPs must hurdle in order to prove divisibility and apportionment are proper. In addition, the Court indicated divisibility and apportionment is a viable alternative to joint and several liability, a dangerous proposition for those concerned about the long term

---

145 *Id.*
146 *Id.*
147 *Id.*

viability of CERCLA. Despite these principles set forth by the Court in *Burlington Northern*, the district courts have thus far distinguished the case in an effort to preserve CERCLA's joint and several liability scheme and the long-term viability of the law.