



Engineering Sciences Section - 2012

C6 Apportionment of CERCLA Liability - A Case Study

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After attending this presentation, attendees will understand how CERCLA liability was apportioned following trial in one case, in a decision affirmed by the U.S. Supreme Court, as well as the implications of that case for demonstrating a reasonable basis for apportionment.

This presentation will impact the forensic science community by illustrating how relevant data are used by the courts.

Burlington Northern v. United States, 129 S.Ct. 1870 (2009), was the first CERCLA action in which a district court determined the degree to which different parties contributed to the contamination at a site and apportioned liability accordingly.

In 1960, Brown & Bryant (B&B) opened an agricultural chemical facility on its 3.8-acre parcel. B&B carried two soil fumigants, D-D and Nemagon, manufactured by Shell Oil Company (Shell), and a weed killer, dinoseb, made by Dow Chemical.

In 1975, B&B leased an adjacent 0.9-acre parcel from the predecessors of BNSF Railway Company and Union Pacific Railroad Company (the Railroads), on which they parked application rigs, kept dinoseb cans, and stored empty Nemagon containers.

The site made the National Priorities List in 1989. In 1996, the United States and California Department of Toxic Substances Control filed cost recovery actions against B&B, the Railroads, and Shell. A major focus of the trial was whether the environmental harm was capable of apportionment, including the underlying analytical data regarding contamination on the railroad parcel.

Restatement (Second) of Torts Section 433A provides that damages are to be apportioned among two or more causes where there are distinct harms, or where there is a reasonable basis for determining individual contributions to a single harm. The Railroads argued that either the limited soil contamination on their parcel was a separate harm from the extensive soil and groundwater contamination on B&B's property, or the site contamination constituted a single harm that could be apportioned based on the relative mass of contaminants in groundwater attributable to each parcel. The Railroads submitted expert testimony to support this basis for apportionment.

The government argued the contamination constituted an indivisible harm that could not be apportioned, claiming releases on the Railroad parcel contributed to the groundwater contamination. Because the evidence was too uncertain to quantify the respective contributions from the two parcels, the Railroads were arguably jointly and severally liable.

The government also argued that apportionment is discretionary, and to avoid injustice to the plaintiff agencies, the court should allocate (insolvent) B&B's orphan share to the other defendants.

Shell argued any D-D contamination associated with product deliveries had not impacted groundwater and that it was not liable for the "hot spot" of dinoseb contamination because dinoseb was not its product.

The district court found the soil and groundwater contamination at the site was a single harm. While acknowledging the Railroads' evidence for apportionment, the court did not find that evidence to be helpful because it was unable to translate the expert's formula for apportioning the harm into usable data. Instead, the court's approach considered the size of the Railroad parcel relative to the total site area, the length of time it was leased to B&B, and that releases of dinoseb and Nemagon on the Railroad parcel contributed to the contamination. The court calculated the Railroads' divisible share to be 6%, then added a 50% allowance for calculation errors and concluded the Railroads' divisible share was not more than 9% of the total site response costs.¹

Citing evidence as to the estimated quantities of various types of D-D spills, the district court apportioned 6% of total site response costs to Shell.

Finally, the district court concluded that reallocating B&B's orphan share would be "manifestly inequitable."²

On appeal, the Ninth Circuit reversed the district court's apportionment rulings and imposed joint and several liability on the Railroads and Shell. While agreeing that, conceptually and with adequate information, the contamination traceable to the parties could be apportioned, the Ninth Circuit found that the numbers used by the district court bore an insufficient logical connection to the pertinent issue and lacked the necessary precision.

The Supreme Court reversed the Ninth Circuit and held that the district court's apportionment of 9% of the harm to the Railroads was supported by the evidence and consistent with applicable principles, concluding "that the facts contained in the record reasonably supported the apportionment of liability."³

The Court acknowledged the Ninth Circuit's criticisms, but determined that "it was reasonable for the court to use the size of the leased parcel and the duration of the lease as the starting point for its analysis."⁴ The Court also found any miscalculation due to the district court's conclusion that Nemagon and dinoseb accounted for two-thirds of the contamination was harmless since the final apportionment determination included a 50% margin of error. Had the court limited its apportionment calculation to the amount of time B&B used the Railroad parcel and that parcel's percentage of total site area, it would have reached the same result.



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The Supreme Court applied a clearly erroneous standard of review to the district court's apportionment of liability to the Railroads, as reflected by how the Court framed the issue – whether the record provided a reasonable basis for the district court's decision.

The Court's decision demonstrates that a CERCLA defendant may meet its burden of proving a reasonable basis for apportionment by introducing evidence sufficient for the district court, as fact finder, to determine the degree to which different parties contributed to the harm, even while not accepting the defendant's own arguments and expert testimony as factual bases for apportionment.

Affirming the district court's apportionment determination as a reasonable approximation of the Railroads' contribution to the harm, the Court rejected the Ninth Circuit's demand for "sufficient data to establish the precise proportion of contamination" attributable to the Railroad parcel.⁵

The Ninth Circuit agreed with other courts that, with adequate information, divisibility may be established by volumetric, chronological, geographic, or other types of evidence.⁶ The Supreme Court's decision establishes that such "simplest of considerations" may be sufficient to provide a reasonable basis for apportionment,⁷ affirming that a calculation limited to the amount of time B&B used the Railroad parcel and that parcel's percentage of the site area adequately supported the district court's apportionment determination.

Courts have long acknowledged that CERCLA allows for apportionment while almost always imposing joint and several liability. *Burlington Northern* demonstrates that a district court has considerable discretion to weigh the evidence relevant to a defendant's contribution to site contamination and find that such evidence provides a reasonable basis for apportionment.

References:

- ¹ *U.S. v. Atchison Topeka & Santa Fe Ry. Co.*, 2003 WL 25518047 (E.D. Cal. July 15, 2003) ¶¶ 474-478, 480-484, 488-489.
- ² *Id.* ¶ 471.
- ³ 129 S.Ct. at 1882-83.
- ⁴ *Id.* at 1883.
- ⁵ *Id.* at 1882.
- ⁶ 520 F.3d 918, 936 n.18 (9th Cir. 2008).
- ⁷ 129 S.Ct. at 1883 (quoting 520 F.3d at 943).

CERCLA, Apportionment, Liability