Restatement for Joint and Several Liability Under CERCLA After *Burlington Northern*

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This past May, the U.S. Supreme Court for the first time addressed two issues that the U.S. Congress left open in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[1] These issues are: (1) the scope of "generator" or "arranger" liability under the language of CERCLA §107(a)(3)[2]; and (2) the circumstances under which a liable party under §107[3] may be held jointly and severally liable. Rejecting the position of the U.S. government on both issues, the Court found that the government had attempted to extend CERCLA generator liability "beyond the limits of the statute itself" and that, despite the government's "refusal to acknowledge the potential divisibility of the harm," the district court's rough formula limiting the CERCLA liability of the railroad defendants to 9% of the government's total response costs "was supported by the evidence and comports with the apportionment principles" to which members of Congress had made reference in 1980—"traditional and evolving principles of common law" set forth in the American Law Institute's (ALI's) Restatements.[4]

Because the Court first addressed these two issues more than 28 years after CERCLA's enactment and because of the fact that the Court rejected the government's litigation position, which it had asserted regularly in the lower courts, *Burlington Northern & Santa Fe Ry. Co. v. United States*[5] has implications for the precedential effect of hundreds of lower court opinions. This is especially so with respect to the second issue: the application of joint and several liability.[6] Below, we adopt the artifice of a hypothetical Restatement for this area of Superfund jurisprudence. Following the structure of a Restatement, there are three subdivisions: (1) the black-letter law, reflecting an assessment of the current applicable legal rules in summary form after *Burlington Northern*; (2) Comments and Illustrations, reflecting an elaboration and application of these rules with reference to prior cases; and (3) Reporter's Notes, reflecting commentary about these rules, applications, and likely areas of ambiguity or dispute that courts may need to visit or revisit.

I. Restatement of the Law: Apportionment of CERCLA Liability

When two or more persons acting independently cause a release, or a threatened release causing the incurrence of response costs, and there is a reasonable basis for determining the contribution of a person's cause to the release or threatened release, that person is subject to liability only for the portion of the total damages that he has himself caused.

> (1) The liable person seeking to avoid entire liability ordinarily bears the burden of proof (with a relaxed burden of production) that a reasonable basis for apportionment exists to limit the extent of his liability. Where demanded by the circumstances, a court may independently perform an apportionment analysis and limit liability even if not advanced by such person.
>
> (2) Where the court does not find a reasonable basis of apportionment, the damages are indivisible and are to be allocated using such equitable factors as the court determines are appropriate.

II. Comments and Illustrations

A. *Scope*

This Restatement addresses the standard for imposing or avoiding joint and several liability among parties potentially liable under CERCLA, identified in §107(a)(1)-(4).[7] Because

1. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405).
2. 42 U.S.C. §9607(a)(3) (2007).
3. 42 U.S.C. §9607.
4. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1879, 1881, 1883, 39 ELR 20098 (2009).
5. 129 S. Ct. at 1870.
6. Arranger liability is the subject of another article, Alfred R. Light, *A Restatement for Arranger Liability Under CERCLA: The Implications of* Burlington Northern *for Superfund Jurisprudence*, 11 Vt. J. Envtl. L. (forthcoming 2009).
7. 42 U.S.C. §9607(a)(1)-(4).

the Supreme Court in *Burlington Northern* did not agree that the appellant held liable in the lower courts as an arranger, Shell Oil Co., fell within the scope of §107(a)(3), it did not address the district court's apportionment of liability to that defendant.[8] Nonetheless, the opinion's discussion of joint and several liability and apportionment applies to all liable parties under §107(a). For the sake of simplicity, except where the context indicates otherwise, this Restatement uses the word "damages" to encompass response costs, natural resource damages, and the costs of health effects studies recoverable under §107(a).[9] Similarly, the word "harm" is interchangeable with "release, and threatened release" within the CERCLA context.[10]

B. History

In the 1980 CERCLA compromise, the U.S. Senate backroom negotiators deleted the phrase "joint and several" from the bill's liability provision. According to proponents of the compromise bill, the deletion was intended to empower the courts to decide whether joint and several liability should apply on a case-by-case basis. Sen. Jennings Randolph (D-W. Va.) explained:

> It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tort feasors will be determined under common or previous statutory law.[11]

When the bill reached the U.S. House of Representatives, Rep. James Florio (D-N.J.) included in the *Congressional Record* a letter from the U.S. Department of Justice (DOJ) that referenced William Prosser's *The Law of Torts* and the *Restatement (Second) of Torts* as relevant common-law indicators.[12] The seminal district court decision on this issue, *United States v. Chem-Dyne Corp.*,[13] held, based on this legislative history, that CERCLA incorporates the Restatement approach to joint and several liability as the applicable uniform federal common-law standard under the statute.[14] In *Burlington Northern*, the Court acknowledged that "the *Chem-Dyne* approach has been fully embraced by the Courts of Appeals."[15]

This *Chem-Dyne* approach, as described in *Burlington Northern*, largely rests on sections of the *Restatement (Second) of Torts* covering causation. *Chem-Dyne* makes specific reference to §§433A, 433B, 875, and 881.[16] *Burlington Northern* especially emphasizes §433A(1)(b), which states that "apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'"[17] The Court noted: "[n]either the parties nor the lower courts dispute the principles that govern apportionment in CERCLA cases."[18] Nonetheless, *Burlington Northern* reflects a trend toward receptivity to apportionment that had become apparent in the lower courts for two reasons: (1) the practical difficulties in finding a rational basis are not insurmountable; and (2) compelling one or a few defendants to pay the entire cost of removal or remediation is inherently unfair.[19] The American Law Institute has reformatted and recast the law governing this type of apportionment in the *Restatement (Third) of Torts: Apportionment of Liability* §26, replacing most of the sections of the *Restatement (Second) of Torts* discussed in *Burlington Northern*.[20]

C. Divisible Damages

The language of the first sentence adapts *Restatement (Second) of Torts* §§433A and 881, which the *Burlington Northern* Court references following *Chem-Dyne*, to the CERCLA context.[21] The "harm" that is the subject of a CERCLA action is the "release, or threatened release which causes the incurrence of response costs."[22] The CERCLA action assigns "responsibility for the release of hazardous substances."[23] The *Restatement (Third) of Torts: Apportionment of Liability* §26

8. *See Burlington,* 129 S. Ct. at 1880.
9. *See* 42 U.S.C. §9601(6), (16), (22), (23) (definitions of damages, natural resources, remove or removal, and remedy or remedial action).
10. *See* 42 U.S.C. §9601(22) (definition of release).
11. 126 Cong. Rec. 30932 (1980), *reprinted in* 1 Senate Comm. on Env't & Pub. Works, A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 95-510, at 686 (1983) [hereinafter Legis. Hist.].
12. 126 Cong. Rec. 30965-66, *reprinted in* Legis. Hist., *supra* note 11, at 778-81.
13. 572 F. Supp. 802, 13 ELR 20986 (S.D. Ohio 1983).
14. *Id.* at 810-11.
15. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1881, 39 ELR 20098 (2009).
16. *Chem-Dyne*, 572 F. Supp. at 811.
17. *Burlington*, 129 S. Ct. at 1881 (quoting Restatement (Second) of Torts §433A (1965)).
18. *Id.* With respect to the position of the United States, this has not always been the case. *See* Reporter's Note to this comment, *infra* notes 70-71 and accompanying text.
19. Gerald W. Boston, *Apportionment of Harm in Torts Law: A Proposed Restatement*, 21 U. Dayton L. Rev. 267, 353 (1996) (citing United States v. Alcan Aluminum Co., 990 F.2d 711, 23 ELR 20706 (2d Cir. 1993) and United States v. Alcan Aluminum Co., 964 F.2d 292, 22 ELR 21124 (3d Cir. 1992) as "crack[ing] the government's string-of-success with joint and several liability").
20. Restatement (Third) of Torts: Apportionment of Liability §26, cmt. b (2000):
    > Division of Damage by Causation was addressed in *Restatement (Second) of Torts* §§433A (Apportionment of Liability), 433B (Burden of Proof), 434 (Function of Judge and Jury), 879 (Concurring and Consecutive Independent Acts), and 881 (Distinct or Divisible Harms). This section replaces §§433A, 433B, 879, 881, and the portion of §434 that addressed division of damages by causation.
21. *Burlington*, 129 S. Ct. at 1881.
22. 42 U.S.C. §9607(a)(4) (2007).
23. *See Burlington*, 129 S. Ct. at 1881 (referring to "responsibility for the release or threatened release" and "potential divisibility of the harm" in consecutive sentences).

refers to the divisibility situation as "When Damages Can Be Divided by Causation." It explains: "[d]amages can by divided by causation when any person or group of persons to whom the factfinder assigns a percentage of responsibility (or any tortious act of such a person) was a legal cause of less than the entire amount of damages."[24] Prosser explains the question of divisibility as "primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to two or more causes."[25] Where "some rough practical apportionment" is possible, "it may be expected that the division will be made."[26]

Divisible damages can occur in a variety of circumstances.[27] Obviously, there is divisibility where there are separate areas of contamination and distinct sources of contamination.[28] They can occur when one person caused all of the damages, for example the operator of a disposal facility, and another person caused only part of the damages, such as a person who arranged for disposal or treatment of some (but not all) of the hazardous substances disposed of there.[29] They can occur when the parties caused one part of the damages through a release of hazardous substances, and another part of the damages was caused by a release of materials that are excluded from the definition of hazardous substances, e.g., petroleum, or by a defendant who is not liable because it has a complete defense, e.g., the third-party defense.[30] They can occur in cases involving serial releases, regardless of the length of time between the releases, such as when a party owned or operated a facility for a limited period of time in which contamination occurred.[31] They can occur when the plaintiff's own conduct caused part of the damages, e.g., through its own disposal arrangements or botched remediation.[32] Dividing damages by causation among different liability-creating acts of the same person may be required, such as when the same defendant over time arranged for and transported different wastes under different contractual arrangement to a site now requiring cleanup.[33] When a person commits two or more acts that cause different parts of the damages, each act is treated separately.

Illustrations

1. The owner of a facility finds the release of a hazardous substance on his property and incurs response costs by arranging with a transporter for disposal of wastes offsite. The wastes are disposed of at an offsite disposal facility, where the wastes are again released into the environment causing the incurrence of response costs. The owner sues the transporter for damages. The first task is to divide the plaintiff's damages between the initial cleanup at the owner's site and the off-site disposal. The transporter did not cause the release on the owner's site and is not liable for it, no matter how culpable the transporter was in selecting the disposal facility and transporting the wastes to it from the owner's site under §107(a)(4). The owner, however, is responsible for cleanup under §107(a)(1). The owner also is liable for cleanup of the offsite disposal site as a arranger under §107(a)(3). In allocating responsibility

24. Restatement (Third) of Torts: Apportionment of Liability §26, cmt. a.
25. William L. Prosser, The Law of Torts 334 (1st ed. 1941). *See also* Boston, *supra* note 19.
26. Prosser, *supra* note 25, at 327.
27. This paragraph adapts to the CERCLA context examples found in *Restatement (Third) of Torts: Apportionment of Liability* §26, cmt. f, using CERCLA apportionment cases that have been decided.
28. FMC Corp. v. Vendo Co., 196 F. Supp. 2d 1023, 1034, 32 ELR 20642 (E.D. Cal. 2002) (separate and distinct subterranean plumes of groundwater contamination provide a basis to divide CERCLA liability for a site); Akzo Coatings, Inc. v. Aigner Corp., 881 F. Supp. 1202, 1210-19, 25 ELR 21339 (N.D. Ind. 1994) (harms divisible based upon geographic location of the harm, based upon the presence of distinct, noncontiguous areas of soil contamination, groundwater contamination, and buried drums); United States v. Broderick Inv. Co., 862 F. Supp. 272, 276, 25 ELR 29462 (D. Colo. 1994) (damages divisible geographically).
29. *Cf.* Kamb v. U.S. Coast Guard, 869 F. Supp. 793, 799, 25 ELR 20653 (N.D. Cal. 1994) (dividing site into discrete segments, only one of which "generator" defendants polluted, and dividing liability among those defendants for that portion by volume).
30. *See* Reichhold, Inc. v. United Metals Ref. Co., 2009 U.S. Dist. LEXIS 52471, *131 (D.N.J. June 22, 2009) (limiting defendant's liability to one-half the costs of capping "the BTL Parcel" caused by defendant and a third party because of "the circumstances that each was responsible for a sufficient amount of metals contamination that required the cap"); Catellus Dev. Corp. v. L.D. McFarland Co., 23 ELR 21487, 21491, 21494 (D. Ore. July 27, 1993) (denying plaintiff's motion for summary judgment, finding that material issues of fact regarding divisibility remained in that defendants might show that spill of creosote caused by juvenile vandals resulted in divisible harm and that divisibility might be shown as to liability of defendants vs. liability of plaintiffs, even though plaintiffs did not dispose of offending wastes); United States v. Fidelcor Bus. Credit Corp., 1993 U.S. Dist. LEXIS 9909, **19-20 (E.D. Pa. July 21, 1993) (refusing to strike defenses that various drums at site do not contain hazardous substances and various drums contain materials that are specifically exempt from definition of "hazardous substances" because those defenses pertain to the issue of divisibility).
31. In re Bell Petroleum Servs., Inc., 3 F.3d 889, 902-04, 23 ELR 21474 (5th Cir. 1993) (remanding for a finding of apportionment based on volume where three successive operators of a facility disposed of the same substance); Browning-Ferris Indus. of Ill., Inc. v. Ter Maat, 13 F. Supp. 2d 756, 770, 29 ELR 20142 (N.D. Ill. 1998) (although liable for other cleanup costs at the site, former landfill operator not liable for costs of emergency removal action and interim remedial measures where: (1) emergency removal and interim measures were necessitated by subsequent landfill operator's failure properly to close the landfill; and (2) toxicity of the waste disposed of by former operator had no bearing on the need for these actions); Hatco Corp. v. W.R. Grace & Co., 836 F. Supp. 1049, 1087-89, 25 ELR 21149 (D.N.J. 1993) (where predecessor of current owner/operator used some portions of the site that later owner/operator did not use, apportionment of full liability of those areas to the predecessor is appropriate).
32. *See, e.g.*, Dent v. Beazer Materials & Servs., Inc., 993 F. Supp. 923, 946-48 (D.S.C. 1995) (granting defendant's request for declaratory relief and finding plaintiff liable for 100% of past and future costs where: (1) all constituents of concern arose from plaintiff's disposal of hazardous substances; (2) "but for" plaintiff's releases no remediation would have been necessary; (3) defendants were potentially liable only as owners of property under which plaintiff's wastes had migrated; and (4) there was no evidence that any hazardous substances released by defendants would impact the cost of remediation).
33. For example, a transporter may not be liable for all the costs because some of the wastes he transported did not cause some of the costs at the site. Similarly, the same person might be liable as both a transporter and an arranger, if he sufficiently "owned or possessed" wastes, while in other situations he might be liable solely as a transporter, under 42 U.S.C. §9607(a)(4), for those wastes only if he selected the disposal site to which he transported the wastes. *See* B.F. Goodrich v. Betkowski, 99 F.3d 505, 520-21, 27 ELR 20329 (2d Cir. 1996) (site selection a required element for transporter liability), *reh'g denied*, *clarified*, 122 F.3d 88 (2d Cir. 1997); United States v. USX Corp., 68 F.3d 811, 820-21, 26 ELR 20030 (3d Cir. 1995) (same); Puerto Rico Ports Auth. v. PCI Int'l, Inc., 200 F. Supp. 2d 61, 67, 32 ELR 20700 (D.P.R. 2002) (transporters liable only if they transport hazardous substances to a site and select or have "substantial influence" in selecting the site where the release occurred).

between the owner and the transporter for the owner's wastes requiring cleanup at the off-site disposal facility, the transporter's liability should be reduced "using such equitable factors as the court determines are appropriate" under §113(f).[34]

Any basis upon which contributions of a defendant can be measured or compared to contributions of others may provide a basis for divisibility.[35] For a person held liable as an owner or operator, for example, such a reasonable basis may include the time period in which that person's conduct occurred or ownership existed, the estimated maximum contribution of that person's activities that released hazardous substances that caused contamination, and the geographic distribution of contamination.[36] For a person held liable as an arranger, the basis for comparison may be volume[37] or comparative toxicity.[38] Some bases that a court may use to divide damages by causation also may be equitable factors that the same court may use to allocate costs among jointly and severally liable persons where damages are not divisible.[39]

2. A remediates contamination at the facility and then sues B for reimbursement of all its costs of response as owners and operators. B's parcel constituted 19% of the surface area of the facility. B had leased their parcel to C, which disposed of the contamination for 13 years, which was only 45% of the time in which C operated the facility. Evidence established that the volume of hazardous-substance-releasing activities on C's property was at least 10 times greater than the releases that occurred on B's parcel. Evidence further established that only two chemicals, Nemagon and dinoseb, substantially contributed to the contamination that had originated on B's parcel, and that those two chemicals had contributed to two-thirds of the overall site contamination requiring remediation. Multiplying .19 by .45 by .66 (two-thirds) and rounding up, B is responsible for 6% of the remediation costs. Allowing for calculation errors, B may be held responsible for 9% of the total response costs.[40]

3. Same as Illustration 2, except that the district court's finding that the two chemicals account for two-thirds of the contamination lacks sufficient evidentiary support. Multiplying .19 by .45 and rounding up, B may be held responsible for 9% of the total response costs. By including a two-thirds reduction in liability for the Nemagon and dinoseb with 50% "margin of error," the court reached the same "ultimate allocation of liability" as if it had not relied on the erroneous discount, so the error is harmless. Limitation of B's liability to 9% of the total response costs is affirmed.[41]

4. A manufactured aluminum sheet and plate products, which produced as a byproduct an emulsion consisting of 95% deionized water and 5% mineral oil. Trace quantities of hazardous substances were also contained in the emulsion. A arranged for the disposal of used emulsion with B, who disposed of it through a borehole into the site. The release of hazardous substances at the site caused the government to incur response costs. After assessing the relative toxicity, migratory potential, and synergistic capacity of substances in the release causing the incurrence of response costs at the site, A shows that the emulsion did not and could not, when mixed with other hazardous substances, contribute to the release and the resultant response costs. Though nominally a liable party under CERCLA as an

34. This Illustration is based on a tort case example discussed in *Restatement (Third) of Torts: Apportionment of Liability* §26, cmt. d, as follows:

> The plaintiff's ship caught fire while tied up at the defendant's dock. The fire was initially caused by plaintiff's crew, but the defendant was negligent for sending the plaintiff's ship away before the fire was extinguished. The fire then caused further damage. The court properly held that its first task was to divide the plaintiff's damages between the initial fire and the decision to send the ship away. The defendant did not cause the original fire and should not be liable for it, no matter how culpable the defendant was in sending the ship away . . . . The plaintiff's negligence also caused the extra damage; but for the original fire, there would have been no damage. If the plaintiff's original negligence was a legal cause of the extra damage, comparative responsibility should reduce the plaintiff's recovery for that part of the injury.

35. United States v. Hercules, Inc., 247 F.3d 706, 719, 31 ELR 20567 (8th Cir. 2001) (possible to prove divisibility of single harms based on volumetric, chronological, and other types of evidence or establishment of "non-contiguous areas of contamination."); Boston, *supra* note 19, at 360.
36. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1883, 39 ELR 20098 (2009); *In re Bell Petroleum*, 3 F.3d at 895 (divisibility where successive owners, operating the same plant, pollute the same stream over successive periods of time); *id*. at 895-96 (divisibility based on relative quantities of waste discharged into a stream). *See also* United States v. Broderick Inv. Co., 862 F. Supp. 272, 25 ELR 20462 (D. Colo. 1994), *rev'd in part*, United States v. Burlington N. R.R. Co., 200 F.3d 679, 30 ELR 20281 (10th Cir. 1999). *Cf.* United States v. Dico, Inc., 136 F.3d 572, 578-79, 28 ELR 20608 (8th Cir. 1998) (remanding for trial on liability because district court failed to distinguish between two geographically separate areas within single hazardous waste site).
37. *In re Bell Petroleum*, 3 F.3d at 901-02. *See* Kamb v. U.S. Coast Guard, 869 F. Supp. 793, 799, 25 ELR 20653 (N.D. Cal. 1994) (apportioning liability based on the volume of lead each defendant contributed to the site and based on the divisibility of the site into two discreet sections—a trap/skeet range not used by defendants and a firing range).
38. *See* Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 937-38, 25 ELR 21378 (8th Cir. 1995) (allocating by toxicity in a contribution action).
39. Courts frequently make reference to the Gore factors, named for Rep. Al Gore in an amendment that did not become part of CERCLA, as equitable allocation factors. These include some factors potentially relevant to divisibility, such as the distinguishability of a defendant's discharge from other discharges, amount of hazardous waste involved, degree of toxicity of the hazardous waste involved, and the degree of involvement by the parties in generation, transportation, treatment, storage, or disposal of the wastes. Other of the Gore factors appear unrelated to causation, such as the degree of care exercised with respect to the hazardous waste concerned and the degree of cooperation with Federal, State, or local officials to prevent any harm to the public health or environment. United States v. Township of Brighton, 153 F.3d 307, 319 n.16, 29 ELR 20045 (6th Cir. 1998) ("Some of the Gore factors (1, 2, and 3) are compatible with causation analysis; others (5 and 6) reflect fairness concerns; at least one (4) does both."); United States v. Cantrell, 92 F. Supp. 2d 704, 711 (S.D. Ohio 2000) ("Divisibility determinations are to be based on legal considerations of causation, not of equitable considerations of fairness. Considerations of fairness which are not relevant to divisibility determinations include the degree of care taken by the PRPs and the degree of cooperation by the PRPs with the government to prevent harm to the environment or to the public.").
40. *Burlington*, 129 S. Ct. at 1882 (district court's original division of costs by causation).
41. *Id*. at 1883.

arranger, A has divided the damages by causation and is not liable to the government for *any* response costs.[42]

5. A owned the real property at the site, a 24-block area north of a chrome-plating shop operated successively from 1971 through 1977 by A, B, and C. A owned the property from 1967 through 1981 and conducted chrome-plating activities there in 1971 and 1972. In 1972, B purchased the shop and leased the property from A. B continued to conduct similar, but more extensive, chrome-plating activities there until mid-1976. In August 1976, C purchased the assets from B, leased the property from A, and conducted similar chrome-plating activities there until late 1977. The release of hazardous substances at the site caused the government to incur response costs, and it sues A, B, and C for reimbursement. Various witnesses testify regarding the rinsing and wastewater disposal practices of each defendant, and the amount of chrome-plating activity conducted by each. C introduces expert testimony regarding a volumetric approach, calculating the total amount of chromium that had been introduced into the environment by A, B, and C, collectively and individually. A second expert estimated the amount of chromium on the basis of electrical usage records. C has established a reasonable basis for division of the damages by causation.[43]

D. Indivisible Damages

Damages are indivisible, and thus the release is indivisible, when all liability-creating conduct of the plaintiff and every liability-creating act of the defendants and other relevant persons caused all the damages.[44] Unless sufficient evidence permits the judge to determine that damages are divisible, they are indivisible.[45] When damages are not divisible by causation (called a single, indivisible harm in the *Restatement (Second) of Torts*), courts are not to make an arbitrary apportionment for its own sake, and each of the causes is charged for responsibility of the entire harm.[46]

Illustrations

1. A is alleged to be responsible for cleanup of a single plume of contamination in the groundwater underlying C's Basket Creek facility. A collected and stored liquid chemical waste materials in 55-gallon drums. A hired B to remove hundreds of the drums from A's facility. B subsequently arranged with C to store A's drums at C's Basket Creek facility until B could arrange for the waste to be stored, reprocessed for sale, incinerated, or buried. B's and C's records show that 800 of 1,649 of A's drums were to be shipped to C's Borden Springs facility. A's records show that it recommended to B that only 153 of 181 drums be disposed of in a landfill. Testimony indicates that approximately 160 drums were transported from A to Basket Creek, in two rigs. An environmental enforcement official told the men not to dump the drums from the second rig, which contained 80 drums. The parties stipulated that C incinerated some of A's wastes. Three days later, an environmental enforcement official reported that C's Borden Springs facility contained approximately 1,000 drums. On this evidence, A asserts that it is responsible for only 80 drums at Basket Creek, identified to C on the uphill northern portion of Basket Creek. There is no evidence, however, that any or most of A's drums ever made their way to Borden Springs. C's deposition testimony indicates that *all* of A's drums were to be dumped at Basket Creek. The same type of hazardous substances that came from A's drums are found all over the site, beyond the 80 identified drums on the uphill portion of the site. On these facts, A has not established geographic divisibility and is jointly and severally liable.[47]
2. A asserts divisibility based on the relative number of barrels sent to the site by each generator based on expert testimony that waste at the site was indistinguishable in terms of its relative toxicity or other environmental impact, that the removal costs were a direct function of the number of barrels, and available information indicated a reasonable volumetric contribution of each generator. The government shows that the site contained different types of wastes that were commingled and that response costs at the site involved remediation beyond removal of the drums, including absorbent booms and pads to limit migration, removal of asbestos and debris, and remediation of oily hazardous liquid in a basement and liquid leaking through the foundation of a building. The government also points out that A presented no evidence as to the relative toxicity, migratory potential, and synergistic capacities at issue. The government further contests the credentials of A's expert and the facts upon which he relied in developing

42. *See* United States v. Alcan Aluminum Corp., 964 F.2d 252, 268-69, 22 ELR 21124 (3d Cir. 1992) (cited in *Burlington*, 129 S. Ct. at 1881).
43. In re Bell Petroleum Servs., Inc., 3 F.3d 889, 902-04, 23 ELR 21474 (5th Cir. 1993) (cited in *Burlington*, 129 S. Ct. at 1881). Prof. Gerald Boston characterizes this decision and the two circuit decisions involving Alcan Aluminum Corporation as "agreeing that divisibility of the harm could be establishing even if wastes were commingled." Boston, *supra* note 19, at 357.
44. Restatement (Third) of Torts: Apportionment of Liability §26, cmt. g. *See, e.g.*, Axel Johnson, Inc. v. Carroll Carolina Oil Co., 191 F.3d 409, 417-19, 30 ELR 20084 (4th Cir. 1999) (harm indivisible where: (1) contamination existed throughout the facility; (2) the entire facility was relatively small (13 acres); and (3) liable plaintiff had had control of the entire facility throughout the relevant period).
45. Restatement (Third) of Torts: Apportionment of Liability §26, cmt. g.
46. *Burlington*, 129 S. Ct. at 1881 (quoting Restatement (Second) of Torts §433A, cmt i).
47. Chem-Nuclear Sys., Inc. v. Bush, 292 F.3d 254, 32 ELR 20703 (D.C. Cir. 2002).

his opinion. On these facts, A has failed to establish that volume is a reasonable basis for apportionment.[48]

E. Burden of Proof and Sufficiency of the Evidence to Permit Damages to Be Divided by Causation

Whether damages are divisible is a question of fact.[49] A party alleging that damages are divisible ordinarily has the burden to prove they are divisible.[50] The magnitude of each divisible part is also a question of fact. The burden to prove the magnitude of each part is on the party who seeks division.[51] Notwithstanding this initial burden, both the *Restatement (Second) of Torts* and the *Restatement (Third) of Torts* have noted the potential unfairness of this general rule because it can impose full liability on a defendant who only caused part of the damages.[52] The third Restatement recommends that the "more attractive solution is to place the burden of proof on the party seeking to avoid responsibility for the entire injury, along with relaxing the burden of production."[53] Under *Burlington Northern*, where an apportionment analysis is demanded by the circumstances of a case, a court may apportion liability sua sponte, even if not advanced by a defendant.[54]

Illustrations

1. A contracted with numerous off-site waste producers for the transport, recycling, and disposal of chemical and other wastes, including B and C. Between 1976 and 1980, A haphazardly deposited more than 7,700 drums of chemicals on the site. The government sues B and C for reimbursement of costs incurred in removing the drums. B and C offer only conclusory allegations that their waste, deposited at the site, was at some time prior to 1979 transported from that facility to other sites operated by A and present no evidence showing a relationship between the waste volume, the release of hazardous substances, and the harm at the site. They present no evidence disclosing the individual and interactive qualities of the substances deposited there. Because of the lack of proof that the proportionate volumes of the hazardous substances are probative of contributory harm, B and C have not established that the environmental harm at the site was divisible among responsible parties. Each is jointly and severally liable for all response costs incurred by the plaintiffs.[55]
2. A agreed to allow his pig farm to be used for drummed and bulk waste. Thousands of barrels were dumped on the farm, culminating in a monstrous fire ripping through the site. Some of the barrels dumped at the site came from B and C. B and C do not contest that they arranged for disposal of these barrels. Because of the fire and the conditions of the site, it is not possible to determine how many barrels are traceable to the two companies. Out of approximately 10,000 barrels that are excavated, only 300-400 can be traced, and these include 10 drums from B and 49 drums and 303 five-gallon pails from C. Evidence showed that C was entrusting substantial amounts of waste to a single transporter, who ultimately proved unreliable. On this evidence, the defendants have not shown a reasonable basis of apportionment.[56]
3. The government sues A for all costs incurred at the facility. A vigorously defends the action, contesting responsibility for the release of hazardous substances that occurred on their parcel throughout the 13-year period of its lease to C, which contaminated the site. The government refuses to acknowledge potential divisibility of the harm in order to bolster its demand for joint and several liability. Neither the government nor A attempts to link evidence supporting apportionment to the proper allocation of liability. Evidence is presented, however, regarding the time period in which defendants' conduct occurred and ownership existed, and as to the estimated maximum contribution of each party's activities that released hazardous substances that caused site contamination. On these facts, the district court may sua sponte independently apportion damages and limit A's liability.[57]

48. United States v. Agway, Inc., 193 F. Supp. 2d 545, 549-52, 32 ELR 20587 (N.D.N.Y. 2002).
49. *See generally* Price v. U.S. Navy, 39 F.3d 1011, 1018, 25 ELR 20177 (9th Cir. 1994) (affirming assignment of percentages of liability to two defendants (95% to the U.S. Navy, 1% to a home builder) and declining to second-guess discretion of court in apportioning liability). *Cf.* In re Dana Corp., 379 B.R. 449, 457-58 (S.D.N.Y. 2007) (divisibility analysis "intensely factual" but the preliminary matter of whether harm is capable of apportionment is a question of law).
50. Raytheon Aircraft Co. v. United States, 532 F. Supp. 2d 1306, 1310, 38 ELR 20010 (D. Kan. 2007) (placing divisibility burden on government as defendant in private cost recovery action); *In re Dana Corp.*, 379 B.R. at 457.
51. Restatement (Third) of Torts: Apportionment of Liability §26, cmt. h.
52. *Id.*; Restatement (Second) of Torts: Apportionment of Liability §433B.
53. Restatement (Third) of Torts: Apportionment of Liability, §26, cmt. h.. *See* United States v. Alcan Aluminum Corp., 990 F.2d 711, 722, 23 ELR 20706 (2d Cir. 1993); United States v. Alcan Aluminum Corp., 2006 U.S. Dist. LEXIS 24309, **34-35 (N.D.N.Y. Apr. 26, 2006) (denying motion for summary judgment in favor of jury trial on divisibility, indicating potential divisibility of Alcan wastes "chronologically, physically, and geographically," apportionment by volume, and an analysis of issues of relative toxicity, migratory potential and synergy); *Agway*, 193 F. Supp. 2d at 548 ("To defeat a motion for summary judgment on the issue of divisibility, a defendant 'need only show that there are genuine issues of material fact regarding a reasonable basis for apportionment of liability.'") (quoting *Alcan*, 990 F.2d at 722); United States v. Chrysler Corp., No. 88-341 LON, 29 Chem. Waste Lit. Rep. 566, 576 (D. Del. Dec. 9, 1994) (an evidentiary hearing should be conducted and summary judgment should not be granted when there is a genuine issue of material fact as to whether there is a reasonable basis for apportioning liability).
54. In *Burlington*, the parties "left the court to independently perform the equitable apportionment analysis demanded by the circumstances of the case." 129 S. Ct. at 1881. In upholding the court's analysis, the Supreme Court implicitly found permissible the district's courts apportionment of liability on its own initiative, i.e., sua sponte. It did this despite the argument of the United States that the trial court's mode of procedure deprived it of a fair opportunity to respond to the court's theories of apportionment and to rebut their factual underpinnings. 129 S. Ct. at 1886 (Ginsburg, J., dissenting).
55. United States v. Monsanto Co., 858 F.2d 160, 171-73, 19 ELR 20085 (4th Cir. 1988) (cited in *Burlington*, 129 S. Ct. at 1881).
56. O'Neil v. Picillo, 883 F.2d 176, 20 ELR 20115 (1st Cir. l989).
57. *Burlington*, 129 S. Ct. at 1881-84.

F. Equitable Allocation of Indivisible Damages

Divisibility should be distinguished from equitable allocation of damages of a single and indivisible release. Damages associated with an indivisible release are to be allocated among the jointly and severally liable parties "using such equitable factors as the court determines are appropriate," pursuant to the statute's rules regarding contribution claims.[58] The equitable considerations the court may use in this allocation are separate and apart from the apportionment analysis and play no role in it.[59] A party's equitable share of damages is different from the magnitude of the damages the party caused. A party's comparative responsibility may have been minimal, but the party may have caused the majority of the damages. Under joint and several liability, a defendant may be liable for more than the defendant's own percentage share of the damages. If a defendant did not cause the damages, however, the defendant should not be liable, regardless of joint and several liability.[60] Divisibility is entirely a technical, scientific inquiry having nothing to do with culpability, cooperation, or any other conduct factors that may bear on the allocation of costs in a CERCLA contribution action.[61] The relationship between apportionment and equitable allocation is a developing area of the law.[62]

Illustrations

1. A leased property at the facility operated by the government. At the facility, A retrofitted rocket motors for the government. Using a high-pressure water spray, A removed pieces of propellant from the motors. It then burned the propellant pieces. Some of the resultant wastewater and burned fuel contaminated soil and groundwater at the facility. A cleans the facility and then sues the government for recovery of some of its costs. A's claim is a cost recovery claim under §107(a)(4)(B) based on its incurrence of response costs. However, assuming that the government counterclaims for contribution under §113(f), resolution of that claim necessitates the equitable allocation of costs among the liable parties, including the potentially responsible party (PRP) who filed the §107 action. The court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate, even if the defendant does not prove divisibility.[63]
2. A, a private company, owns a portion of the site and is the corporate successor to a company that contaminated the site years ago. A enters into an Administrative Order by Consent with the U.S. Environmental Protection Agency (EPA) under CERCLA §122(a) to perform a remedial investigation/feasibility study (RI/FS), incurring $2,000,000. The RI/FS identified only low concentrations of contaminants remaining on-site and indicated that no additional remedial action would be required. A sues other current and past owners and operators of parcels of the site for reimbursement of the costs of the RI/FS. Because A has not been sued under §§106 or 107 and has not entered into a judicially or administratively approved settlement under §§122(g) or 122(h), A has not resolved any of its liability to the United States within the meaning of §113(f). A therefore has no claim for contribution under §113(f)(3)(B). However, A may proceed against the other PRPs under §107(a).[64] The defendants may then counterclaim for contribution to seek an equitable allocation of costs between plaintiff and defendants.
3. A, a private company, owned land and operated a business on-site. At an earlier time, B operated a dry cleaner business on the property, which contaminated the site with perchloroethylene (PCE). The state ordered B by administrative order to investigate and clean the soil and groundwater at the site. A was directed to conduct the work if B failed to act. When B failed to act, A incurred costs performing site-characterization and investigation, and identification and investigation of PRPs. A has not been subject to a civil action under §§106 or 107. It is therefore not entitled to seek contribution under §113(f). A should proceed under §107 for cost recovery. If B counterclaims for contribution against A, there may be an equitable allocation between them.[65]
4. The government files suit against A under §107, seeking recovery of response costs associated with releases or threatened releases of hazardous substances at the site. A enters into a consent decree with the government, whereby A and other defendants agree to incur response costs associated with the release of hazardous substances at the site. A sues B and other defendants for contribution under §113(f). B files a third-party claim against the government for contribution, alleging that the government is liable because it controlled the site. Because (1) the underlying action giving rise to B's potential liability and B's third-party contribution

58. 42 U.S.C. §9613(f)(1) (2007).
59. *Burlington*, 129 S. Ct. at 1882 n.9.
60. Restatement (Third) of Torts: Apportionment of Liability §26, cmt. h.
61. Boston, *supra* note 19, at 359.
62. *See generally* Goodrich Corp. v. Town of Middlebury, 311 F.3d 154, 170 n.16, 33 ELR 20086 (2d Cir. 2002) (approving complex allocation of costs and distinguishing standard for apportionment); Restatement (Third) of Torts: Apportionment of Liability §26, cmt. a:

    > Dividing damages by causation and apportioning liability by responsibility in the same case has not been widely addressed by statute or case law. Most rules about dividing damages by causation were developed before comparative responsibility. *See Restatement, Second* §§433A, 433B, 434, 879, 881. Most rules about comparative responsibility were developed in the context of indivisible injuries. Few courts have addressed the interaction of the two processes.

63. United States v. Atl. Research Corp., 551 U.S. 128, 140, 37 ELR 20139 (2007).
64. ITT Industries, Inc. v. BorgWarner, Inc., 506 F.3d 452, 455-61, 37 ELR 20261 (6th Cir. 2007). *See also* W.R. Grace & Co. v. Zotos Int'l, Inc., 559 F.3d 85, 39 ELR 20066 (2d Cir. 2009) (state consent order).
65. Kotrous v. Goss-Jewett Co. of N. Cal., 523 F.3d 924, 934, 38 ELR 20091 (9th Cir. 2008).

claim was brought under §107, and (2) B has alleged that the government is a potentially liable party as to the specific site from which B is alleged to have released or threatened to release hazardous substances at the site, B has stated a contribution claim under §113(f). The fact that B may pursue an indemnity claim based on its contracts with the government in the Court of Federal Claims does not preclude B's contribution claim under CERCLA. In order to determine each contribution defendant's equitable share, it may be necessary to determine whether, and to what extent, B and the government are each responsible for releases of hazardous materials at the site.[66]

III. Reporter's Notes

A. Scope

There is little case law on how to apportion costs so as to limit liability under the Restatement standard that Congress mandated for §107 or on how to allocate costs using equitable factors that the court determines are appropriate under §113(f). This is not surprising in light of the government's advocacy of joint and several liability in virtually every CERCLA case and its extreme reluctance to involve itself in matters of contribution among liable parties.[67] There is only a handful of circuit court opinions evaluating a district court's apportionment or of its refusal to apportion costs or damages.[68] More remarkably, under tort law generally there is also very little case law or statutory language to give guidance on how to apportion an injury by responsibility and divide damages by causation in the same case. In part, this dearth of case law in recent times results from the dwindling number of jurisdictions that, after the advent of comparative fault, continue to have a standard of joint and several liability of multiple tortfeasors for indivisible harm.[69]

B. History

For much of CERCLA's history, the government asserted a position on joint and several liability that superficially resembled the *Restatement (Second) of Torts* but encouraged district courts to impose a more stringent standard of apportionment departing from the Restatement approach by requiring both divisibility of the harm *and* a reasonable basis for apportionment.[70] The government position was that, even if it is possible to determine what proportion of the costs is attributable to a defendant, joint and several liability still is proper because "the harm to be apportioned is not the cost but the environmental contamination that prompts the response action."[71] *Burlington Northern* clearly rejects the government's desired departure from common-law principles.

C. Divisible Damages

Under the Restatement standard applicable under CERCLA, explained in *Burlington Northern*, a single harm is divisible when it is possible to discern the degree to which different parties contributed to the damage.[72] Divisibility may be provable even where wastes have become cross-contaminated and commingled, for "commingling is not synonymous with indivisible harm."[73] As the science of advanced chemical fingerprinting has developed, it is possible that the defendants pursued by the government at some of the most polluted or expensive CERCLA sites may be justified to investigate the prospect for determining the relative contribution of particular substances or wastes at such sites.[74]

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66. Port of Tacoma v. Todd Shipyards Corp., 2008 U.S. Dist. LEXIS 83580, **17-18 (W.D. Wash. Sept. 30, 2008).
67. Alfred R. Light, *The Importance of "Being Taken": To Clarify and Confirm the Litigative Reconstruction of CERCLA's Text*, 18 B.C. Envtl. Aff. L. Rev. 1, 7-8, 20-25 (1990).
68. *See, e.g.,* United States v. Alcan Aluminum Co., 315 F.3d 179, 33 ELR 20145 (2d Cir. 2003) (affirming denial of apportionment because of failure to consider cumulative impact of generator's hazardous substance); United States v. Hercules, Inc., 247 F.3d 706, 718-19, 31 ELR 20567 (8th Cir. 2001) (finding district court applied incorrect divisibility standard by not assessing whether there was a reasonable basis for apportionment of a single harm); United States v. Township of Brighton, 153 F.3d 307, 29 ELR 20045 (6th Cir. 1998) (remanding for apportionment determination under this correct standard); In re Bell Petroleum Servs., Inc., 3 F.3d 889, 896, 903-04, 23 ELR 21474 (5th Cir. 1993) (reversing district court determination and setting forth the reasonable basis of apportionment); United States v. Alcan Aluminum Corp., 964 F.2d 252, 22 ELR 21124 (3d Cir. 1992) (remanding for hearing on apportionment determination).
69. Restatement (Third) of Torts: Apportionment of Liability §A18, cmt. a ("Joint and several liability for independent tortfeasors who cause indivisible harm was frequently imposed before the adoption of comparative fault. It remains the rule in a number of jurisdictions, although the number is dwindling.").
70. In the *South Carolina Recycling* district court opinion drafted by the government upon the judge's request, the *Restatement (Second) of Torts* §433A is misread to state that joint and several liability may be avoided only "[i]f the harm is divisible *and* there is a reasonable basis for apportionment." United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 994, 14 ELR 20272 (D.S.C. 1984) (quoting United States v. Chem-Dyne, 572 F. Supp. 802, 811, 13 ELR 20986 (S.D. Ohio 1983) (emphasis added). Apparently, the government decided to take advantage of a "typo" in the *Chem-Dyne* decision, despite the fact that the *Chem-Dyne* court had earlier used the proper disjunctive "or" rather than the incorrect conjunctive "and" in its initial recitation of the standard in *Restatement (Second) of Torts* §433A. *See Chem-Dyne*, 572 F. Supp. at 810 (quoting the portion of Restatement including the avoidance of joint and several liability when "there is a single harm for reasonable basis for division according to the contribution of each"). Interestingly, in its *South Carolina Recycling* opinion, the government did not make reference to the other "typo" on page 810, a reference to *Restatement (Second) of Torts* §443A, a section of the Restatement which does not exist.
71. O'Neil v. Picillo, 883 F.2d 176, 180, 20 ELR 20115 (1st Cir. 1989) (quoting government's brief). The U.S. Court of Appeals for the First Circuit seemed rather annoyed with this position, going out of its way in dictum to state, "It would seem incumbent upon the Agency . . . to demonstrate that on this *particular* question of joint and several liability, Congress intended for us to abandon the common law." *Id*. at 181. Sometimes, even in the early days of CERCLA, the Department of Justice departed from this hardline position when it was a CERCLA defendant rather than the plaintiff. *See* Alfred R. Light, *Modest Proposal to Codify the Fair and Just View of the Justice Department on CERCLA*, 16 ELR 10064 (Mar. 1986) (discussing the government's brief as a defendant in Mola Dev. Corp. v. United States, No. CV-82-0819-RMT (JRx), ELR 65891 (C.D. Cal. filed Dec. 16, 1985)).
72. *Hercules*, 247 F.3d at 718. *See also* United States v. Vertac Chem. Corp., 453 F.3d 1031, 1040, 36 ELR 20135 (8th Cir. 2006).
73. *Hercules*, 247 F.3d at 718 (quoting United States v. Alcan Aluminum Corp., 990 F.2d 711, 722, 23 ELR 20706 (2d Cir. 1993)).
74. *See* Roslyn K. Myers, *Advanced Chemical Fingerprinting in Hazardous Waste Liability Under CERCLA*, 6 Fordham Envtl. L.J. 253 (1995); *but see* Mark

D. Indivisible Damages

Allocation of indivisible damages among jointly and severally liable parties is determined using such equitable factors as the court determines are appropriate under §113(f). Determining what constitutes divisible damages necessarily requires understanding what constitutes an indivisible release. Moreover, after divisible damages are divided into their component parts, the component parts may have been caused by two or more persons. Apportionment of these indivisible parts is determined under §113(f). An indivisible release is one in which the entire damages were caused by every act of each person. As with divisible damages, this requires an understanding of the applicable rules for determining liability under §107(a)(1)-(4).[75]

E. Burden of Proof and Sufficiency of the Evidence to Permit Damages to Be Divided by Causation

The rationale for relaxing the burden of production is set forth in *Restatement (Third) of Torts: Apportionment of Liability* §26, Reporter's Notes to Comment h.[76] This Restatement thus supports the Supreme Court's catholic approach to the district court's apportionment without requiring the zealous assistance of the parties.[77]

Relaxation of the defendant's burden of production means that the plaintiff, frequently the government, more often will have to come forward with its own evidence on the issue and will not be able to avoid trial of the issue through summary judgment.[78] The plaintiff also assumes the risk that the district court may perform its own apportionment analysis even when not advocated by the defendant, as endorsed in *Burlington Northern*. Most of the early CERCLA decisions regarding joint and several liability were district court rulings on motions for summary judgment. For example, the *Chem-Dyne* decision, which the *Burlington Northern* court followed, is an opinion resolving the defendant's motion for partial summary judgment regarding their joint and several liability, in which the defendants only presented their legal argument that "because joint and severally [sic] liability is not expressly provided for in CERCLA, there is no basis for its imposition."[79] As to divisibility, the court only found "an insufficient evidentiary basis, with unresolved factual questions, which precludes the resolution of the case in the form of a summary judgment motion."[80]

The Supreme Court's endorsement of the district court's independent apportionment (in the divisibility of the damages by causation sense) also avoids serious constitutional difficulties that would be presented were CERCLA to impose disproportionate, retroactive liability for all damages where a defendant's maximum contribution to the harm is comparatively slight—the proverbial "one-drum" contributor to a massive hazardous waste disposal facility requiring cleanup. The DOJ consistently maintained in congressional hearings during the CERCLA reauthorization process in 1985 that it did not intend and did not think it could "impose liability for 100 percent of the costs on a *de minimis* contributor."[81] The Assistant Attorney General for Environment and Natural Resources explained: "Congress indicated in the legislative history in 1980 that joint and several liability was deleted expressly from the statute because it should be left to the courts to deal with on a case-by-case basis so that it would not be oppressively or unfairly applied in inappropriate circumstances."[82] Even if "CERCLA . . . does not require causation as a prerequisite to liability,"[83] a less stringent attitude toward the burden regarding apportionment permits courts to avoid violation of the requirement of "fair play and substantial justice" embodied in the Due Process Clause of

R. Misiorowski & Joel D. Eagle, *The Diminishing Role of Science in CERCLA After* Burlington Northern & Santa Fe, Toxics L. Daily (BNA), July 9, 2009 (indicating that "the Supreme Court landed a silent but direct blow to the role of legitimate science in liability apportionment cases [by upholding the district court's] apportionment calculation despite the fact that the calculation was devoid of any scientific or engineering basis."). *See also* Alfred R. Light, *Apportioning Costs by Causation After* Burlington Northern: *Superfund Meets NCIS*, 24 Toxics L. Rep. (BNA) 948 (2009) (fictional account of a Naval Criminal Investigative Service investigation into potential CERCLA liability of a Navy contractor).

75. *See* Restatement (Third) of Torts: Apportionment of Liability §26, Reporter's Notes to cmt. g.

76. The Reporter notes that commentators generally favor all or part of the *Loui-Campione* approach:

> By requiring a "rough apportionment" in the face of weak evidence, the court in Loui v. Oakley, 438 P.2d 393 (Haw. 1968), similarly recognized the desirability of causal division based on available evidence, even if that evidence is not of the same quality that would ordinarily be required. *See also* Campione v. Soden, 695 A.2d 1364 (N.J. 1997); Reed v. Chrysler Corp. 494 N.W.2d 224, 228 (Iowa 1992); Hillrichs v. Avco, 478 N.W.2d 70, 75 (Iowa 1991).

Restatement (Third) of Torts: Apportionment of Liability §26, Reporter's Notes to cmt. h.

77. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1883, 39 ELR 20098 (2009) ("[T]he District Court's ultimate allocation of liability is supported by the evidence and comports with the apportionment principles outlined above.").

78. So long as there is a "genuine issue of material fact" as to divisibility of the damages, the plaintiff's motion for summary judgment must be denied even though the defendant bears the ultimate burden of persuasion at trial. *See generally* Fed. R. Civ. P. 56(c).

79. United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810, 13 ELR 20986 (S.D. Ohio 1983).

80. *Id.* at 811. *See also* Transp. Leasing Co. v. State of California (Caltrans), 861 F. Supp. 931, 939-40, 25 ELR 20231 (C.D. Cal. 1993) (divisibility of harm could not be resolved in the context of pre-trial motions); AM Int'l, Inc. v. DataCard Corp., 146 B.R. 391, 402 (N.D. Ill. 1992) (adopting report and recommendations of magistrate judge denying summary judgment and finding that divisibility issue involved unresolved questions of fact); Hatco Corp. v. W.R. Grace & Co., 801 F. Supp. 1309, 1327-31 (D.N.J. 1992) (denying plaintiff's summary judgment motion on divisibility because defendant raised "sufficient fact questions as to the relative degrees of harm caused by [the plaintiff]"); Weyerhaeuser Corp. v. Koppers Co., 771 F. Supp. 1406, 1416, 22 ELR 20163 (D. Md. 1991) (declining to rule on apportionment issue at summary judgment phase); United States v. Marisol, Inc., 725 F. Supp. 833, 841-42 (M.D. Pa. 1989) (defendants are at the very least entitled to conduct some discovery of defenses alleging divisibility of the harm).

81. *Insurance Issues and Superfund: Hearing Before the Subcomm. on Environment and Public Works*, 99th Cong. 13 (1985) (testimony of Assistant Attorney General Henry Habicht). *See generally* Alfred R. Light, *"Minimum Contacts" Under CERCLA: Joint and Several "Generator" Liability and the Fifth Amendment*, 24 Toxics L. Rep. (BNA) 545, 547-49 (2009) (elaborating the government's view of joint and several liability in the 1985 Superfund Amendments and Reauthorization Act hearings).

82. *Superfund Improvements Act of 1985: Hearing Before the Subcomm on the Judiciary*, 99th Cong. 71 (1985).

83. United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 937, 38 ELR 20079 (9th Cir. 2008), *rev'd on other grounds*, *Burlington*, 129 S. Ct. 1870.

the Fifth Amendment.[84] If a generator's maximum contribution is small enough, its apportioned share of the liability may be nothing, particularly in light of §107(o), added to CERCLA in 2002, presumptively exempting persons who arranged for disposal or treatment of less than 110 gallons of liquid materials or less than 200 pounds of solid wastes from liability for response costs at a facility on the national priorities list.[85]

F. Equitable Allocation of Indivisible Damages

Whether or not there is a reasonable basis for apportionment limiting the liability of any defendant, a court usually must also allocate costs among jointly and severally liable parties on an equitable basis, in what the Supreme Court has called "equitable apportionment."[86] Under the liberal joinder rules of the *Federal Rules of Civil Procedure*, there likely will be an equitable allocation of responsibility prior to entry of final judgment, whether or not the damages are at all divisible.[87] For example, since a PRP with a cost recovery claim may sue the government as another PRP, the government as defendant wishing to keep the costs on the PRP plaintiff must litigate its fair allocation by bringing a "§113(f) counterclaim" in the PRP's cost recovery suit the same as any other PRP.[88] When a party decides to seek recovery of its cleanup costs, therefore, the plaintiff cannot, by establishing the joint and several liability of the defendants, postpone its day of reckoning with regard to the adjudication of its own equitable share of CERCLA liability under §113(f).[89] The plaintiff's recovery against the defendants will be reduced by its own equitable share.[90] A PRP plaintiff's settlement with some but not all defendants reduces the PRP's claim against the nonsettling parties by the equitable share of the settlors, which may be by an amount more than the amount of the settlement.[91] Whether a PRP conducts a cleanup without any compulsion or under an EPA or state administrative order, that PRP's incurrence of response costs triggers the availability of the private cause of action under §107(a)(4)(B).[92] To extinguish a PRP's cost recovery claim against it in a civil action, the government will have to address that claim in a judicially approved or administrative settlement expressly acknowledged in CERCLA.[93] Moreover, a consent decree between a plaintiff PRP and other PRPs does not affect the plaintiff's own equitable share of responsibility based on its own CERCLA liability in a claim by nonsettling PRPs against it.[94]

84. *See generally* Light, *supra* note 81, at 548-50 (exploring this requirement from *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987) through a CERCLA hypothetical based on the facts regarding Shell Oil Company in *Burlington*).
85. 42 U.S.C. §9607(o) (2007), added to CERCLA by the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).
86. United States v. Atl. Research Corp., 551 U.S. 128, 138, 140, 37 ELR 20139 (2007); *Burlington*, 129 S. Ct. at 1882 n.9.
87. *See generally* Alfred R. Light, *CERCLA's Wooden Iron: The Contribution Counterclaim*, 23 Toxics L. Rep. (BNA) 642 (2008).
88. *Atl. Research*, 551 U.S. at 140 ("In any event, a defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim."); Fed. R. Civ. P. 13(a). The government has sovereign immunity if PRPs seek to join it as a necessary party plaintiff under Fed. R. Civ. P. 19(a). *See, e.g.*, In re Hemingway Transp., Inc, 70 B.R. 549, 17 ELR 20709 (Bankr. D. Mass. 1987); Missouri v. Indep. Petrochemical Corp., 12 Chem. Waste Lit. Rep. 1084 (E.D. Mo. Oct. 16, 1984). Thus, while it may be unwise for the United States not to join a private cost recovery action at a site where the government has also incurred response costs because of the risk of a persuasive precedent against it on PRP liability issues in the private suit, nonetheless it may choose not to join. This only applies, however, where the government is not itself a PRP. There, sovereign immunity is waived pursuant to 42 U.S.C. § 9620. *See, e.g.*, E.I. DuPont de Nemours & Co., Inc. v. United States, 508 F.3d 126, 130, 37 ELR 20286 (3d Cir. 2007); FMC Corp. v. U.S. Dep't of Commerce, 29 F.3d 833, 840, 24 ELR 21097 (3d Cir. 1994) (en banc).
89. *Atl. Research*, 551 U.S. at 140 ("Resolution of a [CERCLA §]113(f) counterclaim would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the [CERCLA §]107(a) action."). *Cf.* Comm'r of the Dep't of Planning & Natural Res. v. Century Alumina Co., 2009 U.S. Dist. LEXIS 52135, *25 (D.V.I. June 19, 2009) ("Principles of equity and judicial economy compel us to permit defendants' counterclaims in this case despite the limited capacity in which plaintiffs ostensibly bring suit."); Adobe Lumber, Inc. v. Hellman, 2009 U.S. Dist. LEXIS 10569, *19, 39 ELR 20028 (E.D. Cal. Feb. 3, 2009) ("[T]o resolve the instant litigation, the court must ultimately allocate costs among all PRPs").
90. *See, e.g.,* Price v. United States, 818 F. Supp. 1326, 1332 (S.D. Cal. 1992) (reducing the plaintiff's recovery against other PRPs by the 4% "proportionate share of the total response costs incurred" attributable to that plaintiff).
91. *Adobe Lumber*, 2009 U.S. Dist. LEXIS 10569, at *25 (rejecting condition in proposed settlement that court order that settlement only reduces the liability of non-settling defendants by the amount of the settlement because "the proportionate share approach governs the effect of settlements in this [CERCLA] case."). *See* Light, *supra* note 67, at 33-35 (arguing that "liability must be reduced at least by the amount of the settlement, but may be less than the balance should the court find the non-settlors' equitable shares to be less than the shares that the settlement contemplated.").
92. W.R. Grace & Co. v. Zotos Int'l, Inc., 559 F.3d 85, 39 ELR 20066 (2d Cir. 2009) (party remediating site pursuant to a consent order entered with a state agency has §107 claim); Kotrous v. Goss-Jewett Co. of N. Cal., 523 F.3d 924, 38 ELR 20091 (9th Cir. 2008) (parties remediating site under state regional control board cleanup and abatement orders have §107 claim); ITT Industries, Inc. v. BorgWarner, Inc., 506 F.3d 452, 457-58, 37 ELR 20261 (6th Cir. 2007) (party conducting RI/FS under EPA administrative order on consent has a §107 claim).
93. *See supra* Illustration 3 in comment f (based on *Kotrous*, 523 F.3d at 934).
94. *See supra* Illustration 4 in comment f (based on *Port of Tacoma v. Todd Shipyards Corp.*, 2008 U.S. Dist. LEXIS 83580, **17-18 (W.D. Wash. Sept. 30, 2008).