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# Unresolved CERCLA Issues After *Atlantic Research* and *Burlington Northern*

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In two major Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] opinions, *United States v. Atlantic Research, Inc.*[2] and *Burlington Northern & Santa Fe R.R. v. United States*,[3] the U.S. Supreme Court provided long-sought guidance for parties litigating hazardous waste cleanup issues under CERCLA. *Atlantic Research* addressed the right of certain potentially responsible parties (PRPs) under CERCLA—those who had incurred CERCLA response costs without being subject to prior litigation or administrative action—to bring a §107 cost recovery action against other allegedly liable parties. This issue became critical when the Court's 2004 *Cooper Industries, Inc. v. Aviall Services, Inc.*[4] decision held that such a party could not assert a §113 contribution claim, the usual remedy in such cases. *Burlington Northern* addressed the standards that would govern "divisibility" of a CERCLA site—one mechanism by which parties can avoid joint and several liability—as well as the standards for "arranger liability" under CERCLA in the context of sales of a useful product. *Burlington Northern* has widely been recognized as a setback for the aggressive theories of joint and several liability often advanced by the government in CERCLA enforcement actions, although the full implications of the decision are not yet clear. At minimum, *Burlington Northern* reiterated traditional principles of common-law apportionment and reduced—but definitely did not eliminate—the prospects for joint and several liability to be imposed on parties at a CERCLA site.

This Article addresses some of the major issues that remain open after *Atlantic Research* and *Burlington Northern*. First, does *Atlantic Research* allow all PRPs to assert §107 cost recovery claims against other PRPs, or only some limited category of PRPs? Second, are PRPs asserting §107 claims entitled to obtain joint and several liability against other PRPs? And how does this affect the government at sites where it is also a PRP? Third, does the contribution protection provided to settling parties under CERCLA protect them from §107 claims? Fourth, what are the operative standards for establishing divisibility at a CERCLA site post-*Burlington Northern*? Fifth, can the government avoid limitations on joint and several liability by showing that a PRP's individual contribution would have required the same remedy if there had been no other PRPs involved? Last, to what extent do limitations on joint and several liability and a reinvigorated divisibility defense impact the government's ability to impose unilateral administrative orders under §106 of CERCLA?

## I. Overview of Joint and Several Liability Under CERCLA

The significant litigation that has surrounded many of the issues considered in this Article has been driven by the potential availability of joint and several liability in a §107 cost recovery action. Given the high costs of environmental cleanup, and the reality that much of the environmental contamination at particular CERCLA sites was caused by bankrupt or defunct companies, the issue of whether, and in what circumstances, the remaining solvent defendants can be held liable for contamination caused in part by others has been a major source of disputes from the inception of CERCLA through the present. This is a major issue for the government, in terms of funding cleanups, and it has also prompted certain private parties to pursue aggressive theories allowing them to shift costs to other parties.

When CERCLA was originally passed, a reference to "joint and several liability" was deleted from the statute.[5] As explained in one of the earliest and most influential CERCLA decisions, *United States v. Chem-Dyne Corp.*, CERCLA's legislative history suggests that this term was deleted "to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases."[6] Rather, under CERCLA, the scope of liability is to be "determined under common law principles, where a court

1. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
2. 551 U.S. 128, 37 ELR 20139 (2007).
3. 129 S. Ct. 1870, 39 ELR 20098 (2009).
4. 543 U.S. 157, 34 ELR 20154 (2004).
5. United States v. Chem-Dyne Corp., 572 F. Supp. 802, 806, 13 ELR 20986 (S.D. Ohio 1983).
6. *Id.* at 808.

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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."[7] Accordingly, the *Chem-Dyne* court looked to and relied upon the *Restatement (Second) of Torts*, §433A, to provide guidance for its analysis of whether or not joint and several liability should be imposed.[8] Later decisions followed the principles set forth in *Chem-Dyne* in concluding that joint and several liability was available under CERCLA, but was not mandatory and need not be applied in cases where that outcome would be inequitable. For instance, in *United States v. Monsanto*, the U.S. Court of Appeals for the Fourth Circuit found that CERCLA did not mandate the imposition of joint and several liability, and that, "[i]n each case, the court must consider traditional and evolving principles of federal common law."[9]

In general, the government has been far more successful in asserting claims for joint and several liability under CERCLA than private parties have been. In many cases, this result was consistent with the historic understanding of joint and several liability, which was that, in cases where the harm is indivisible, an "innocent" or pure plaintiff should not bear the risk of failures of proof as to the specific share of liability attributable to each defendant. CERCLA itself was enacted at a time of transition in the common law of joint and several liability. The *Restatement (Second) of Torts*, which many courts have relied on in interpreting CERCLA, reflected an approach to the apportionment of liability that allowed for joint and several liability to be obtained by an innocent plaintiff under certain circumstances, but which also held that a plaintiff's own contributory negligence was an absolute bar to recovery.[10] This approach was harsh, in different ways, to joint tortfeasors in some cases and to less-than-pure plaintiffs in others. Accordingly, the trend in the common law has been away from such harsh results and toward a comparative fault approach—allowing non-innocent plaintiffs to recover a portion of their damages, and allowing tortfeasors to escape joint and several liability in cases where they caused just a portion of the harm.[11]

While, generally speaking, courts have followed the principles of the *Second Restatement* in addressing apportionment issues, much of the CERCLA case law was developed in the context of cases where the government was not a PRP—rendering any contributory negligence defense irrelevant—or in cases where a PRP was limited to §113 contribution, rendering joint and several liability inapplicable. Such cases have prompted some courts to erroneously assume that joint and several liability is essentially automatic under CERCLA; the *Burlington Northern* decision should result in a reexamination of such cases.

As PRPs begin to pursue §107 claims much more aggressively post-*Atlantic Research*, the comparative fault principles of the *Third Restatement* would provide a much more reasonable approach than joint and several liability—a principle that is a bad fit for cases where plaintiffs so often bear some responsibility. Indeed, a more rigorous examination of the common-law principles that the U.S. Congress intended to apply to CERCLA may suggest that joint and several liability should not be available to the government itself at sites where it is also a PRP. While this result would conflict with many past decisions addressing this issue, the *Aviall, Atlantic Research* and *Burlington Northern* decisions all corrected misunderstandings of CERCLA that had become prevalent in the courts over time. The view that the federal government is always entitled to impose joint and several liability under §107, even at sites where the government may have had a greater role than the parties it is suing in causing the contamination, is one that is ripe for reexamination in light of the recent shift in CERCLA jurisprudence.

## II. Availability of §107 Cost Recovery Claims to PRPs

Although the hasty drafting of CERCLA left a number of open legal issues to be clarified by judicial decision, over time, courts developed a practical framework for adjudicating CERCLA claims between PRPs. Prior to 1986, courts had recognized that §107 provided a cause of action for contribution claims asserted by a liable party, which allowed a liable party to recover cleanup costs from another party.[12] This cause of action was often referred to as the "implied" right of contribution under §107, and it was later endorsed by the Supreme Court in *Key Tronic Corp. v. United States*, which acknowledged that, in addition to the express right of contribution created by §113 of CERCLA, the statute also "impliedly authorizes a similar and somewhat overlapping remedy in §107."[13]

This issue became less important after 1986, because the Superfund Amendments and Reauthorization Act of 1986 (SARA), created an express right of contribution under §113 of CERCLA.[14] Over time, courts nearly uniformly concluded that the presence of an express right to contribution under §113 of CERCLA meant that parties that were themselves PRPs were required to proceed using that cause of action, and could not assert a §107 cause of action.[15] One

7. *Id.*
8. *Id.* at 810.
9. 858 F.2d 160, 171, 19 ELR 20085 (4th Cir. 1988).
10. Restatement (Second) of Torts, §467.
11. Restatement (Third) of Torts: Apportionment of Liability, §1, cmts. (2001).
12. *See, e.g.,* United States v. Conservation Chemical Co., 619 F. Supp. 162, 228, 16 ELR 20193 (W.D. Mo. 1985).
13. 511 U.S. 809, 816, 24 ELR 20955 (1994). In dissent, Justices Antonin Scalia and Clarence Thomas argued that §107 expressly creates this cause of action.
14. 42 U.S.C. §9613.
15. *See, e.g.,* Metro. Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 828 n.4., 37 ELR 20010 (7th Cir. 2007) (collecting cases); Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.,

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of the reasons underlying this result was that because joint and several liability was potentially available under §107, PRPs would universally opt for the superior §107 remedy and argue for joint and several liability if allowed to proceed under that section.[16]

Although this result makes sense, it left one hole in the statutory scheme. Because a contribution action can be brought only "during or following" an action brought under §§106 or 107 of CERCLA or after a settlement of liability under §113[17]—provisions that deal with administrative orders, injunctive remedies, settlements, and cost recovery—if a party incurred costs cleaning up a site *before* it was sued or subject to an administrative order, the plain language of the statute did not entitle that party to seek contribution under §113. While many courts neglected to apply this language and allowed such parties to obtain contribution under §113, the Supreme Court disagreed with this view and held that the statutory language must be given effect.[18] Thus, in the absence of an action under §§106 or 107 or a settlement under §113, there could be no §113 remedy. Such a PRP had either a claim under §107 or no remedy at all.

Many courts believed that Congress could not have intended such a harsh result and, while the Supreme Court left the issue undecided, the majority of the courts to consider the issue concluded that §107 was available to such a PRP.[19] In *Atlantic Research*, the Supreme Court endorsed this result, holding that certain PRPs under CERCLA—those who do not have the ability to assert a §113 claim because there had been no prior administrative settlement, judicial settlement, or lawsuit, as required by the statute—could assert a §107 claim.[20] The Supreme Court, however, expressly left open the question of whether the costs related to work performed under a consent decree could be recovered under §§107, 113, or both.[21] In declining to resolve the issue, the *Atlantic Research* court left open the question of whether a PRP has the ability to opt between §§107 and 113 of CERCLA.

In *Atlantic Research*, the Supreme Court held that certain PRPs could pursue §107 cost recovery claims.[22] Acknowledging previous rulings that §§107 and 113 provide "clearly distinct remedies," the Court stated that "the remedies available in §§107(a) and 113(f) complement each other by providing causes of action 'to persons in different procedural circumstances.'"[23] The Court clarified the two remedies:

> Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under §106 or §107(a). And §107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs. Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue §113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under §107(a). As a result, though eligible to seek contribution under §113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under §107(a).[24]

Subsequent cases have analyzed the preceding paragraph to determine the circumstances under which parties may pursue §107 cost recovery claims and §113 contribution claims. Although post-*Atlantic Research* courts have consistently recognized that the two remedies are available under different procedural circumstances, those courts have not explicitly held that the availability of one remedy necessarily forecloses the availability of the other. Rather, a frequent interpretation is that the remedy is dependent on whether the costs were incurred voluntarily or not. If incurred voluntarily, the party could pursue a §107 claim, and if not, a §113 claim.

Most of the courts that have recently considered the issue distinguish cost recovery claims and contribution claims on the basis of procedural circumstances, as suggested by *Atlantic Research*, focusing on the degree to which the costs incurred were voluntary. That is, these cases stand for the proposition that a PRP may only pursue a §107 claim to recover costs voluntarily incurred; however if a PRP has been sued under §§106 or 107, or has entered into an administrative settlement with the government, that PRP may only pursue a §113 claim. As the U.S. Court of Appeals for the Ninth Circuit stated:

> a PRP . . . that incurs costs voluntarily, without having been subject to an action under §106 or §107, may bring a suit for recovery of its costs under §107(a); a party in such a position does not need a right to implied contribution under §107. Any of the defendants sued by such a PRP may seek contribution under §113(f) because they now will have been subject to an action under §107.[25]

This holding is echoed by the U.S. Court of Appeals for the Third Circuit: "[p]ermitting parties who voluntarily incur cleanup costs to bring suit under §107 comports with the fundamental purposes of CERCLA."[26] The District Court of New Jersey held that "[c]osts undertaken as the result of

191 F.3d 409, 30 ELR 20084 (4th Cir. 1999); Bedford Affiliates v. Sills, 156 F.3d 416, 29 ELR 20229 (2d Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 29 ELR 20065 (6th Cir. 1998; Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 27 ELR 20211 (9th Cir. 1997; New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 27 ELR 21159 (3d Cir. 1997; Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 27 ELR 20028 (11th Cir. 1996).

16. *See, e.g.*, Kalamazoo River Study Group v. Rockwell Int'l, 991 F. Supp. 890, 893, 28 ELR 21139 (W.D. Mich. 1998) (discussing cases).
17. 42 U.S.C. §§9613(f)(1), (3).
18. Cooper Indus., Inc. v. Aviall Services, Inc., 543 U.S. 157, 34 ELR 20154 (2004).
19. *See, e.g.*, Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc., 423 F.3d 90, 100 (2d Cir. 2005).
20. United States v. Atlantic Research, Inc., 551 U.S. 128, 141, 37 ELR 20139 (2007).
21. *Id.* at 139 n.6.
22. 551 U.S. 128.
23. *Id.* at 139 (quoting *Consolidated Edison Co.*, *supra* note 19).
24. *Id.*
25. Kotrous v. Goss-Jewett Co., 523 F.3d 924, 933, 38 ELR 20091 (9th Cir. 2008).
26. E.I. DuPont de Nemours v. United States, 508 F.3d 126, 135, 37 ELR 20286 (3d Cir. 2007); *see also* New York v. Next Millennium Realty, LLC, 2008 WL 1958002 at *6 (E.D.N.Y. May 2, 2008); OSI, Inc. v. United States, 525 F.3d 1294, 1297 n.1, 38 ELR 20107 (11th Cir. 2008).

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a legal judgment or settlement are not 'voluntary' and are thus recoverable only under §113. Costs incurred for any other reason . . . are voluntary and thus recoverable under §107."[27] In determining what constitutes voluntary costs, the U.S. Court of Appeals for the Second Circuit stated that the "relevant inquiry with respect to §107(a) is whether the party undertook the remedial actions without the need for the type of administrative or judicial action that would give rise to a contribution claim under §113(f)."[28]

In *ITT Industries v. BorgWarner, Inc.*,[29] the U.S. Court of Appeals for the Sixth Circuit addressed the issue of what remedies, post-*Atlantic Research*, were available to PRPs. In distinguishing between §§107 and 113, the Sixth Circuit focused on how those costs were incurred. "[T]he Court noted that a §107(a) action may lie where a party has itself 'incurred' cleanup costs as opposed to reimbursing costs paid by other parties, which is more appropriately covered by §113(f)."[30] The Sixth Circuit went on to state that to "maintain the vitality of §113(f), however, PRPs who have been subject to a civil action pursuant to §§106 or 107 or who have entered into a judicially or administratively approved settlement must seek contribution under §113(f)."[31] Thus, the Sixth Circuit is interpreting *Atlantic Research* to hold that PRPs who have been subject to an administrative or judicial action are foreclosed from pursuing a §107 cost recovery claim, and must, instead, pursue a §113 claim.

After the Sixth Circuit remanded the case, the plaintiffs amended their complaint to allege claims for §107 cost recovery for the sites in question. In addressing this issue, the Western District of Michigan drew attention to the Supreme Court's statement that "'it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of §107(a)(4)(B), and cost of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under §113(f)."[32] The court did acknowledge that the Supreme Court considered it possible that the two remedies might overlap in some instances, however it did not elaborate upon how that overlap might be resolved. In finding that the plaintiffs were precluded from bringing §107 cost recovery claims, the court stated:

> [c]onsistent with the language of the statute and the case law, the relevant procedural circumstances are whether the plaintiff has been subject to an enforcement *action* under §106 or §107. If it has, then the plaintiff is limited to a §113(f) contribution claim. If it has not, then the plaintiff can bring a §107 claim.[33]

In response, the plaintiffs argued that the voluntariness distinction is not in the text of CERCLA, and therefore should be broadly construed to permit a §107 action by anyone who incurs costs of response, regardless of whether it did so pursuant to agreements with the government. The court rejected this interpretation of the statute, holding that the "only construction that does justice to the statutory structure and legislative history . . . is one that provides that where a party has been the subject of a CERCLA enforcement action and can assert a claim under §113(f), that party cannot also assert a claim under §107(a)."[34]

This holding was recently echoed by the Second Circuit in *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*[35] In determining whether a PRP could pursue a §107 cost recovery claim against another PRP, the Second Circuit held that because the plaintiff had settled its CERCLA liability with the New York Department of Environmental Conservation (even without express authorization by the U.S. Environmental Protection Agency (EPA)), the only claim available was one for contribution, not cost recovery.[36] The Second Circuit reasoned: "Congress recognized the need to add a contribution remedy for PRPs similarly situated to NiMo. To allow NiMo to proceed under §107(a) would in effect nullify the SARA amendment and abrogate the requirements Congress placed on contribution claims under §113."[37]

In *Appleton Papers, Inc. v. George A. Whiting Paper Co.*,[38] the Eastern District of Wisconsin took a similar view, holding that "the operative principle appears to be that §107(a) is available to recover payments only in cases where §113(f) is not. In cases where a claim for contribution can be asserted under §113(f), §107(a) cannot be used."[39] The court went on to state that "the question whether Plaintiffs have a claim under §107(a) depends on whether any of the payments they seek to recover are recoverable under §113(f). If all of the payments they now seek to recover are recoverable under §113(f), their §107(a) claim should be dismissed."[40] The court's next statement, however, is worth noting: "If, on the other hand, some of their payments can not be recovered under §113(f), then their §107(a) claim survives."[41] This statement seems to suggest that in the event a party has *some* payments that cannot be recovered under §113, the §107 claim would still be viable. The court does not elaborate on exactly how this would play out.

In *Carolina Power & Light v. 3M*,[42] the Western District of North Carolina recently addressed whether compelled costs of response, which are neither voluntary nor reimbursement of another parties costs, can be recovered under §§107 or 113, or both. "After considering these factors, the court agrees with many of the other courts that have addressed this question that response costs incurred pursuant to an administrative settlement with the United States are recoverable

27. Reichhold, Inc. v. U.S. Metals Refining Co., 2008 WL 5046780 at *7, 39 ELR 20289 (D.N.J. Nov. 20, 2008).
28. W.R. Grace & Co. v. Zotos Int'l, Inc., 559 F.3d 85, 94, 39 ELR 20066 (2d Cir. 2009).
29. 506 F.3d 452, 37 ELR 20261 (6th Cir. 2007).
30. *Id.* at 458.
31. *Id.*
32. ITT Indus. v. BorgWarner, Inc., 615 F. Supp. 2d 640, 646, 39 ELR 20170 (W.D. Mich. July, 29 2009).
33. *Id.* at 647.
34. *Id.* at 648.
35. 596 F.3d 112, 40 ELR 20060 (2d Cir. Feb. 24, 2010).
36. *Id.* at *4.
37. *Id.* at 32.
38. 572 F. Supp. 2d 1034, 38 ELR 20231 (E.D. Wis. 2008).
39. *Id.* at 1043.
40. *Id.*
41. *Id.*
42. No.5:08-CV-463-FL (W.D.N.C. Mar. 24, 2010).

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only under §113."[43] The court stated that because plaintiffs had settled their liability with EPA, received contribution protection, and were seeking reimbursement from other parties on the theory that the costs they incurred were higher than their proportionate share, it was properly an action for contribution.

In an unpublished opinion, the Third Circuit came to the opposite conclusion, stating that in *Atlantic Research*, the Supreme Court

> distinguished actions to recover incurred clean-up costs under §107(a) (which may be undertaken by any private party at any time) with actions for contribution under §113(f) (which may only be undertaken by a party facing liability under §§106 or 107(a), and only where there has been an inequitable distribution of common liability)[.][44]

It should be noted, however, that the plaintiff in *Montville Township v. Woodmont Builders, LLC*[45] was itself a voluntary PRP—the township had purchased contaminated land and voluntarily cleaned it up without administrative or judicial compulsion.

The bulk of the courts that have examined the issue have found that §107 claims are available to PRPs who have not been subject to a §§106 or 107 suit, whereas §113 claims are available to PRPs who have been subject to a §§106 or 107 suit. Many of these cases frame this distinction in terms of whether the costs were incurred voluntarily or not. While the courts do acknowledge the potential for overlap noted by the Supreme Court in *Atlantic Research*, how this overlap might manifest has not been discussed in depth.

Of primary import in whether a party can bring a §107 claim is whether a party can assert joint and several liability, rather than being restricted to several liability under §113. This has dramatic implications on burdens of proof. Does the PRP plaintiff have to show the several share of each defendant, or merely that each PRP defendant sent hazardous wastes to the site? It is also determinative of whether the PRP-plaintiff is responsible for the orphan share or if the PRP-defendants are, which is typically a significant component of any Superfund case. These issues are discussed below.

## III. Availability of Joint and Several Liability to PRPs

After *Atlantic Research* opened the way for at least some PRPs to pursue §107 cost recovery claims, though many courts have commented on the issue, few have extensively examined whether PRPs may actually obtain joint and several liability from other PRPs. Although two district courts have held that joint and several liability is available to PRPs, just as with any other party, these two cases[46] contradict the majority of cases to address this issue. Most courts, for a variety of reasons, have held that PRPs should not be permitted to seek joint and several liability from other PRPs.

In *Aviall*, the Supreme Court explicitly chose not to address whether a PRP could seek a §107 cost recovery claim against other PRPs for joint and several liability.[47] The Court did, however, acknowledge that the parties had cited "numerous decisions of the Courts of Appeals as holding that a private party that is itself a PRP may not pursue a §107(a) action against other PRPs for joint and several liability."[48] Despite the Supreme Court's reluctance to address the issue directly, several other courts have explicitly declined to allow PRPs to seek joint and several liability from other PRPs. "Under CERCLA, where one responsible party . . . seeks to impose the response cost burden on other potentially responsible parties, it is inherently and solely an action in contribution. One potentially responsible party therefore may not obtain a judgment of joint and several liability against another potentially responsible party."[49] One district court that had analyzed the issue determined that "all of the Circuit Courts that have considered this issue have held that PRPs cannot sue other PRPs under §107 for joint and several liability."[50] The U.S. Court of Appeals for the Seventh Circuit echoed those findings, stating that "[e]very circuit to decide the issue held that, after SARA, PRPs were precluded generally from seeking joint and several cost recovery under §107(a), and that any claim seeking to shift costs from one responsible party to another must be brought as a §113(f) claim for contribution."[51]

Although it is difficult to determine whether the above-referenced cases meant to preclude PRPs from obtaining joint and several liability, or merely from seeking a §107 cost recovery claim, other courts have held that PRPs simply may not obtain joint and several liability. The Second Circuit stated:

> where multiple parties are responsible, joint and several liability attaches. Consequently, one potentially responsible person can never recover 100 percent of the response costs from others similarly situated since it is a joint tortfeasor—and not an innocent party—that must bear its *pro rata* share of cleanup costs under §107(a).[52]

The Ninth Circuit reached the same conclusion, stating that "[a] PRP's liability will correspond to that party's equitable share of the total liability and will not be joint and several."[53]

The Fourth Circuit came to a similar conclusion, and further elaborated:

43. *Id.* at 22.
44. 244 Fed. Appx. 514, 518, 37 ELR 20213 (3d Cir. 2007).
45. *Id.*
46. Reichhold Inc. v. U.S. Metal Refining Co., 2008 WL 5046780 (D.N.J. Nov. 20, 2008); Raytheon Aircraft Co. v. United States, 532 F. Supp. 2d 1306, 38 ELR 20010 (D. Kan. 2007).
47. 543 U.S. 157, 169, 34 ELR 20154 (2004).
48. *Id.*
49. Miami-Dade County v. United States, 345 F. Supp. 2d 1319, 1334 (S.D. Fla. 2004).
50. Kalamazoo River Study Group v. Rockwell Int'l, 991 F. Supp. 890, 892, 28 ELR 21139 (W.D. Mich. 1998).
51. Metro. Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 828, 37 ELR 20010 (7th Cir. 2007).
52. Bedford Affiliates v. Sills, 156 F.3d 416, 424, 29 ELR 20229 (2d Cir. 1998).
53. Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301, 27 ELR 21211 (9th Cir. 1997).

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> A potentially responsible person within the meaning of §107 is, however, presumptively liable for some portion of those costs, and therefore the only recovery it could properly seek would be *partial* recovery. A claim for partial recovery of CERCLA costs will generally be indistinguishable from a claim for contribution, and thus courts have held that as a general rule any claim for damages made by a potentially responsible person—even a claim ostensibly made under §107—is considered a contribution claim under §113.[54]

The Third Circuit agreed, stating, "[i]n other words, while a potentially responsible person should not be permitted to recover all of its costs from another potentially responsible person, the person should be able to recoup that portion of its expenditures which exceeds its fair share of the overall liability."[55] The Sixth Circuit reached the same conclusion by looking to the contribution protection provisions of §113(f)(2).[56] They reasoned that to allow PRPs to seek joint and several liability under §107 would expose parties who had settled, and were protected from contribution. "Obviously such a result would be absurd, and Congress cannot have intended PRPs to seek joint and several liability or it would have included a provision prohibiting joint and several cost recovery against settling PRPs as well as contribution."[57]

Because the courts addressing the issue of joint and several liability did so before the Supreme Court's decision in *Atlantic Research*, there remains some uncertainty about whether a PRP can seek joint and several liability from another PRP. However, the majority of courts to examine the issue have answered in the negative, and nothing in *Atlantic Research* appears to overturn these cases, at least as to the issue of joint and several liability.[58] However, the *Atlantic Research* opinion did assume, without deciding, that §107 provides for joint and several liability.[59]

## IV. Federal PRPs and Joint and Several Liability

One interesting implication of the *Atlantic Research* and *Burlington Northern* decisions is that they may prompt a reexamination of the seldom-questioned assumption that the federal government is always entitled to impose joint and several liability upon private parties in CERCLA litigation (subject to divisibility defenses).The federal courts have routinely concluded that the federal government is entitled to impose joint and several liability, even at sites where it is also a PRP,[60] and the few courts to have considered the issue explicitly concluded that allowing defenses such as contributory negligence to be asserted under CERCLA was contrary to public policy.[61]

While this result is understandable to a certain extent given Congress' intention to provide for a robust CERCLA enforcement program, it is undeniably in tension with the common-law principles underlying joint and several liability, which Congress also respected in passing CERCLA by removing the reference to mandatory joint and several liability in CERCLA and by implicitly instructing courts to look to common-law principles, such as those embodied in the *Second Restatement*.[62] It is not at all obvious why the government should be allowed to impose joint and several liability at every CERCLA site, no matter the factual context, especially in cases where it is the most significant remaining party, or the most significant of those parties that still remain viable. Common-law principles do not compel such a result, and while courts have routinely referenced the need to protect the public purse and impose cleanup costs on private parties where possible,[63] this principle has little force as applied to a site where the government itself has caused some or all of the contamination. In such a case, the public, no less than a private party, has profited from environmental contamination and should be forced to internalize those costs.

The general move away from joint and several liability to comparative fault principles suggests that it may be time to revisit this issue, especially at sites where the federal government is a large PRP. It should be noted that one federal court has already endorsed a private party's attempt to impose joint and several liability on the United States, suggesting that courts are more sympathetic to such arguments now than has been the case in the past.[64]

One interesting fact pattern in which this issue may be litigated is in the context of "unpatented mining claims." In an unpatented claim, an operator engages in mining operations on land that remains owned by the federal government. A perfected mining claim is essentially a grant from the United States for the exclusive right of possession to the claim, though fee title remains in the United States.[65] "These possessory mineral interests are known as 'unpatented' claims to distinguish them from the ownership interest of the private owner who has obtained a 'patent,' that is, an official document issued by the United States attesting that fee title to the land is in the private owner."[66] While particular legal relationships have created close questions of law regarding "own-

54. Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc., 191 F.3d 409, 415, 30 ELR 20084 (4th Cir. 1999).
55. New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1122, 27 ELR 21159 (3d Cir. 1997).
56. Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 352 n.11, 29 ELR 20065 (6th Cir. 1998) (The court's ruling in this case, that PRPs could not seek cost recovery under §107, was overturned by *Atlantic Research*, however).
57. *Id*.
58. Justice Thomas does suggest, however, that even if a PRP were to obtain joint and several liability from another PRP, the defending PRP could bring a §113(f) counterclaim to "blunt any inequitable distribution of costs[.]" *Atlantic Research*, 551 U.S. at 140.
59. *Id*. at 140, n.7.
60. United States v. Simon Wrecking, Inc., 481 F. Supp. 2d 363, 367 (E.D. Pa. 2007); New York v. Moulds Holding Corp., 196 F. Supp. 2d 210, 214, 32 ELR 20477 (N.D.N.Y. 2002).
61. United States v. Manzo, 182 F. Supp. 2d 385, 410 n.19 (D.N.J. 2001); United States v. Atlas Minerals & Chemicals, Inc., 797 F. Supp. 411, 418, 23 ELR 20288 (E.D. Pa. 1992).
62. United States v. Chem-Dyne, 572 F. Supp. 802, 13 ELR 20986 (S.D. Ohio 1983).
63. *See* Aviall Services Inc. v. Cooper Indus., Inc., 312 F.3d 677, 681, 33 ELR 20101 (5th Cir. 2002).
64. Raytheon Aircraft Co. v. United States, 532 F. Supp. 2d 1306, 38 ELR 20010 (D. Kan. 2007).
65. United States v. Etcheverry, 230 F.2d 193, 195 (10th Cir. 1956).
66. Kunkes v. United States, 78 F.3d 1549, 1551, 26 ELR 21107 (Fed. Cir. 1996).

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ership" in certain CERCLA cases, the courts have generally agreed that CERCLA imposes liability upon the mere ownership of a facility where hazardous substances are released: "Under CERCLA, ownership liability attaches to a party who holds title to the property that comprises the facility."[67] Under the plain language of CERCLA, then, the federal government should be considered a PRP at any CERCLA site where hazardous substances were released due to mining operations conducted on federally owned lands. While two federal district courts have rejected this view,[68] this question has not been heavily litigated to date, and one district court has held that the federal government was a CERCLA PRP, due to mining activities that occurred on tribal land owned by the United States.[69] At such sites, the government will likely be challenged in the future on its ability to obtain joint and several liability against other PRPs.

## V. Contribution Protection and Other Settlement Issues

Although it appears unlikely that courts will allow PRPs to obtain joint and several liability for §107 claims, the decision in *Atlantic Research* potentially creates a means by which nonsettling PRPs can sidestep the contribution protections afforded to settling PRPs by §§113(f)(2) and 122(g). Nonsettling parties can argue that contribution protection afforded to settling parties applies only to §113 claims, not to §107 cost recovery claims, which would leave the settling parties exposed to further litigation.

Courts have long recognized the importance of settlement under CERCLA, and have recognized that the protection of settling parties from further litigation is an important part of that process.[70] In 1986, Congress ensured that parties could definitively resolve their liability at a CERCLA site by providing settling parties with contribution protection—which is operative by action of the statute—protecting them from CERCLA claims at a site. Section 113 states that "[a] person who has resolved its liability to the United States or a state in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."[71] The U.S. Court of Appeals for the First Circuit concluded that "[t]his provision was designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle."[72] And, as the Second Circuit held in *Bedford Affiliates v. Sills*, courts have not allowed state-law claims for contribution or indemnity to be brought against settling parties, reasoning that allowing recovery from parties protected by §113(f)(2) would conflict with the statutory settlement scheme, deter settlement, and thus was preempted by CERCLA.[73] Furthermore, "the courts have consistently enforced CERCLA by providing settling parties with immunity from *any claim* regarding matters addressed in the settlement," so long as the claim is "in substance" one for contribution.[74] The U.S. Court of Appeals for the Eighth Circuit later affirmed, stating that "protection from contribution actions is mandatory whenever the government covenants not to sue[.]"[75] Thus, to the extent that §107 cost recovery claims could be characterized as being, *in substance*, for contribution, then case law suggests that the contribution protection afforded by §113(f)(2) would protect against cost recovery claims.

Prior to the Supreme Court's decision in *Atlantic Research*, some of the courts that addressed the availability of §107 cost recovery to PRPs discussed the potential ramifications of allowing a nonsettling party to seek cost recovery from a party that had settled its liability to the United States. Some courts addressing the issue held that a nonsettling PRP could not pursue a §107 cost recovery claim against a settling PRP, because to do so would essentially nullify the contribution protection of §113(f)(2).[76] Other courts came to the opposite conclusion, stating that allowing PRPs to pursue §107 cost recovery claims against nonsettling PRPs would not dampen the incentive to settle early.[77]

On the other hand, the text of the statute states that "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."[78] As the Supreme Court notes in *Atlantic Research*, "[t]he settlement bar does not by its terms protect against cost-recovery liability under §107(a)."[79] This issue was not before the Court, however, and may not be controlling. Nevertheless, despite the policy considerations discussed above, the contribution protection afforded by §113(f)(2) may not protect a settling party from a §107 cost recovery claim pursued by another PRP. The United States has been actively advocating that §113(f)(2) bars §107, as well as §113 claims.[80]

67. Castlerock Estates v. Estate of Markham, 871 F. Supp. 360, 364, 25 ELR 20755 (N.D. Cal. 1994); *see also* Servco Pacific, Inc. v. Dods, 193 F. Supp. 2d 1183, 1196, 32 ELR 20536 (D. Haw. 2002) ("Damon Estate as the fee simple owner is an 'owner' for purposes of section 9601(20)(A). Damon is a CERCLA PRP as a matter of law."); Briggs & Stratton Corp. v. Concrete Sales & Services, 20 F. Supp. 2d 1356, 1367, 29 ELR 20264 (M.D. Ga. 1998) ("However, as the holder of legal title to the facility . . . the McCord Trust was an 'owner' of the property under the meaning of 42 U.S.C. §9607(a).").
68. *See* United States v. Friedland, 152 F. Supp. 2d 1234 (D. Colo. 2001); Coeur D'Alene Tribe v. ASARCO, Inc., 280 F. Supp. 2d 1094 (D. Idaho 2003).
69. United States v. Newmont, 504 F. Supp. 2d 1050, 37 ELR 20234 (E.D. Wash. 2007).
70. *See* United States v. New Castle County, 642 F. Supp. 1258, 16 ELR 21007 (D. Del. 1986); United States v. Conservation Chemical Co., 628 F. Supp. 391, 17 ELR 20158 (W.D. Mo. 1985).
71. §9613(f)(2).
72. United States v. Cannons Eng'g Corp., 899 F.2d 79, 92, 20 ELR 20845 (1st Cir. 1990).
73. 156 F.3d at 427, 29 ELR 20229 (2d Cir. 1998).
74. Dravo Corp. v. Zuber, 804 F. Supp. 1182, 1186, 24 ELR 20489 (D. Neb. 1992); *see also* United States v. Pretty Products, 780 F. Supp. 1488, 1492-96 & nn.3, 7, 22 ELR 20725 (S.D. Ohio 1991) (dismissing contribution claims and various claims under Ohio state law and common law, including those labeled as indemnity and breach of contract claims).
75. Dravo Corp. v. Zuber, 13 F.3d 1222, 1226, 24 ELR 20489 (8th Cir. 1994).
76. *See, e.g.*, United Tech. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 103, 24 ELR 21356 (1st Cir. 1994).
77. *See, e.g.*, United States v. Taylor, 909 F. Supp. 355, 365, 26 ELR 20736 (M.D.N.C. 1995).
78. §9613(f)(2).
79. *Atlantic Research*, 551 U.S. at 140.
80. *See* Memorandum of the United States as *amicus curiae*, Dec. 18, 2008, Ashland, Inc. v. GAR Electroforming et al., Doc. No. 1:08-CV-227-T (D.R.I.).

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Along with §113, in 1986, Congress added §122 of CERCLA, which directed EPA to promptly reach final settlements with parties that it determined to be de minimis. Section 122(g) of CERCLA provides that "whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party . . . if such settlement involves only a minor portion of the response costs at the facility concerned . . . ."[81] Congress enacted §122(g) to protect de minimis parties, those who had sent hazardous substances that were minimal in terms of amount and toxic or other hazardous effects, from costly litigation.[82] Section 122(g) provides for EPA to enter into "final settlements" with de minimis parties "as promptly as possible."[83]

The purpose of this statutory provision was to provide de minimis parties with a final resolution of their liability at a site: "the covenant not to sue (the granting of which is within the President's discretion) and the protection from contribution claims (which must accompany a covenant not to sue) provide powerful incentives for PRPs to resolve their potential liability."[84] Courts have acquiesced to the intent of Congress in this regard.[85] Importantly, unlike the contribution protection offered by §113(f)(2), the Supreme Court did not discuss the provisions of §122. Not all CERCLA settlements with the United States involve a de minimis determination, and although the applicability of §113(f)(2) contribution protection to §107 claims is questionable after *Atlantic Research*, nothing in *Atlantic Research* suggests that the protection afforded by §122 is diminished.

As with issues related to contribution protection, post-*Atlantic Research* courts have not definitively addressed how a settlement between a plaintiff in a §107 cost recovery suit and a defendant affects nonsettling defendants. That is, if a plaintiff in a §107 action settles with a party, is the actual amount of the settlement deducted from the plaintiff's claim, or is the proportionate share of the settler's liability deducted from the plaintiff's claim? Courts that examined this question prior to *Atlantic Research* were fairly consistent in finding that when a PRP settled its liability with the government, any potential liability of the nonsettlers would be reduced by the actual amount of the settlement.[86] Because of the joint and several liability available to the government, there was little concern about the settling party paying less than its ultimate proportional share, because the nonsettling parties would have to bear the burden of any discrepancy. On the other hand, where a PRP settled its liability with another PRP in a §113 contribution action, the nonsettlers' liability would be reduced by the amount of the settler's equitable share of obligation.[87] This method of calculation places the risk of a settling party paying less than its equitable share on the plaintiff. Because PRPs may now bring §107 cost recovery actions, courts must determine which method is most in line with the language and underlying principles of CERCLA. This question may ultimately hinge, however, on whether a PRP may obtain joint and several liability from other PRPs.

## VI. *Burlington Northern* and Divisibility Issues

In *Burlington Northern*, the Supreme Court reiterated the traditional principles of law underlying divisibility and rejected the approach taken by a number of courts, including the Ninth Circuit in that case, that had determined that it was nearly impossible for a CERCLA PRP to establish divisibility of harm at a CERCLA site. The practical impact of this decision is that it has expanded the number of situations in which divisibility will provide a meaningful opportunity for CERCLA litigants to avoid joint and several liability.[88] This decision raises a number of important questions for CERCLA litigants: what is a reasonable basis for the divisibility or apportionment of liability under *Burlington Northern*, and how can a CERCLA defendant establish the factual elements supporting such a finding? Further, while the *Burlington Northern* decision has substantially strengthened private parties' ability to avoid joint and several liability under CERCLA, are there creative ways for the government to counter this defense? One such possibility is the government's recent argument on "stand-alone" costs, discussed below. Finally, while divisibility is unquestionably a defense to cost recovery claims, is it also a defense to CERCLA unilateral administrative orders (UAOs)? Section 106 of CERCLA provides a "sufficient cause" defense to a §106 enforcement orders, and while we are aware of no cases where an entity has attempted to interpose divisibility as a defense to a UAO—an unsurprising finding given the substantial penalties for noncompliance and the short shrift many courts had given CERCLA divisibility pre-*Burlington Northern*—the *Burlington Northern* decision strengthens such an argument, and may make it viable in the right factual context.

In *Burlington Northern*, the Supreme Court considered a challenge to a California district court's apportionment of liability between two CERCLA PRPs.[89] The CERCLA facility at issue in the case had become contaminated by the "sloppy" operations of an agricultural chemical distribution business (B&B), which spilled chemicals on the ground.[90] Part of B&B's operation was located on land leased from the

81. 42 U.S.C. §9622(g) (emphasis added).
82. Dravo Corp. v. Zuber, 13 F.3d 1222, 1226, 24 ELR 20489 (8th Cir. 1994).
83. 42 U.S.C. §9622(g).
84. *Dravo*, 13 F.3d at 1225.
85. Dravo Corp. v. Zuber, 804 F. Supp. 1182, 1189, 23 ELR 20317 (D. Neb. 1992), *aff'd*, 13 F.3d 1222, 24 ELR 20489 (8th Cir. 1994) (Sections 122(g) and 113(f) bar claims for monetary and declaratory relief against de minimis settlors); United States v. Alexander, 771 F. Supp. 830, 832, 22 ELR 20447 (S.D. Tex. 1991), *vacated on other grounds*, 981 F.2d 250, 23 ELR 20791 (5th Cir. 1993) (de minimis defendants who settled in partial consent decree were shielded from contribution and indemnification claims by §9613(f)(2)).
86. *See* United States v. Pretty Products, Inc., 780 F. Supp. 1488, 22 ELR 20725 (S.D. Ohio 1991); United States v. Union Gas Co., 743 F. Supp. 1144, 21 ELR 20337 (E.D. Pa. 1990); United States v. Rohm & Haas Co., 721 F. Supp. 666, 20 ELR 20127 (D.N.J. 1989).
87. *See* State of New York v. Solvent Chem. Co., 984 F. Supp. 160, 28 ELR 20570 (W.D.N.Y. 1997).
88. *See* Evansville Greenway & Remediation Trust, 2009 U.S. Dist. LEXIS 95091 (S.D. Ind. Sept. 29, 2009).
89. Burlington N. & Santa Fe Ry. v. United States, 129 S. Ct. 1870, 39 ELR 20098 (2009).
90. *Id.* at 1875.

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Burlington Northern Railroad (BN).[91] As a result of contamination from the spilled chemicals, EPA ultimately placed the contaminated site on the National Priorities List and ordered BN, the owner of part of the contaminated site, and Shell Oil Company, the supplier of the chemicals to B&B, which was insolvent, to undertake remedial actions.[92] Seeking to recover its response costs, BN initiated a suit against B&B, and that suit was consolidated with a cost recovery action against Shell and BN brought by EPA and the state.

While finding that BN, Shell, and B&B were all liable under CERCLA, rather than imposing joint and several liability, the district court found that the site contamination created a single harm but concluded that the harm could reasonably be apportioned. It based that apportionment on the following factors: (1) the percentage of the total area of the site owned by the railroad; (2) the duration of B&B's business divided by the term of BN's lease; and (3) that only two of the three polluting chemicals spilled on the leased parcel required remediation and that those two chemicals were responsible for about two-thirds of the overall site contamination requiring remediation. It found BN's several share of the government's total response costs to be 9%. Based on the estimation of chemical spills of Shell's products, the court found Shell's several share to be 6%. The government subsequently appealed this apportionment to the Ninth Circuit, which reversed the district court, finding that the record did not establish a reasonable basis for apportionment. BN and Shell subsequently appealed to the Supreme Court.[93]

Considering the issue of apportionment, the Supreme Court adopted the Southern District of Ohio's approach for *Chem-Dyne*, stating that "the universal starting point for divisibility of harm analysis in CERCLA cases is §433A of the Restatement (Second) of Torts."[94] The Court then said that the only real issue before it was whether the record provided a "reasonable basis" to uphold the trial court's apportionment analysis.[95] Finding that "the record reasonably supported apportionment of liability," the Supreme Court pointed to facts such as the district court's finding that the primary source of contamination was at the portion of the facility most distant from BN's parcel and that spills of hazardous chemicals on BN's parcel contributed no more than 10% of the total contamination.[96] Further, while finding that the trial court's calculation of the percentages of harm was not as well-supported in the record, the Supreme Court still upheld the apportionment, because the trial court used a 50% margin of error and "the District Court's ultimate allocation of liability is supported by the evidence and comports with the apportionment principles [of the *Second Restatement*]."[97]

The Supreme Court's endorsement of an apportionment analysis for a harm that many courts would have previously found to be indivisible, and which was based on a straightforward analysis involving the size of parcels, the number of contaminants, and periods of ownership, appears to make apportionment analysis available in a broader range of cases and undermines many past decisions holding that apportionment was not available unless a PRP's specific share of liability could be established with near-certainty. After *Burlington Northern*, the question for CERCLA PRPs then becomes what facts are necessary to establish a reasonable basis for apportionment of harms.

Prior to *Burlington Northern*, the courts appeared to be unified on three points: (1) §433A of the *Restatement* should govern any apportionment analysis[98]; (2) it is a factually complex inquiry[99]; and (3) volumetric contributions alone are rarely, if ever, an appropriate basis for apportionment.[100] Given that *Burlington Northern* expressly adopts *Chem-Dyne*'s holding that the *Restatement* should govern, courts should follow the *Restatement*'s guidance and allow apportionment any time there is a reasonable basis for doing so.[101] According to the *Restatement*, a "reasonable basis" includes harms that are clearly distinct,[102] harms that can be separated in time,[103] and harms that, while not clearly segregable, "are still capable of division on a reasonable and rational basis."[104] As a paradigmatic example of this final category, the comments to the *Restatement* discuss a hypothetical stream contaminated by the actions of multiple polluters and states that the harm may be apportioned among polluters on the basis of their respective contributions to the total pollution in the stream.[105] With this minimal guidance, a few district courts have considered the application of a "reasonable basis" for apportionment since the Supreme Court's decision in *Burlington Northern*. Thus far, these courts have been quite expansive in their interpretation of what is reasonable.

The Southern District of New York considered *Burlington Northern* in a recent decision in the ongoing methyl tertiary butyl ether (MTBE) products liability litigation.[106] The court found that liability is several and that the defendant in a case bears the burden for establishing a reasonable basis for apportionment.[107] The court found that an injury will be divisible only when damages can be divided by relative causation. Because the court had previously recognized that multiple manufacturers of gasoline contributed to MTBE contamina-

91. *Id.*
92. *Id.* at 1876.
93. *Id.*
94. *Id.* at 1881.
95. *Id.*
96. *Id.* at 1882-83.
97. *Id.* at 1883.
98. United States v. Chem-Dyne Corp., 572 F. Supp. 802, 13 ELR 20986 (S.D. Ohio 1983); *see also* United States v. Brighton, 153 F.3d 307, 318; 32 ELR 20530 (6th Cir. 1998); United States v. Alcan Aluminum Corp., 964 F.2d 252, 268, 22 ELR 21124 (3d Cir. 1992); O'Neil v. Picillo, 883 F.2d 176, 178, 20 ELR 20115 (1st Cir. 1989).
99. *See Brighton*, 153 F.3d at 319; *Alcan*, 964 F.2d at 269.
100. *See Alcan*, 964 F.2d at 269 (divisibility analysis requires consideration of "relative toxicity, migratory potential and synergistic capacity of the hazardous waste at issue"); *Chem-Dyne*, 572 F. Supp. at 811 ("the volume of waste of a particular generator is not an accurate predictor of the risk associated with the waste because the toxicity or migratory potential of a particular hazardous substance generally varies independently with (sic) the volume of waste"); United States v. Kramer, 757 F. Supp. 397, 422, 21 ELR 20879 (D.N.J. 1991).
101. Restatement (Second) of Torts §433A.
102. *Id.* cmt. b.
103. *Id.* cmt. c.
104. *Id.* cmt. d.
105. *Id.*
106. In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 2009 U.S. Dist. LEXIS 61382, 39 ELR 20239 (S.D.N.Y. July 14, 2009).
107. *Id.* at *2.

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tion and it was impossible to distinguish the source of the MTBE, the products liability action had proceeded under a commingled product theory. Given that the basis of liability was contribution to a commingled product that caused contamination, the court found that market share could provide a reasonable basis for apportioning harm.[108] The court noted the highly factual nature of divisibility inquiries, but found the fact that each party would call an expert on market share should provide the jury sufficient information to determine apportionment. The court went on in a footnote to say if necessary, the jury could be instructed that an assumption of equal market shares "might provide a reasonable basis for assigning a market share to defendant in the absence of any other method for doing so."[109]

In *ITT Corp. v. BorgWarner*,[110] the Western District of Michigan considered the application of *Burlington Northern* in a contribution action between PRPs. Both parties to the contribution action had entered into separate administrative orders on consent for the cleanup of different operating units within the same CERCLA site that were contaminated with trichloroethylene.[111] The plaintiff, ITT, then instituted a cost recovery action. The defendant attempted to avoid liability on the grounds that the operating units were distinct CERCLA sites subject to apportionment. The court found that defendant's evidence, consisting primarily of expert evidence demonstrating that water flow between the two operating units could not have carried contaminants from defendant's operations to ITT's property, constituted a "plausible basis" for apportionment.[112] However, the court declined to rule on apportionment at the summary judgment stage, finding that it was a highly factual inquiry that required further development.[113]

In *Saporito v. Carr*,[114] the Northern District of Illinois refused to apportion liability based on defendant's status as an operator, because facts relating to defendant's status were in dispute. Saporito was the former operator of an electroplating operation that released hazardous wastes, which ultimately required cleanup. In a cost recovery action by EPA, Saporito attempted to avoid liability on the grounds that he was never actually an operator of the facility in question, and his only involvement was in lending Carr, who ran the electroplating facility, money to keep it running.[115] Saporito further claimed that, even if he was an operator under CERCLA, liability should be apportioned such that his share was de minimis.[116] The court found that apportionment based on defendant's status as an operator with limited involvement "might be appropriate" but that it could not decide the issue on summary judgment, because the facts of defendant's involvement in the operation were disputed.[117] The court went on to hold that, under the *Restatement*, apportionment is not appropriate for joint venturers, so if defendant was a joint venturer, he could not seek apportionment under *Burlington Northern*.[118]

Collectively, these cases do little to define the bounds of a reasonable basis for apportionment. What is clear after *Burlington Northern* is that defendants have the burden to allege facts that support a reasonable basis for apportionment. At this stage, it appears that courts are willing to read "reasonable basis" quite expansively, and the highly factual nature of the inquiry renders courts hesitant to decide what constitutes a "reasonable basis" at the summary judgment stage.

## VIII. "Stand-Alone" Response Costs and Apportionment

At oral argument in *Burlington Northern*, the United States raised objections to the trial court's apportionment, stating that a more appropriate basis of apportionment would have been to calculate the government's response costs if the only source of contamination had been from the railroad parcel.[119] Under the government's theory, it should be able to recover from the railroad all costs of investigation and remediation related to the railroad parcel "standing alone" as a source of contamination. The consequence of this position would be that, even if a harm were to be divisible, one defendant could still be held liable for all of the government's response costs, if the government could show that the single defendant's contribution would have required the same cleanup.

As a starting point in understanding the impact of the government's stand-alone argument, it is important to revisit the history and purposes of CERCLA. CERCLA liability under §107 was designed to allow the government to recover the full costs of response from any *potentially* responsible party, leaving disputes over apportionment of costs based on actual responsibility for contribution actions under §113.[120] The central purpose of this design is to ensure that the government recovers first, so that it may continue to clean up contaminated sites.[121] To the extent that apportionment analysis is applied in lieu of joint and several liability in cost recovery actions, the government is increasingly faced with the possibility of not recovering the full costs of cleanup.

Under a pure several liability system, the government would bear the burden of joining all PRPs and proving the contribution of each one in order to ensure cost recovery.[122] Courts have historically resisted the application of such pure several liability in CERCLA cases, citing the broad remedial purposes of the statute, and its emphasis on the fact that parties actually responsible for contamination bear the costs

108. *Id.* at *20.
109. *Id.* at *24 n.54.
110. 2009 U.S. Dist. LEXIS 67409, 39 ELR 20170 (W.D. Mich. July 29, 2009).
111. *Id.* at *5.
112. *Id.* at *16.
113. *Id.*
114. 684 F. Supp. 2d 1043, 40 ELR 20053 (N.D. Ill. Feb. 9, 2010).
115. *Id.* at 1053.
116. *Id.* at 1061.
117. *Id.* at 1061-62.
118. *Id.* at 1062.
119. 129 S. Ct. at 1885.
120. United States v. Alcan Aluminum Corp., 964 F.2d 252, 263-64, 22 ELR 21124 (3d Cir. 1992); Acushnet Co. v. Mohasco Co., 191 F.3d 69, 77, 30 ELR 20071(1st Cir. 1999)
121. *See* United States v. Kramer, 953 F. Supp. 592, 614, 27 ELR 20878 (D.N.J. 1997).
122. *See* Restatement (Third) Torts: Apportionment of Liability §11 cmt. a ("several liability shifts the burden of insolvency from defendants to plaintiffs").

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of cleanup.[123] However, apportionment analysis, such as that upheld by the Supreme Court in *Burlington Northern*, represents a shift away from the type of full recovery that the government has traditionally been able to obtain through both the imposition of joint and several liability and the apportionment of orphan shares belonging to insolvent PRPs.[124] Consequently, the stand-alone argument is an attempt to establish that, even under a system of several liability, there are some contributors who cause a large enough share of the contamination that they can equitably be held liable for all of the response costs. In this way, it is consistent with the modified joint and several liability regimes that have been adopted in many states, which allow joint and several liability to be imposed on parties who bear a large enough share of the total fault.[125]

The only court to consider a stand-alone-type argument since *Burlington Northern* is the Western District of Michigan in *ITT*.[126] In *ITT*, the defendant argued that it should not be a PRP, because the same investigation and remediation would have been required without its contribution of pollutants to the site. The court dismissed this argument stating, "the relevant inquiry is whether each defendant discharged contaminants to the site—not whether it discharged contaminants to the site in sufficient quantities to have justified the incurrence of response costs."[127] This is consistent with numerous pre-*Burlington Northern* holdings finding that de minimis contributions do not provide an escape from §107 liability.[128] While these cases establish that the stand-alone argument will not be a valid defense to §107 liability, they do not address the core issue of the government's ability to assert that one PRP's contribution is large enough to entitle the government to full recovery from that party under an apportionment scheme.

Note that, on some levels, the stand-alone argument as raised by the government in *Burlington Northern* calls for a reconsideration of the relevant "facility" under CERCLA, which could greatly complicate the analysis. That is, in *Burlington Northern* itself, the government argued that the basis for apportionment should have been the extent of contamination and response costs on the railroad's property. It does not appear that prior to raising this argument the government argued for separate CERCLA "facilities" at the site. Consequently, the assertion of a stand-alone argument at the apportionment phase may be dictated in part by how the government's initial complaint bounds the CERCLA facility. Another interesting consideration for the stand-alone argument is that the eight-Justice majority ignored the government's argument on this point. Only Justice Ruth Bader Ginsberg, in dissent, referred to it as a basis for remanding the case back to the trial court for findings based upon the stand-alone argument. Thus, it may be reasonable to argue that the Supreme Court considered and tacitly rejected this argument.

## VIII. Apportionment as a Potential Defense to a §106 Order

Courts have recognized that PRPs may avoid responsibility for a §106 UAO to clean up a contaminated site if they can demonstrate "sufficient cause" for resisting the order.[129] While divisibility has long been recognized as a defense to cost recovery claims, it is also worth considering whether divisibility would, in appropriate factual circumstances, also serve as sufficient cause for a party to refuse to comply with a UAO. There are certainly good arguments that it should—what, after all, is the point of allowing parties to escape joint and several liability for cost recovery via divisibility, if the government could obtain precisely the same relief against such parties using the injunction-like mechanism of a UAO? On the other hand, allowing such a defense in too many cases could undermine the government's ability to take action via a UAO—a result that courts will rightly be skeptical of, given Congress' clear intention that this remedy be available to the government. This is a high-stakes question, given the Draconian penalties available—treble damages and a per-day penalty of $37,500—should a party that does not comply with a UAO later be held to have acted without sufficient cause. Perhaps unsurprisingly, given these penalties, this issue has not been heavily litigated, and there is not a large amount of case law considering the "sufficient cause" defense.[130]

The litigation risk associated with asserting that divisibility provides "sufficient cause" to refuse a UAO was overwhelming in the pre-*Burlington Northern* environment, but that calculus may be changing. To be sure, in the core cases that the UAO mechanism was designed for—true emergency situations—a major PRP at a site has very little chance of asserting such a defense, and rightly so. But where *Burlington Northern* may make a difference is at the margins—cases, for example, where all major PRPs are insolvent or defunct, but where the government chooses to pursue the remaining solvent parties, even if otherwise minor or de minimis.

Generally speaking, the standard for the "sufficient cause" is that the party receiving the UAO must have a good-faith

123. Uniroyal Chemical Co. v. Deltech Corp., 160 F.3d 238, 242, 29 ELR 20285 (5th Cir. 1999).

124. *See Kramer*, 953 F. Supp. 592 and Charter Township v. American Cyanamid, 898 F. Supp. 506, 25 ELR 21460 (W.D. Mich. 1995) (holding that orphan shares may be apportioned).

125. N.Y. C.P.L.R. §1601 (2010); 42 Pa. Cons. Stat. Ann. §7102 (2009).

126. ITT Corp. v. BorgWarner, Inc., 615 F. Supp. 2d 640, 39 ELR 20170 (W.D. Mich. July 29, 2009).

127. *Id.* at *12

128. *See, e.g.*, Acushnet Co. v. Mohasco Co., 191 F.3d 69, 75, 30 ELR 20071 (1st Cir. 1999) (refusing to impose a causation requirement for the imposition of §107 liability); United States v. Alcan Aluminum Corp., 964 F.2d 252, 264, 22 ELR 21124 (3d Cir. 1992) ("the fact that a single generator's waste would not in itself justify a response is irrelevant in the multi-generator context").

129. *See* Solid State Circuits v. Envtl. Prot. Agency, 812 F.2d 383, 389-91, 17 ELR 20453 (8th Cir. 1987); United States v. Centerior Svc. Corp., 610 F. Supp. 162, 205 (W.D. Mo. 1985).

130. General Electric (GE) is currently appealing an adverse decision of the U.S. District Court for the District of Columbia, which rejected its challenges to EPA's "pattern and practice" regarding UAOs, including the use of UAOs in nonemergency situations, the Agency's reliance on the extraordinary penalties for noncompliance to compel parties to comply, and the Agency's refusal to provide clear guidance on the parameters of the "sufficient cause" defense. *See* General Elec. Co. v. Jackson, 595 F. Supp. 2d 8, 39 ELR 20022 (D.D.C. 2009). If GE's appeal is successful, it could significantly alter the legal landscape regarding EPA's use of UAOs.

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belief—it is an open question as to whether the belief must be objectively reasonable, or whether subjective good faith suffices—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) EPA's actions in issuing the order are arbitrary and capricious.[131] In light of *Burlington Northern*'s expansive reading of divisibility, it is not clear whether a sufficiently strong divisibility case would give a PRP an objectively reasonable belief under CERCLA that it is not a liable party for those portions of a site where it could prove divisibility. That is, if a PRP receives a cleanup order for a large site and it has a reasonable basis to believe that it could successfully demonstrate that its liability is limited to a small corner of the site, could the party resist the order to clean up the larger area?

There is at least some support in the legislative history for the proposition that such a defense should, in certain circumstances, be recognized. For instance, in a 1980 statement, Sen. Robert Stafford (R-Vt.) observed that the sufficient cause defense might well apply in cases where a minor party was ordered to clean up an entire site:

> 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.[132]

The Supreme Court's *Burlington Northern* decision, and recent cases allowing small parties to avoid any CERCLA liability in cases where their contribution to a site is inconsequential compared to the contribution created by the significant PRPs,[133] suggests that courts are becoming more solicitous of objections to the harshness of CERCLA as applied to small parties.

On the other hand, because the overall aim of CERCLA is to ensure the swift cleanup of contaminated sites, courts are likely to allow EPA to exercise a significant degree of discretion in issuing UAOs to address CERCLA sites. In particular, asserting geographic divisibility as endorsed by *Burlington Northern* as a defense to a UAO could potentially conflict with cases providing EPA with broad discretion in defining the bounds of a CERCLA "facility." Resisting the order on the grounds that the PRP is liable for only a portion of the site arguably amounts to a challenge of EPA's definition of the CERCLA facility, a point on which EPA is accorded significant deference.[134]

On balance, while post-*Burlington Northern* apportionment analysis is not likely to substantially impact the assertion of the "sufficient cause" defense in the broad run of CERCLA cases, it may well serve as a defense in cases where a UAO pushes the outer bounds of EPA's authority. While the decision to reject a UAO is a weighty one, in appropriate factual circumstances, this may become a viable alternative. For instance, in a case where a UAO is issued to a party that is a small player at a site, where that party has a very strong divisibility case, and where other equitable considerations—such as a non-named federal PRP—come into play, it may well be that *Burlington Northern* will support the finding of "sufficient cause" to reject a UAO.

## IX. Conclusion

*Burlington Northern* has extended the scope of cases in which a "reasonable basis" of divisibility of harm can be asserted, although it is just as fair to say that the Supreme Court has restored this concept to something much closer to Congress' original intent, rejecting the relentless expansion of joint and several liability that had, decision by decision, lost sight of the common-law principles on which CERCLA was based and which were analyzed with care in cases like *Chem-Dyne.* Even so, the specific facts and outer bounds of what may constitute a "reasonable basis" are not yet clearly defined. Now, after the courts' decades-long digression into an approach where joint and several liability is basically always available and apportionment requires near-metaphysical certainty has been ended by the Supreme Court, it appears that the federal courts will return to the work that started in cases like *Chem-Dyne*: adjudicating CERCLA liability in a manner that is consistent with common-law principles and method. Such an approach gives opportunities for lawyers on either side of a CERCLA case to develop arguments regarding how those principles apply.

While lawyers representing industry now have better prospects in arguing for reasonable apportionment based on whatever facts appear appropriate in a given case, the government has the same opportunity. The government's "standalone" argument, for example, is an attempt to avoid the risk of partial cost recovery under apportionment of liability by establishing a threshold above which large polluters could still be held liable for all response costs. While raised in *Burlington Northern* and arguably tacitly rejected, it is certain to appear again in future cases and is representative of the kind of argument that the government will need to make after *Burlington Northern.* Finally, the impact of *Burlington Northern* on a private party's ability to resist a UAO is an

131. *Id.*

132. 126 Cong. Rec. 30986 (Nov. 24, 1980).

133. *See* Acushnet Co. v. Mohasco Corp., 191 F.3d 69, 30 ELR 20071 (1st Cir. 1999).

134. *See* Cytech Indus. v. B.F. Goodrich Co., 232 F. Supp. 2d 821, 835-36 (S.D. Ohio 2002) and Carrier Corp. v. Piper, 460 F. Supp. 2d 830, 837 (W.D. Tenn. 2006) (the bounds of a facility are determined by the administrative order); *see also* Frontier Communications Corp. v. Barnett Paving Materials, Inc., 631 F. Supp. 2d 110, 113, 39 ELR 20153 (D. Me. 2009) and Douglas Autotech Corp. v. Scott Fetzer Co., 2008 WL 205217, 38 ELR 20045 (W.D. Mich.) (holding that the boundaries of a facility are defined by the consent decree).

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open question. The endorsement of apportionment in *Burlington Northern* strengthens the argument that a party should be able to use divisibility as a "sufficient cause" to refuse to comply with a UAO. As a practical matter, this argument is most likely to be of use at sites where such a party has an extremely strong divisibility defense, as well as favorable facts and circumstances.