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2018

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Recommended Citation

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Note

Superfund and Tort Common Law: Why Courts Should Adopt a Contemporary Analytical Framework for Divisibility of Harm

*Joshua M. Greenberg**

The year is 1980.¹ The Gordon family had owned their farm in Arvin, California for fifty years and never had any concerns about drinking water quality. Indeed, the Gordons had been pumping water from their private well without any issue for as long as Michael, father of four and husband to Susan, could remember since taking over the farm from his father some thirty years earlier. However, on the morning of November 17, Michael noticed that the water from the well had a peculiar scent to it, and tasted bitter and slightly metallic. Susan confirmed that the water tasted “funny,” and urged her husband to report the incident to the proper authorities. Concerned for the health of his family and thinking someone had tampered with the farm’s only source of drinking water, Michael called the local police department and reported his concerns. After finding no evidence of

* J.D. Candidate, 2019, University of Minnesota Law School. Thank you to everyone who provided ideas and feedback throughout the writing process, especially Professor Alexandra Klass, Professor Brad Clary, and *Minnesota Law Review* editors and staff. A special thank you to my family, especially my parents, and to Taylor Mayhall for their love and support throughout law school and the writing process. Copyright © 2018 by Joshua M. Greenberg.

1. This fictionalized introductory narrative is based on the history of the Arvin Superfund Site, the place at issue in the seminal CERCLA divisibility case—*Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009). For a summary of the historical background of the Arvin Superfund Site, see *id.* at 602–05 (discussing Brown and Bryant’s twenty-eight-year agricultural chemical distribution operation at the Arvin Superfund Site and the toxic havoc that resulted thereafter); John C. Cruden, Acting Assistant Attorney Gen., Env’t & Nat. Res. Div., U.S. Dep’t of Justice, Speech Before the Environmental Law Institute: The Supreme Court’s Decision in *Burlington Northern & Santa Fe Railway Company v. United States* (May 29, 2009) [hereinafter Cruden ELI Speech], <https://www.justice.gov/enrd/acting-aag-john-cruden-s-remarks-burlington-northern-santa-fe-railway-co>. See *infra* Part I.C for a more detailed discussion of the Burlington Northern saga.

trespass or wrongdoing, the police referred the matter to the California Department of Toxic Substances Control (CDTSC) to determine the extent of the contamination.

The Gordon family was not the first landowner in the area to report potentially contaminated drinking water, and they would not be the last. As other landowners with private wells continued to intermittently complain about bitter-tasting water for the next three years, CDTSC began to connect the dots. During their investigation of numerous private wells, CDTSC determined that there was toxic pesticide contamination in the groundwater and contacted the U.S. Environmental Protection Agency (EPA) for assistance in finding the source of the contamination. In 1983, CDTSC and EPA began investigating the Arvin Plant in Arvin, CA—home to Brown & Bryant, Inc. (B & B), an agricultural chemical distribution company.² The most noticeable thing about the Arvin Plant was the odor. The acrid stench of chemicals permeated the entire grounds of the nearly thirteen-acre facility.³ Along the walls of the main warehouse were massive bulk storage tanks each the size of a standard sedan; countless barrels housing a multitude of different pesticides were precariously stacked one on top of the other.

A brownish-red chemical, the source of the odor, leaked from many of the barrels and bulk storage tanks onto the concrete floor, as haphazardly placed buckets overflowed and failed to contain the errant liquid. B & B employees periodically sprayed down the warehouse floor and other equipment, washing away the toxic pesticides into the surrounding soil and nearby unlined drainage pond, eventually contaminating the groundwater beneath the Arvin Plant.⁴ EPA and CDTSC were particularly concerned about toxic threats to neighboring drinking water supplies, as the “plume of contaminated ground water located under the facility . . . threatened to leach into an adjacent supply of potential drinking water.”⁵

In cooperation with EPA and CDTSC, B & B “undertook some efforts at remediation,”⁶ but discontinued all operations in

2. *Burlington N.*, 556 U.S. at 604.

3. “B & B opened its business on a 3.8-acre parcel of former farmland in Arvin, California, and in 1975, expanded operations onto an adjacent 0.9-acre parcel of land . . .” *Id.* at 602–03. The Burlington Northern & Santa Fe Railway Company and the Union Pacific Railroad Company (the Railroads) jointly owned the 0.9-acre parcel and leased it to B & B. *See id.* at 603, 606.

4. *Id.* at 603.

5. *Id.* at 604; *see also* Cruden ELI Speech, *supra* note 1.

6. Remedial actions address the release of hazardous substances through

1989 due to insolvency.⁷ EPA, pursuant to its authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁸ and in cooperation with CDTSC, began cleanup activities at the Arvin facility that same year.⁹ B & B would normally be responsible for funding federal cleanup activities as owner of the facility.¹⁰ However, nearly ten years after B & B declared bankruptcy, EPA sued the Burlington Northern & Santa Fe Railway Company and the Union Pacific Railway Company (the Railroads), joint owners of part of the property, to recover the government's expended cleanup costs.¹¹ Under CERCLA case law that existed at that time and absent a showing of divisibility,¹² the Railroads most likely would have been held jointly and severally liable for all of the governmental response costs towards remediating the soil and groundwater contamination at the Arvin facility, despite the fact that B & B was directly responsible for the contamination.

emphasizing permanent cleanup solutions. Remedial actions are often contrasted with removal actions, which are short-term solutions that address the release of hazardous substances requiring a prompt response. *See, e.g.*, 42 U.S.C. § 9601(23)–(24) (2012); *Superfund: CERCLA Overview*, EPA, <https://www.epa.gov/superfund/superfund-cercla-overview> (last visited Oct. 31, 2018).

7. *Burlington N.*, 556 U.S. at 605.

8. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601–75, more commonly called Superfund, establishes the framework for how the government addresses threats to “human health or the environment resulting from releases or potential releases of hazardous substances from abandoned or uncontrolled hazardous waste sites.” *See* TECH. INNOVATION OFFICE, OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, EPA, CERCLA/SUPERFUND ORIENTATION MANUAL, at I-1 (1992) [hereinafter SUPERFUND ORIENTATION MANUAL], <https://semspub.epa.gov/work/11/174484.pdf>. This Note uses the terms CERCLA and Superfund interchangeably.

9. *Burlington N.*, 556 U.S. at 605.

10. *See* 42 U.S.C. § 9607(a).

11. *Burlington N.*, 556 U.S. at 605.

12. The legislative history of CERCLA indicates, and subsequent litigation confirms, that Congress intended CERCLA liability to be governed by evolving principles of federal common law. *See infra* Part I.A. Under the common law of torts, a party otherwise jointly and severally liable may limit their liability by showing that the harm in question is *divisible*, or capable of being apportioned to multiple causes. In the CERCLA arena, courts apply the Restatement (Second) of Torts and ask whether “there is a reasonable basis for determining the contribution of each cause to a single harm.” *Burlington N.*, 556 U.S. at 614 (quoting RESTATEMENT (SECOND) OF TORTS § 433A(1)(b) (AM. LAW INST. 1965)). *See also infra* Part II.A for a more detailed discussion on how courts have applied divisibility post-*Burlington Northern*.

However, in *Burlington Northern & Santa Fe Railway Co. v. United States*,¹³ the Supreme Court held that the harm¹⁴ at the Arvin facility was divisible, and apportioned the Railroads' share to nine percent, leaving the remaining financial burden on the federal government and other parties that undertook cleanup efforts voluntarily.¹⁵ Remediation efforts at the Arvin Superfund¹⁶ Site to date, including groundwater treatment and soil capping,¹⁷ have been largely successful at reducing the risk of potential exposure to contaminants¹⁸ and the Railroads, who were not directly responsible for the contamination, were able to avoid paying more than their fair share of the cleanup costs by asserting a divisibility defense.

13. 556 U.S. at 600.

14. To further complicate an already complicated analysis, courts have struggled to define "harm" in a CERCLA context. *See, e.g.*, Steve C. Gold, *Dis-Jointed? Several Approaches to Divisibility After Burlington Northern*, 11 VT. J. ENVTL. L. 307, 315 (2009) (citing *O'Neil v. Picillo*, 883 F.2d 176, 180 (1st Cir. 1989)). The court in *O'Neil* "express[ed] doubt as to whether 'harm,' for divisibility purposes, consists of response costs, of environmental contamination that actually occurred, or of environmental contamination averted by response action." *Id.* at 315 n.35; *see also* *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 938–39 (9th Cir. 2008), *rev'd*, 556 U.S. 599 (2009) (outlining different approaches for interpreting "harm" within the CERCLA context).

15. The district court held that the Railroads' liability was limited to "9% of the total Site CERCLA response costs including interest and attorneys' fees" based on geographic, temporal, and volumetric/toxicity factors. *United States v. Atchison, Topeka & Santa Fe Ry.*, No. CV-F-92-5068 OWW, No. CV-F-96-6226 OWW, No. CV-F-96-6228 OWW, 2003 WL 25518047, at *91 (E.D. Cal. July 15, 2003). On appeal, the Ninth Circuit Court of Appeals reversed the district court's finding that there was a reasonable basis for apportioning the Railroads' liability, holding the Railroads jointly and severally liable. *Burlington N.*, 520 F.3d at 946. The Supreme Court ultimately reversed the Ninth Circuit and upheld the district court's original finding of divisibility for the Railroads. *Burlington N.*, 556 U.S. at 619.

16. "Superfund" is often informally used to refer to CERCLA. *What Is Superfund?*, EPA, <https://www.epa.gov/superfund/what-superfund> (last visited Oct. 31, 2018). Superfund can also refer to the Superfund Trust Fund, a fund used by the government to pay for cleanup activities. *See* 26 U.S.C. § 9507 (2012); 42 U.S.C. § 9601(11) (2012); SUPERFUND ORIENTATION MANUAL, *supra* note 8, at II-1 to II-2.

17. Soil capping does not destroy or remove hazardous contaminants, but rather, involves placing a protective cover over contaminated soil to isolate the contamination at issue. *See* OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, EPA, A CITIZEN'S GUIDE TO CAPPING 1 (2012), <https://semsub.epa.gov/work/HQ/158704.pdf>. Caps can range in complexity from a single layer of asphalt aimed at isolating low-level contamination to multiple-layer caps of different materials for more hazardous sites. *See id.*

18. *See Superfund Site: Brown & Bryant, Inc. (Arvin Plant), Arvin, CA Cleanup Activities*, EPA, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0901425> (last visited Oct. 31, 2018).

However, in contrast to the outcome in *Burlington Northern*, the vast majority of parties found liable under CERCLA are not successful in invoking a divisibility defense to limit their financial contributions towards reimbursement of cleanup costs.¹⁹ Defendants found liable to the government or another private party for cost recovery can bring a claim for contribution under CERCLA Section 113, which allows the court to consider equitable factors in allocating liability.²⁰ However, where a Section 113 suit is not available to a defendant because other potentially liable parties are not financially viable, unable to be located, or have resolved their liability with the government through a settlement,²¹ that defendant's only option for limiting its liability is to prove that the harm in question is divisible using causation principles.²² Whereas holding a defendant liable for the cost of an entire cleanup is fair and reasonable when that party was a direct cause of a substantial portion of the contamination, parties that are less culpable (such as the Railroads in *Burlington Northern*) are often left paying more than their fair share of cleanup costs.²³

This Note surveys the landscape of CERCLA cases dealing with apportionment of harm and argues that divisibility defenses have been largely unsuccessful because of the courts' reliance on the Restatement (Second) of Torts and the high evidentiary bar to prove a "reasonable basis for apportionment." It further argues that because Congress intended CERCLA's liability scheme to be governed by the evolving principles of common law, and because states have been moving away from joint and several liability, courts should adopt the Restatement (Third) of Torts in analyzing whether harm can be apportioned. The Restatement (Third) of Torts differs from the Restatement (Second) in that the former reflects the states' general shift away from joint and several liability schemes by being more receptive to divisibility arguments, allowing for apportionment where a

19. See *infra* notes 131–34 and accompanying text.

20. See 42 U.S.C. § 9613(f)(1); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160–61 (2004) (holding that Section 113 contribution claims are only available to parties that have been found liable under Section 107); *infra* notes 83, 146 and accompanying text for more discussion on the differences between apportionment under Section 107 and allocation under Section 113.

21. 42 U.S.C. § 9613(f)(2) ("A person who has resolved its liability to the . . . [government] in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.").

22. See *infra* Part I.B.

23. See, e.g., *infra* Part II.A.2; see also *infra* Appendix.

party can prove that it is liable for “less than the entire amount of damages.”²⁴ Further, the Restatement (Third) uses a two-step process for apportionment of liability in an effort to effectuate the policy that defendants should not be responsible for damages that they did not cause—a rule that better reflects the current state of common law and statutory tort law in the states.²⁵

Part I contextualizes CERCLA, describes how liability under the statute works in practice, and discusses *Burlington Northern* in detail. Part II discusses how courts before and after *Burlington Northern* have been relatively consistent in analyzing divisibility defenses under the Restatement (Second), how those approaches lag behind the rest of tort law doctrine in the states, and how the current state of affairs is best reflected in the Restatement (Third). Part III argues that to better align CERCLA divisibility practice with the development of state tort law, courts should adopt the Restatement (Third) of Torts in analyzing divisibility of harm in Superfund cases. This Note concludes that the current practice of presumptive joint and several liability under the Restatement (Second) in CERCLA actions is outdated and that it should be updated to better reflect the more prevalent rule of comparative responsibility.

I. CERCLA LIABILITY IN CONTEXT

To better understand why the analytical framework for divisibility analyses should be updated, it is important to establish how and why the CERCLA liability scheme came about in the first place. Section A discusses Congress’s motivations in creating CERCLA and how inopportune timing forced the House and Senate to compromise on the final law. Section B discusses how CERCLA works in practice, with a specific focus on its liability provisions and divisibility of harm, using the first seminal CERCLA case as an example. Section C discusses the *Burlington Northern* saga in detail, focusing on the factual determinations made by the district court, eventually resulting in the U.S. Supreme Court upholding the Railroads’ divisibility defense.

24. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26 cmt. a (AM. LAW INST. 2000); Michael Foy, *Apportioning Cleanup Costs in the New Era of Joint and Several CERCLA Liability*, 51 SANTA CLARA L. REV. 625, 648 n.172 (2011).

25. See RESTATEMENT (THIRD) § 26 cmt. d.

A. CIRCUMSTANCES SURROUNDING CERCLA'S ENACTMENT AND LEGISLATIVE HISTORY

The primary motivation behind enacting CERCLA was the “highly publicized Love Canal tragedy,” which cost the American public \$27 million in cleanup costs by 1980.²⁶ At the time, “Love Canal [was] one of the most appalling environmental tragedies in American history.”²⁷ From the early 1920s until 1953, the Love Canal site in Niagara Falls, New York was used as a chemical dumpsite for municipal and industrial waste by the Hooker Chemical Company.²⁸ In the late 1950s, after the dumpsite was filled in and sold to the City of Niagara Falls, NY, a public school and approximately 100 family homes were built over the site.²⁹ As the years passed, “82 different compounds, 11 of them suspected carcinogens,” percolated through the soil as drum containers rotted and leached their contents into the areas surrounding the homes and public school.³⁰ By the late 1970s, the environmental havoc was evident—“trees and gardens were turning black and dying[,] . . . [p]uddles of noxious substances were in [residents'] yards . . . [and] basements Everywhere the air had a faint, choking smell.”³¹ In the immediate aftermath of the Love Canal tragedy, the State of New York bought out all of the homes affected by the contamination.³² President Jimmy Carter “approved emergency financial aid for the Love Canal area.”³³ Although EPA had begun to address toxic pollution through a variety of other legal frameworks,³⁴ the question of who should be held liable for previously disposed-of hazardous

26. J.P. Sean Maloney, *A Legislative History of Liability Under CERCLA*, 16 SETON HALL LEGIS. J. 517, 517 (1992) (citing Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982)).

27. Eckardt C. Beck, *The Love Canal Tragedy*, EPA J., Jan. 1979, at 17.

28. *Id.*

29. *Id.*

30. *Id.* The chemical leaching resulted from the landfill site exploding, as record amounts of rainfall triggered the explosion. *Id.*

31. *Id.* Other consequences of the toxic contamination at Love Canal included a “disturbingly high rate of miscarriages” and birth defects. *Id.*

32. *Id.* at 18.

33. *Id.* The appropriation of emergency federal funds for Love Canal was the first in American history to be approved “for something other than a ‘natural’ disaster.” *Id.*

34. “The Clean Air and Water Acts, the Safe Drinking Water Act, the Pesticide Act, the Resource Conservation and Recovery Act, [and] the Toxic Substances Control Act” are all “essential links” in addressing the problem of hazardous waste. *Id.*

substances remained unanswered until 1980 when CERCLA was enacted.³⁵

Congress's ultimate comprehensive cleanup scheme, known as CERCLA, or Superfund, resulted from many compromises in the legislature, which are reflected in the somewhat vague liability provisions of CERCLA,³⁶ as the law was "hastily passed in the waning days of the lame duck session of the 96th Congress."³⁷ Three bills, H.R. 85,³⁸ H.R. 7020,³⁹ and S. 1480⁴⁰ eventually became part of the Superfund law.⁴¹

H.R. 85 was originally titled the "Oil Pollution Liability and Compensation Act," and "as amended, included provisions for a comprehensive system of liability and compensation for oil spill damage and removal costs."⁴² This system of liability, while limited to damage from oil spills, provided that "with certain limits and defenses, operators or owners of vessels or facilities were to be 'jointly, severally and strictly liable for all damages.'"⁴³ There was little debate on the House floor regarding H.R. 85 and on September 19, 1980, the House passed it and sent the bill to the Senate.⁴⁴ Eventually, some provisions of H.R. 85 unrelated to liability "became incorporated into the final Senate Superfund bill."⁴⁵

The next bill incorporated into CERCLA was H.R. 7020,⁴⁶ which was originally introduced as an amendment to the Resource Conservation and Recovery Act (RCRA).⁴⁷ Because the

35. *See id.*

36. CERCLA's main liability provision, Section 107, states that Potentially Responsible Parties (PRPs) "shall be liable" for cleanup costs, leaving unclear the standard of liability it imposes." Maloney, *supra* note 26, at 518; *see also* 42 U.S.C. § 9607(a) (2012). For a more detailed discussion of how CERCLA's liability provisions work in practice, *see infra* Part I.B.

37. Maloney, *supra* note 26, at 519.

38. H.R. 85, 96th Cong. (1979).

39. H.R. 7020, 96th Cong. (1980).

40. S. 1480, 96th Cong. (1979).

41. Maloney, *supra* note 26, at 518.

42. *Id.* at 519 (citing Grad, *supra* note 26, at 3).

43. *Id.* (quoting Grad, *supra* note 26, at 3); *see also* H.R. 85, 96th Cong. § 104, 126 CONG. REC. H9187 (daily ed. Sept. 19, 1980).

44. Maloney, *supra* note 26, at 520.

45. *Id.* Among the provisions of H.R. 85 that were incorporated were those including the concept of government response authority for releases of hazardous substances that were not hazardous wastes (not including oil). *See* Grad, *supra* note 26, at 31.

46. Maloney, *supra* note 26, at 521 (citing 126 CONG. REC. H26,336).

47. 42 U.S.C. §§ 6901–92 (2012). RCRA "was passed by Congress in 1976 to compel responsible parties, including the United States, to dispose of toxic

scope of H.R. 7020 was initially rather limited,⁴⁸ the House debate focused on making the liability provisions of the bill more stringent.⁴⁹

In particular, Congressman Al Gore proposed two amendments aimed at making the bill's liability standard strict liability and requiring divisibility to be proven by a preponderance of the evidence.⁵⁰ Congressman Gore and others believed that H.R. 7020's liability provisions were particularly deficient and the two amendments were offered to "insure that those companies and individuals who [were] responsible for . . . hazardous waste problems [would] bear their share of the cleanup cost burden."⁵¹ The first amendment removed the incentive and ability for parties to contract away liability, and also insured that a negligent defendant could not escape liability, even if the harm resulted from unrelated third-party actions.⁵² This made H.R. 7020's liability standard strict liability.⁵³ The second amendment focused on joint and several liability and aimed to limit the apparent loopholes in the original liability scheme of H.R. 7020 by requiring defendants to prove apportionability by a preponderance of the evidence—a move that brought H.R. 7020 closer to the common law principles of apportionment of harm.⁵⁴ The House, viewing the strict liability and apportionment provisions of the Gore Amendments as consistent with CERCLA's purpose, adopted the amendments, passed H.R. 7020, and sent the bill to the Senate on September 23, 1980.⁵⁵

wastes in an environmentally sound manner." Maloney, *supra* note 26, at 521 n.20 (citing Roger W. Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 3 WIS. L. REV. 635, 636–37 (1978)).

48. The original bill did not apply to hazardous waste caused by oil or pollution in navigable waters and instead focused on inventory and cleanup of "inactive waste disposal sites." *Id.*

49. Most supporters of H.R. 7020 were in favor of "stricter liability provisions" that allowed for EPA's rapid recovery of expended cleanup costs. Maloney, *supra* note 26, at 522 (citing 126 CONG. REC. H26,339–40 (daily ed. Sept. 19, 1980) (memorandum of Rep. Staggers (D-W. Va.))).

50. *See id.* at 525–28.

51. *See id.* at 523 (quoting 126 CONG. REC. H26,781 (daily ed. Sept. 23, 1980) (statement of Rep. Gore (D-Tenn.))).

52. *Id.* at 525.

53. *Id.*

54. *Id.* at 526–28 (citing 126 CONG. REC. H26,784–85 (daily ed. Sept. 23, 1980) (statement of Rep. Gore (D-Tenn.))).

55. *Id.* at 529. (citing 126 CONG. REC. H26,788, H26,798 (daily ed. Sept. 23, 1980)).

The final bill incorporated into CERCLA was S. 1480, originally titled the “Environmental Emergency Response Act.”⁵⁶ The 1980 Presidential Election, however, significantly altered the final version of CERCLA that was eventually enacted because the election resulted in a lame duck session of Congress.⁵⁷ Given the tight deadline and pressures created by an outgoing Congress, only the compromise agreement proposed by Senators Robert Stafford and Jennings Randolph had a chance of passing both houses.⁵⁸ The Stafford-Randolph compromise was introduced as an amendment to the original S. 1480, which in effect, created an entirely new bill drawing inspiration from its predecessors.⁵⁹

According to the bill’s supporters, the amended S. 1480 incorporated the best provisions of the three other bills and eliminated the more controversial provisions.⁶⁰ Specifically, the amended S. 1480 retained a strict liability standard⁶¹ but eliminated any reference to joint and several liability—instead, the bill relied on “common law principles” to determine when defendants should be held jointly and severally liable.⁶² Congress anticipated that relying on such principles for determining liability would result in “extensive litigation.”⁶³ While some viewed the

56. *Id.* at 530 (citing S. 1480, 96th Cong. (1980), 126 CONG. REC. S30,897 (daily ed. Nov. 24, 1980)).

57. *Id.*

58. *Id.*

59. *Id.* at 531.

60. *Id.* at 533 (quoting 126 CONG. REC. S30,935 (daily ed. Nov. 24, 1980) (statement of Sen. Stafford (R-Vt.))) (“Fundamentally, [my compromise] amendment 2623 is a combination of the best of the three other bills [H.R. 85, H.R. 7020, and S. 1480], and an elimination of the worst, or at least the most controversial [provisions] . . .”).

61. The Stafford-Randolph compromise bill kept the strict liability standard by specifying that liability under CERCLA should be construed to be the same as Section 311 of the Clean Water Act. 42 U.S.C. § 9601(32) (2012). That section of the Clean Water Act provides that when an “owner or operator of [a] vessel from which oil or a hazardous substance is discharged in violation of [§ 1321(b)(3)] . . . [he shall] be liable to . . . [the government] for the actual [cleanup costs].” 33 U.S.C. § 1321(f)(1) (2012). Early courts relied on this reference to the Clean Water Act to determine that liability under CERCLA Section 107 was strict. *See, e.g.*, *United States v. Ne. Pharm. & Chem. Co.*, 579 F. Supp. 823, 844 (W.D. Mo. 1984); *United States v. Price*, 577 F. Supp. 1103, 1114 (D.N.J. 1983); *City of Philadelphia v. Stephen Chem. Co.*, 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982).

62. Maloney, *supra* note 26, at 532 (quoting 126 CONG. REC. S30,932 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph (D-W. Va.))).

63. *Id.* at 532–33 (quoting 126 CONG. REC. S30,932 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph (D-W. Va.))).

amended S. 1480 “as gutting a progressive environmental bill,”⁶⁴ the Senate passed the Stafford-Randolph compromise in the waning days of the outgoing 96th Congress.⁶⁵ However, because Superfund “was in part a revenue measure . . . it was necessary to treat it as if it had formally been initiated in the House.”⁶⁶ Thus, in considering H.R. 7020, the Senate “substituted and incorporated” the Stafford-Randolph compromise, passed it by a voice vote, and sent it to the House for final consideration.⁶⁷

The House considered the amended H.R. 7020 on December 3, 1980.⁶⁸ While some members of Congress were reluctant to pass the Senate version of the bill,⁶⁹ others were in favor of passing a flawed bill because “they felt that . . . legislative action was necessary,”⁷⁰ and that any delay in passing the Stafford-Randolph compromise bill would only “prolong the overall danger that the public ha[d] been exposed to already.”⁷¹ Thus, motivated in part by the strongly held belief that *something* had to be done to hold polluters financially responsible for cleaning up hazardous contamination, the House approved the bill by a relatively wide margin.⁷² President Carter then signed the Superfund bill, putting it into effect on December 11, 1980.⁷³ CERCLA’s liability provisions are facially ambiguous and only provide that covered persons “shall be liable,” without specifying a standard of liability.⁷⁴ However, the legislative history indicates that the scope of

64. *Id.* at 533.

65. *Id.* at 533–34.

66. *Id.* at 536.

67. *Id.* (citing 126 CONG. REC. S30,987 (daily ed. Nov. 24, 1980)).

68. *Id.*

69. Congressman James Broyhill, for example, was concerned that there were “dozens of defects” and that the liability provisions of the bill were uncertain. *Id.* at 539 (citing 126 CONG. REC. H31,969 (daily ed. Dec. 3, 1980) (statement of Rep. Broyhill (D-N.C.))).

70. Congressman Mario Biaggi, for example, argued that any further back-and-forth between the Senate and the House of Representatives concerning additional changes to the bill would likely result in no legislation being enacted until the following session. *Id.* at 540 (citing 126 CONG. REC. H31,974 (daily ed. Dec. 3, 1980) (statement of Rep. Biaggi (D-N.Y.))).

71. *Id.* (quoting 126 CONG. REC. H31,973 (daily ed. Dec. 3, 1980) (statement of Rep. Vento (D-Minn.))).

72. The final vote was “274 in favor, 94 against and 64 not voting.” *Id.* at 541 (citing 126 CONG. REC. H31,981–82 (daily ed. Dec. 3, 1980)).

73. *Id.*

74. CERCLA’s main liability provision, Section 107, provides that any covered persons or entities (*see infra* Part I.B for a discussion on the scope of covered persons) “shall be liable for,” *inter alia*, all cleanup costs incurred by the government not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). *See* 42 U.S.C. § 9607(a) (2012). The NCP is

liability under the Superfund statute was meant to be “determined under common law principles,”⁷⁵ including giving defendants the burden of proving divisibility as a defense to joint and several liability.

B. CERCLA’S LIABILITY SCHEME AND THE DOCTRINE OF DIVISIBILITY

Despite the Congressional debate surrounding the liability provisions of CERCLA, it is clear from the legislative history and subsequent case law that Superfund liability under Section 107 was intended to be joint and several through the application of “traditional and *evolving* principles of common law.”⁷⁶ Indeed, “most courts recognize that CERCLA does not mandate the imposition of joint and several liability,” but will apply such a standard “when a person or entity causes a single and indivisible harm.”⁷⁷

CERCLA Section 107 provides insight into when exactly a person can be held liable for such a harm. There are four general classes of parties, referred to in CERCLA as Potentially Responsible Parties (PRPs), who are subject to potential joint and several liability under Section 107: (1) current owners and operators of a facility; (2) past owners and operators of a facility; (3) entities that generated or arranged for hazardous substance transport and/or disposal; and (4) entities that transported the hazardous material.⁷⁸ If an entity fits into one of the four PRP categories, strict liability is triggered if: (1) there are hazardous wastes present at the facility; (2) there is a release (or a threatened release) of the hazardous substances; and (3) response costs have been or will be incurred.⁷⁹

the federal government’s blueprint for implementing CERCLA and “outlines a step-by-step process for conducting both removal and remedial actions.” See SUPERFUND ORIENTATION MANUAL, *supra* note 8, at II-6.

75. Maloney, *supra* note 26, at 546 (internal citation omitted).

76. *Id.* at 541 (citing 126 CONG. REC. H31,965 (daily ed. Dec. 3, 1980) (statement of Rep. Florio (D-N.J.)) (emphasis added)).

77. Lawrence S. Coven, *Liability Under CERCLA: After a Decade of Delegation, the Time Is Ripe for Legislative Reform*, 17 OHIO N.U. L. REV. 165, 192 (1990) (citing *United States v. Monsanto Co.*, 858 F.2d 160, 172 (4th Cir. 1988) (applying RESTATEMENT (SECOND) OF TORTS § 433A (AM. LAW INST. 1976)), *cert. denied*, 109 S. Ct. 3156 (1989)).

78. 42 U.S.C. § 9607(a)(1)–(4); see also *Enforcement: Superfund Liability*, EPA, <https://www.epa.gov/enforcement/superfund-liability> (last visited Oct. 31, 2018).

79. 42 U.S.C. § 9607(a)(1)–(4); see also *Enforcement: Superfund Liability*, *supra* note 78.

The text of statute states that following the release—or threatened release—of a hazardous substance, PRPs may only escape liability by proving that the release was caused by an act of God, war, or a third party.⁸⁰ However, through the application of common law tort liability principles, courts have determined that PRPs may also escape joint and several liability by proving that the harm is divisible—a rare showing that usually has a high evidentiary bar.⁸¹ To determine whether harm is divisible, or capable of being apportioned among multiple causes, courts in CERCLA cases turn to Section 433A of the Restatement (Second) of Torts, and ask whether “there is a reasonable basis for determining the contribution of each cause to a single harm.”⁸² The doctrine of divisibility is an important piece of the Superfund puzzle because it gives PRPs the opportunity to escape the powerful jaws of joint and several liability, and to only be held liable for a portion of the total cleanup cost proportional to that party’s culpability.⁸³

80. 42 U.S.C. § 9607(b). CERCLA has three narrowly defined affirmative defenses, and in lieu of proving one of them, PRPs may only escape joint and several liability under Section 107 by showing that the harm in question is divisible. *See, e.g.*, Gold, *supra* note 14, at 308. Currently, the third party defense excludes innocent landowners, bona fide prospective purchasers and contiguous property owners from Superfund liability if the party in question can meet a number of statutory requirements. *See, e.g.*, Sudhir Lay Burggaard, *Landowner Defenses to CERCLA Liability*, A.B.A. YOUNG LAW. DIVISION: 101 PRAC. SERIES PUBLICATIONS, https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/landowner_defenses_to_cercla_liability.html (last visited Oct. 31, 2018). CERCLA’s statutory defenses are narrowly construed by the courts and “PRPs have had difficulty meeting their burden.” Frank Leone & Mark A. Miller, *Acts of God, War, and Third Parties: The Previously Overlooked CERCLA Defenses*, 45 ENVTL. L. REP. 10,129, 10,135 (2015).

81. *See, e.g.*, *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 n.3 (7th Cir. 2007) (“The only exception to joint liability is when the harm is divisible, but this is a rare scenario.”); *United States v. NCR Corp.*, No. 10–C–910, 2017 WL 3668771, at *5 (E.D. Wis. Aug. 23, 2017) (appeal filed) (“Prior to *Burlington Northern*, exceptions to joint and several CERCLA liability were considered rare and the EPA could usually recover its costs in full from any responsible party, regardless of that party’s relative fault.”).

82. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (quoting RESTATEMENT (SECOND) OF TORTS § 433A(1)(b) (AM. LAW INST. 1965)). Courts use the Restatement (Second)’s approach in analyzing divisibility of harm because it reflects tort common law at the time that the Restatement was written. *See infra* notes 88–99 and accompanying text.

83. Parties found liable under Section 107 may also sue other liable parties or PRPs for contribution pursuant to CERCLA Section 113(f). This process allows courts to “allocate response costs among liable parties using . . . equitable factors” 42 U.S.C. § 9613(f). However, where there are no viable PRPs to

The first seminal case that analyzed the liability standard under Section 107 of CERCLA was *United States v. Chem-Dyne Corp.*⁸⁴ In *Chem-Dyne*, the United States sued twenty-four alleged generators and transporters of the hazardous substances discovered at the Chem-Dyne Superfund Site under Section 107 of CERCLA for recovery of costs expended in carrying out remedial activities.⁸⁵ The defendants moved for partial summary judgment, asking the court to determine that they were not jointly and severally liable for remediation costs at the Chem-Dyne facility in an effort to mitigate their financial exposure.⁸⁶ In denying the defendants' motion, the court turned to Superfund's legislative history to glean the Congressional intent behind the statute.⁸⁷ Importantly, the court noted that the deletion of the term "joint and several liability" from Superfund was to avoid a blanket rule applicable in all cases that might lead to inequitable results, rather than an outright rejection of joint and several liability in all cases.⁸⁸ The court went on to explain that liability under the statute was to be determined under "common law principles" and that the application of joint and several liability would be determined on a case-by-case basis evaluating the complicated scenarios at multiple-generator Superfund sites.⁸⁹

Because CERCLA's subject matter was "easily distinguish[able] from areas of primarily state concern," the statute was passed "in the exercise of a constitutional function or power," and federal programs "must be uniform in character," the court determined that the standard of liability should be determined under a uniform federal common law rule.⁹⁰ Relying on legislative history, the court refused to apply a generally applicable rule of joint and several liability similar to the standard

sue in contribution, a liable party's only option to blunt the harshness of joint and several liability is to prove divisibility of harm (absent an applicable statutory affirmative defense). See *supra* note 80 and accompanying text.

84. See Gold, *supra* note 14, at 311–12, 312 n.25 (referring to *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) as the seminal CERCLA opinion dealing with the issue of liability and apportionment of harm under CERCLA Section 107).

85. *Chem-Dyne*, 572 F. Supp. at 804.

86. *Id.*

87. *Id.* at 805–08 (analyzing the impetus of Superfund's enactment and the lengthy floor debates that occurred in both the House and Senate in considering the amended version of S. 1480 for passage).

88. *Id.* at 808 (internal citations to legislative history omitted).

89. *Id.*

90. *Id.* at 808–09.

under the Federal Water Pollution Control Act,⁹¹ more commonly known as the Clean Water Act.⁹² Instead, the court applied the common law approach of the Restatement (Second) of Torts: “when two or more persons acting independently cause[] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused.”⁹³ However, where a single and indivisible harm is caused by two or more persons, each person is potentially liable for the entire harm.⁹⁴ The court also determined that where two or more persons’ actions combine to violate CERCLA, and a defendant seeks to limit their liability on the basis that the harm is divisible, that defendant bears the burden of proving that the harm is capable of apportionment.⁹⁵ Construing the facts in the light most favorable to the plaintiff, the court then found that the defendants had not met their burden in showing a reasonable basis for apportionment of harm, and accordingly denied the motion for partial summary judgment.⁹⁶

All CERCLA cases post-*Chem-Dyne* have affirmed the court’s analytical framework and courts continue to apply the Restatement (Second) of Torts in determining whether harm is divisible, or whether joint and several liability is appropriate for cost recovery actions under Superfund Section 107.⁹⁷ Congress eventually affirmed the *Chem-Dyne* court’s approach in its consideration of the Superfund Amendments and Reauthorization

91. *Id.* at 808 (“[T]he term [joint and several liability] was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.”).

92. 33 U.S.C. §§ 1251–1387 (2012).

93. *Chem-Dyne*, 572 F. Supp. at 810 (citing RESTATEMENT (SECOND) OF TORTS §§ 433A, 881 (AM. LAW INST. 1976)).

94. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 875 (AM. LAW INST. 1976)).

95. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 433B (AM. LAW INST. 1976)).

96. *Id.* at 811.

97. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (“Following *Chem-Dyne*, the Courts of Appeals have acknowledged that ‘the universal starting point for divisibility of harm analyses in CERCLA cases’ is § 433A of the Restatement (Second) of Torts.” (citing *Chem-Nuclear Sys., Inc. v. Bush*, 292 F.3d 254, 259 (D.C. Cir. 2002)); *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989)).

Act's (SARA's)⁹⁸ contribution provision.⁹⁹ This presumptive joint and several liability that can only be tempered by proving divisibility may seem like a harsh practice because it is; Congress did not design CERCLA to be fair. Rather, Congress designed CERCLA with two overarching goals—promoting timely cleanup of sites contaminated with hazardous waste, and ensuring that those responsible for the contamination pay for the cleanup (“polluter pays”).¹⁰⁰

Successful divisibility defenses were rare in the years after *Chem-Dyne*.¹⁰¹ After *Burlington Northern*, described in the next Section, many practitioners and commentators thought that the Railroads' success in proving divisibility of harm would ease the burden of proof for future CERCLA defendants and make it easier for PRPs to successfully assert divisibility arguments.¹⁰²

98. The Superfund Amendments and Reauthorization Act (SARA) was passed in 1986 and “codified judicial interpretation of CERCLA since 1980.” Maloney, *supra* note 26, at 546 n.167 (citing SARA, Pub. L. No. 99-499, 100 Stat. 613 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.)).

99. *United States v. Monsanto Co.*, 858 F.2d 160, 171 n.23 (4th Cir. 1988) (observing that the *Chem-Dyne* court's approach towards analyzing joint and several liability under CERCLA “was subsequently confirmed as correct by Congress in its consideration of SARA's contribution provisions”).

100. *Burlington N.*, 556 U.S. at 602 (“[CERCLA] was designed to promote the ‘timely cleanup of hazardous waste sites’ and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.”) (quoting *Consol. Edison Co. v. UGI Util., Inc.*, 423 F.3d 90, 94 (2d Cir. 2005)).

101. See, e.g., Martha L. Judy, *Coming Full CERCLA: Why Burlington Northern Is Not the Sword of Damocles for Joint and Several Liability*, 44 NEW ENG. L. REV. 249, 283, 283 n.17 (2010) (stating that prior to 2009, of the 160 federal cases citing to *Chem-Dyne*, defendants met their burden of proving divisibility only four times).

102. See *Cost Recovery: Burlington Northern Decision Called New Path to Fairness Under CERCLA*, TOXICS L. REP. (BNA) (May 21, 2009) (discussing comments made by Burlington Northern's counsel that the Supreme Court's affirmation of the district court's finding of divisibility on a “highly limited factual record” in *Burlington Northern* “reverse[d] a long-standing presumption by [EPA] in favor of joint and several liability in multiple-party cases”); see also Gold, *supra* note 14, at 311 n.22 (referring to an article that argued “apportionment will be more available, more defendants will argue for apportionment, and defendants will have increased leverage in settlement negotiations with government” as a result of *Burlington Northern*). But see Gold, *supra* note 14, at 311 (“[T]he *Burlington Northern* decision should have relatively limited impact on CERCLA litigation, if federal courts understand and apply the Supreme Court's opinion properly.”); Cruden ELI Speech, *supra* note 1, at 1 (arguing that because *Burlington Northern* “arose from an unusual fact pattern,” it is not “the death knell of Superfund enforcement” and actually “reaffirms the law of joint and several liability”).

C. THE CIRCUMSTANCES OF *BURLINGTON NORTHERN*¹⁰³ AND THE DIVISIBILITY FRAMEWORK

Pre-*Burlington Northern*, courts tended to allow apportionment only in relatively simple CERCLA cases, where divisibility hinged on a single factor, such as at a site with geographically separated pollutants or multiple PRPs operating a facility for mutually exclusive periods of time.¹⁰⁴ However, in affirming the district court's finding that the contamination at the Arvin Superfund Site was theoretically divisible and capable of apportionment, the Supreme Court relied on a combination of geographic, temporal, and volumetric/toxicity factors.¹⁰⁵

As discussed in the Introduction, B & B, the owner and operator of the Arvin facility and the party responsible for the contamination at the site, became insolvent in 1989 and was unable to continue cleanup activities.¹⁰⁶ That same year, EPA added the Arvin Site to the National Priorities List (NPL)¹⁰⁷ and, in cooperation with the California Department of Toxic Substances Control (CDTSC), exercised its authority pursuant to CERCLA Section 104 to begin cleanup activities at the site¹⁰⁸ using monies from the Hazardous Substance Response Trust Fund (Superfund

103. For simplicity's sake, this Note does not address the Supreme Court's analysis of Shell Oil Co.'s liability as an "arranger." For a detailed discussion of the *Burlington Northern* "arranger" issue, see, for example, Steven Ferrey, *Reconfiguration of Superfund Liability: The Disconnection Between Supreme Court Decisions and the Lower Federal Courts*, 41 SW. L. REV. 598, 608–10, 612 (2012) and Judy, *supra* note 101, at 253.

104. See Bina Joshi, *Apportionment of CERCLA Liability Post-Burlington Northern*, 25 ENVTL. LITIG. 2, 2 (2014), <https://www.americanbar.org/groups/litigation/committees/environmental-energy/articles/2014/spring2014-apportionment-of-cercla-liability-post-burlington.html>.

105. *Burlington N.*, 556 U.S. at 606, 615–17; see also Joshi, *supra* note 104, at 3. Some scholars argue that the district court's reliance on multiple factors in determining apportionment was flawed. See, e.g., William C. Tucker, *All Is Number: Mathematics, Divisibility and Apportionment Under Burlington Northern*, 22 FORDHAM ENVTL. L. REV. 311, 312–13 (2011) (arguing that apportionment of a single harm has only been appropriate in simple cases, "when one theory of divisibility was alleged," and that the Supreme Court in *Burlington Northern* affirmed a "flawed method of calculating the Railroads' apportioned share of liability," resulting in an "artificially-created unapportioned share").

106. *Burlington N.*, 556 U.S. at 605.

107. The National Priorities List, or NPL, "is the list of sites of national priority among the known releases or threatened releases of hazardous substances . . . throughout the United States," and guides EPA in determining which sites warrant further investigation. *Superfund: National Priorities List (NPL)*, EPA, <https://www.epa.gov/superfund/superfund-national-priorities-list-npl> (last visited Oct. 31, 2018).

108. *Burlington N.*, 556 U.S. at 605.

Trust Fund).¹⁰⁹ To recoup their expended cleanup costs, EPA and CDTSC brought a cost recovery action¹¹⁰ against the Railroads as joint owners of the leased nine-acre portion of the Arvin facility.¹¹¹ Four years after a six-week bench trial,¹¹² the district court ruled in favor of the Government, holding that the Railroads were PRPs under CERCLA Section 107 as “owners of a portion of the facility.”¹¹³

Although the Railroads did not explicitly raise the issue of divisibility at trial, the district court sua sponte searched the evidentiary record to answer the question of divisibility.¹¹⁴ The district court first determined that the harm at the Arvin Superfund Site was a “single harm” consisting of “contaminated soil at various locations and depths around the Site and one . . . plume of contaminated groundwater.”¹¹⁵ Then, the district court found that the length of time that B & B leased the parcel from the Railroads was thirteen years, or 45% of the total amount of time B & B was the sloppy operator¹¹⁶ of the facility,¹¹⁷ and that the

109. In addition to outlining the liability framework for PRPs, CERCLA authorized the creation of the Superfund Trust Fund, a fund financed by a tax on the petroleum and chemical industries, general revenues, earned interest and cost recoveries from PRPs. 26 U.S.C. § 9507 (2012); 42 U.S.C. § 9601(11) (2012); SUPERFUND ORIENTATION MANUAL, *supra* note 8, at II-1 to II-2. EPA uses monies from the Superfund Trust Fund to pay for site cleanup when PRPs cannot be identified or if PRPs are unsuccessful at their own remediation and/or removal efforts. SUPERFUND ORIENTATION MANUAL, *supra* note 8, at II-2.

110. EPA has the authority, pursuant to CERCLA Section 107, to recover all response action costs and damages to natural resources. *See* 42 U.S.C. § 9607(a)(4)(A)–(D); SUPERFUND ORIENTATION MANUAL, *supra* note 8, at IV-3. Typically, EPA will pursue cost recovery actions if negotiation and settlement with PRPs is unsuccessful and the government chooses to perform the cleanup work itself, or when PRPs are identified after the government has incurred response costs and seeks to recoup them. SUPERFUND ORIENTATION MANUAL, *supra* note 8, at IV-11.

111. *Burlington N.*, 556 U.S. at 605.

112. *Id.* (“The District Court conducted a 6-week bench trial in 1999 and four years later entered a judgment in favor of the Governments.”).

113. *Id.*; *see also* *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, Nos. CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228 OWW, 2003 WL 25518047, at *52 (E.D. Cal. July 15, 2003), *aff’d in part, rev’d in part*, 520 F.3d 918 (9th Cir. 2008), *rev’d*, 556 U.S. 599 (2009).

114. *Burlington N.*, 556 U.S. at 622–23 (Ginsburg, J., dissenting) (describing the district court’s “heroic labor” in apportioning costs, despite the fact that the Railroads did not make any arguments regarding apportionment of liability); *see also Atchison, Topeka & Santa Fe Ry. Co.*, 2003 WL 25518047, at *87–91.

115. *Atchison, Topeka & Santa Fe Ry. Co.*, 2003 WL 25518047, at *87.

116. *Id.* at *95 (“By everyone’s account, B & B was a sloppy operator.”).

117. *Id.* at *88 (“The total length of the B & B-Railroad lease, 13 years, is 45% of the B & B total of 29 years of operations at the Site from 1960 to 1989.”).

Railroads' parcel constituted 19.1% of the surface area of the entire Arvin site.¹¹⁸ The district court also noted that the "overwhelming majority of hazardous substances were released from the B & B parcel," and not from the parcel leased by the Railroads.¹¹⁹ Taking the geographic and temporal factors into account, assuming that two-thirds of the site contamination resulted from chemical spills on the Railroads' leased parcel, and using a 50% "fudge factor,"¹²⁰ the district court held that the Railroads' contribution to the harm at the Arvin Superfund Site could be no more than 9%, and therefore, that they were responsible for only 9% of EPA's total response costs at the facility.¹²¹

On appeal, the Court of Appeals for the Ninth Circuit agreed that the harm caused by the Railroads was *theoretically* capable of apportionment but reversed the district court and held that the defendants had not met their burden in showing a reasonable basis for apportionment.¹²² Because the Ninth Circuit concluded that the Railroads had not met their burden in proving divisibility, the ruling held the Railroads jointly and severally liable for cleanup costs at the Arvin Superfund Site.¹²³

The Supreme Court then reversed the Ninth Circuit, holding that the "District Court reasonably apportioned the Railroads' share of the site remediation costs at 9%."¹²⁴ Specifically,

118. *Id.* ("The evidence shows that the Railroad parcel is approximately 19.1% of the surface area of the total site.").

119. *Id.*

120. The Supreme Court held that "any miscalculation . . . [was] harmless in light of the District Court's ultimate allocation of liability, which included a 50% margin of error." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 618 (2009).

121. *Atchison, Topeka & Santa Fe Ry. Co.*, 2003 WL 25518047, at *90–91 (multiplying together 19%, the proportion of the Arvin site's surface area occupied by the Railroads' leased parcel; 45%, the proportion B & B's time spent as the owner/operator of the facility during which it leased the Railroads' parcel; and 66%, the proportion of the site contamination attributable to spills on the leased parcel, and allowing for calculation errors of up to 50%, the district court arrived at an apportioned liability share of 9% for the Railroads).

122. The Ninth Circuit found that the record lacked sufficient data to determine the "precise proportion of contamination that occurred on the relative portions of the Arvin facility and the rate of contamination in the years prior to B & B's addition of the Railroad parcel." *Burlington N.*, 556 U.S. at 617. Further, the Ninth Circuit held that the lease duration and size of the leased area were not reliable measures of the contamination on the portion of the site owned by the Railroads. *Id.*

123. *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 952 (9th Cir. 2008).

124. *Burlington N.*, 556 U.S. at 619.

the Supreme Court concluded that the facts in the record “reasonably supported the apportionment of liability,” according to the principles outlined in the Restatement (Second) of Torts.¹²⁵ The Court held that the district court’s use of the leased parcel’s size and the lease’s duration as a starting point for its divisibility analysis was reasonable, and that any miscalculations resulting from the assumption that two-thirds of the contamination stemmed from the leased parcel were rendered harmless by the inclusion of a 50% margin of error.¹²⁶ By limiting the Railroads’ share of the cleanup costs to 9% and not including the portion of the harm attributed to the then-insolvent B & B, the Court required the government, and by extension the taxpayers, to pay for an “orphan share”¹²⁷ of approximately 91% of the total site remediation costs.¹²⁸

In the aftermath of *Burlington Northern*, many practitioners and commentators thought that the Supreme Court’s significant deference to the district court’s finding of divisibility using multiple theories of apportionment on a highly complicated factual record would result in a lower burden of proof for PRPs arguing for an apportionment of liability.¹²⁹ However, as the next Part shows, that has not been the case. Subsequent decisions

125. See *Burlington N.*, 556 U.S. at 617–19. Even though the burden of proving divisibility normally falls to the party raising the defense, the district court took it upon itself to perform the apportionment analysis because the railroads and the government both “effectively abdicated providing any helpful arguments to the court” by taking an all-or-nothing approach to liability and advocating for 0% and 100% liability, respectively. *United States v. Atchison, Topeka & Santa Fe Ry.*, No. CV-F-92-5068 OWW, No. CV-F-96-6226 OWW, No. CV-F-96-6228 OWW, 2003 WL 25518047, at *82 (E.D. Cal. July 15, 2003). The Supreme Court did not address the burden of proof issue, instead framing the question as “whether the record provided a reasonable basis for the District Court’s conclusion that the Railroads were liable for only 9% of the harm caused by contamination at the Arvin facility.” *Burlington N.*, 556 U.S. at 615.

126. *Id.* at 617–19.

127. An orphan share is the share of liability at a given Superfund site that can be attributed to an insolvent or defunct party or nonparty. See Kenneth K. Kilbert, *Neither Joint nor Several: Orphan Shares and Private CERCLA Actions*, 41 ENVTL. L. 1045, 1067 (2011).

128. See *Burlington N.*, 556 U.S. at 618–19; see also Bradley Marten, *U.S. Supreme Court Holds that Superfund Liability Is Not Joint and Several Where a Reasonable Basis for Apportionment Exists; Court also Narrows Arranger Liability*, MARTEN L. (May 4, 2009), <https://www.martenlaw.com/newsletter/20090504-superfund-liability>.

129. See *supra* note 102 and accompanying text; see also *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 483 (D.S.C. 2011) (“Some legal commentary and case law have interpreted *Burlington Northern* to lessen the burden on defendants seeking to avoid joint and several liability by demonstrating a reasonable basis for apportionment.”).

have determined that *Burlington Northern* simply reiterated the *Chem-Dyne* approach to apportionment and did not endorse a shift in the divisibility analytical framework.¹³⁰

II. SITE COMPLEXITY AND AN OUTDATED ANALYTICAL FRAMEWORK CONTRIBUTE TO CERCLA DEFENDANTS' LACK OF SUCCESS IN ASSERTING DIVISIBILITY DEFENSES

In the thirty-three post-*Burlington Northern* apportionment cases,¹³¹ courts continue to limit divisibility in all but the simplest circumstances. Section A delves into a representative selection of post-*Burlington Northern* apportionment cases and argues that PRPs' lack of success in proving divisibility defenses is due in part to the reliance on the Restatement (Second) of Torts as the analytical framework. Section B discusses the trends in United States tort law and argues that the judiciary's current approach to analyzing apportionment of harm in CERCLA cases is outdated. Section C discusses the major differences between the Restatement (Second) and the Restatement (Third), and contends that the latter better reflects the current state of tort common law.

A. POST-*BURLINGTON NORTHERN*, APPORTIONMENT OF HARM CONTINUES TO BE A HIGH BAR FOR CERCLA DEFENDANTS TO REACH

Superfund jurisprudence after *Burlington Northern* has continued the trend of widespread joint and several liability for PRPs sued for cost recovery under CERCLA Section 107,¹³² and courts continue to exclusively use the Restatement (Second) of Torts in analyzing apportionment of harm.¹³³ Since *Burlington Northern*, there have been thirty-three CERCLA cases analyzing the issue of apportionment; only two concluded that the harm in

130. See, e.g., *United States v. Iron Mountain Mines, Inc.*, No. 91-0768-JAM-JFM, 2010 WL 1854118, at *3 (E.D. Cal. May 6, 2010); Joshi, *supra* note 104. See also *infra* Part II.A, for a discussion of post-*Burlington Northern* cases dealing with divisibility defenses.

131. See *infra* Appendix, for a table of CERCLA cases that analyze the issue of divisibility of harm.

132. See Derek Wetmore, *Joint and Several Liability After Burlington Northern: Alive and Well*, 32 VA. ENVTL. L.J. 27, 40-44, 59 (2014).

133. See, e.g., *United States v. NCR Corp.*, 688 F.3d 833, 838 (7th Cir. 2012) ("The 'universal starting point for divisibility of harm analysis in CERCLA cases' is § 433A of the Restatement (Second) of Torts." (quoting *Burlington N.*, 556 U.S. at 614)).

question was divisible.¹³⁴ The PRPs' success in asserting a divisibility defense in both cases was likely due, at least in part, to the simple factual circumstances surrounding the contamination, compared to that at a typical Superfund site, allowing the courts to find a reasonable basis for apportionment of harm.

1. Successful Divisibility Defenses: *Reichhold* and *City of Gary*

The first post-*Burlington Northern* case resulting in a successful divisibility defense is *Reichhold, Inc. v. U.S. Metals Refining Co.*,¹³⁵ a 2009 case issued shortly after *Burlington Northern*. Despite the *Reichhold* trial taking place before *Burlington Northern* was decided, the Supreme Court's decision apparently influenced the New Jersey federal court's divisibility analysis.¹³⁶ *Reichhold, Inc.* conducted a series of real estate transactions, triggering an affirmative duty under a state environmental statute for the company "to investigate possible environmental contamination at the Site and to remediate such contamination."¹³⁷ After expending cleanup costs, *Reichhold* sued United States Metals Refining Company (USMRC) for cost recovery under CERCLA Section 107 as the past owner of the contaminated site.¹³⁸ *Reichhold* sought to be reimbursed for, inter alia, the cost of capping¹³⁹ a particular parcel of soil at the site as required by the New Jersey Department of Environmental Protection (NJDEP).¹⁴⁰

The *Reichhold* court found that the contamination that necessitated the cap had two separate causes—USMRC's historic smelting operations and extensive use of large amounts of metallic slag as fill material throughout the parcel, and a third party's depositing of an additional two to three feet of fill material containing hazardous metals—and that either cause alone would have spurred NJDEP to require installation of the cap.¹⁴¹

134. *City of Gary v. Shafer*, No. 2:07-CV-56-PRC, 2011 WL 3439239, at *3 (N.D. Ind. Aug. 5, 2011); *Reichhold, Inc. v. U.S. Metals Ref. Co.*, 655 F. Supp. 2d 400, 448–49 (D.N.J. 2009).

135. *Reichhold*, 655 F. Supp. 2d 400.

136. *See id.* at 448 ("The recent Supreme Court decision in [*Burlington Northern*] suggests that this situation might be addressed by apportionment rather than equitable principles."); Wetmore, *supra* note 132, at 41.

137. *Reichhold*, 655 F. Supp. 2d at 406.

138. *Id.* at 404.

139. *See supra* note 17 for more information on capping as a remedy for soil contamination.

140. *Reichhold*, 655 F. Supp. 2d at 448.

141. *Id.*

Looking to the then-recent *Burlington Northern* opinion for guidance, the *Reichhold* court determined that the hazardous metals contamination that was remedied by the cap was a “distinct or single harm that USMRC and a third party caused,” and that the reasonable basis for apportionment was the fact that “each [party] was responsible for a sufficient amount of metals contamination that required the cap.”¹⁴² Thus, rather than apportioning the harm according to the amount of hazardous metal contamination that each party was directly responsible for, the *Reichhold* court split the difference and held USMRC liable for fifty percent of the costs associated with the cap.¹⁴³

The second post-*Burlington Northern* case where a PRP successfully asserted a divisibility defense is *City of Gary v. Shafer*.¹⁴⁴ Despite the court’s citing of *Burlington Northern*, *City of Gary* is not an example of an easing of the divisibility standard,¹⁴⁵ partly because the court’s order seems to conflate Section 107 apportionment with Section 113 allocation through its reliance on equitable factors in “apportioning” the harm.¹⁴⁶ Despite the case being a CERCLA Section 107 cost recovery claim,¹⁴⁷ the court cited both CERCLA Section 107, which allows for *apportionment* of liability when there is a reasonable basis for dividing causation, and CERCLA Section 113, which allows for *allocation* of liability considering causation *and* equitable factors.¹⁴⁸ Nevertheless, because of the small number of cases involving successful divisibility defenses, it is illuminating to discuss the facts and analysis underlying the apportionment issue in *City of Gary*.

The defendant in *City of Gary*, Paul’s Auto Yard, Inc., was the operator of the site in question for approximately two years

142. *Id.* at 448–49 (adopting the *Burlington Northern* court’s use of the Restatement (Second) in analyzing divisibility of harm at the site).

143. *Id.* at 449. Both parties in *Reichhold* were financially solvent and able to pay their half of the bill. *See id.*

144. *City of Gary v. Shafer*, No. 2:07–CV–56–PRC, 2011 WL 3439239, at *3 (N.D. Ind. Aug. 5, 2011).

145. Wetmore, *supra* note 132, at 42.

146. *City of Gary*, 2011 WL 3439239, at *1–3. “While section 107 determines the amount of contribution based solely on *actual* contamination caused by PRPs, section 113 allows courts to examine equitable concerns when allocating liability.” Foy, *supra* note 24, at 640 n.113. Further, while any party that has incurred cleanup costs (PRP or otherwise) may bring a Section 107 cost recovery action, a contribution suit under Section 113 is only available to “PRPs already subjected to an EPA-initiated cost recovery action or cleanup order.” *Id.* (citing *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004)).

147. *See City of Gary v. Shafer*, 683 F. Supp. 2d 836, 840 (N.D. Ind. 2010).

148. *City of Gary*, 2011 WL 3439239, at *2–3 (emphasis added).

and moved a small amount of previously contaminated soil, resulting in a release of hazardous substances and liability under CERCLA.¹⁴⁹ At the damages phase of the trial, the court considered “the allocation of . . . [the defendant’s] proportionate share of the total liability.”¹⁵⁰ Relying on expert testimony, the court determined that the defendant contributed to the lead contamination at the site through moving already-contaminated soil, but that any contribution was *de minimus*.¹⁵¹ The court considered temporal and volumetric factors, and held that “[the defendant’s] proportionate share in the lead contamination of the soil . . . constituted no more than 0.24% of the whole of the contamination.”¹⁵² The court concluded that Paul’s Auto Yard, Inc.’s slight moving of “no more than 0.24% of the total volume of lead-contaminated soil” within “a relatively short period of time” was “a reasonable, objective, measurable, concrete, [and] specific basis for allocation of liability” and ordered that Paul’s Auto Yard, Inc.’s financial contribution be “0.24% of the total costs.”¹⁵³

These two successful instances of a divisibility defense are likely due, at least in part, to the simple factual circumstances of each case. Despite the inclusion of equitable factors in *City of Gary*, the court considered temporal and volumetric variables in allocating liability¹⁵⁴ and the *Reichhold* court apportioned liability of the single harm according to two distinct yet sufficient causes.¹⁵⁵

2. A More Typical Example: NCR Corporation’s Failed Divisibility Defense in the Fox River Superfund Litigation

The methodologies used in these two cases might not be feasible in a situation with a more complex history of hazardous waste contamination. For example, take *United States v. NCR Corp.*,¹⁵⁶ a more typical post-*Burlington Northern* Superfund

149. *See id.* at *2–4.

150. *Id.* at *1.

151. *Id.*

152. *Id.* at *2. Active soil contamination occurred for a period of approximately thirty-eight years and the defendant’s *de minimus* moving of contaminated soil occurred during a window of approximately 1.5 years, or about 3.95% of the time period of interest. *Id.* The volume of lead-contaminated soil disturbed by the defendant “was no more than 0.1% to 0.24% of the total volume of contamination.” *Id.*

153. *Id.* at *3.

154. *See id.* at *1–2.

155. *Reichhold, Inc. v. U.S. Metals Ref. Co.*, 655 F. Supp. 2d 400, 448–49 (D.N.J. 2009).

156. *United States v. NCR Corp.*, No. 10–C–910, 2017 WL 3668771 (E.D.

case involving apportionment of harm at the Fox River Superfund site in Wisconsin, “one of the last and largest uncontrolled sources of [toxic polychlorinated biphenyls (PCBs)] into Lake Michigan.”¹⁵⁷ The PCB contamination at the Fox River Superfund Site resulted primarily from the use of a PCB-containing solvent in the production of carbonless copy paper from 1954 to 1971.¹⁵⁸ Contamination at the site was pervasive, with several paper mills discharging approximately 700,000 pounds of toxic PCBs into the Fox River via “numerous wastewater discharge points” over a period of seventeen years.¹⁵⁹ Before cleanup at the site began, there were approximately fourteen million yards of contaminated sediments containing 65,000 pounds of PCBs, and every year, an estimated 620 pounds of PCBs were flushed from the river into Green Bay.¹⁶⁰

Initially, a variety of paper mills, municipalities, and other entities undertook voluntary and involuntary remedial actions to clean up the PCB-laden sediments.¹⁶¹ However, NCR Corp. (NCR), the sole manufacturer of the toxic coating on every sheet of carbonless copy paper, eventually ceased its voluntary cleanup activities after an unfavorable ruling against it left it without the option to sue other PRPs in a Section 113 contribution action.¹⁶² EPA then filed a CERCLA action against NCR and eleven other PRPs to compel cleanup activities.¹⁶³ Because CERCLA’s statutory defenses were not available to NCR,¹⁶⁴ its sole defense to resisting EPA’s enforcement action was to show that the “harm was divisible and thus capable of apportionment.”¹⁶⁵

Wis. Aug. 23, 2017) (appeal filed).

157. *Case Summary: NCR Corporation Agrees to End Litigation and Complete PCBs Cleanup at Fox River Superfund Site*, EPA, <https://www.epa.gov/enforcement/case-summary-ncr-corporation-agrees-end-litigation-and-complete-pcb-cleanup-fox-river> (last visited Oct. 31, 2018) [hereinafter *Case Summary: NCR Corp.*].

158. *NCR Corp.*, 2017 WL 3668771, at *1.

159. *Case Summary: NCR Corp.*, *supra* note 157.

160. *Id.*

161. *NCR Corp.*, 2017 WL 3668771, at *2–3.

162. *Id.*

163. *Id.* at *4.

164. CERCLA’s three statutorily-defined defenses are the act of God, war, and third-party defenses; these defenses have been narrowly construed by the courts and are often difficult for PRPs to prove. *See supra* note 80 and accompanying text.

165. *NCR Corp.*, 2017 WL 3668771, at *4.

Inspired by the Railroads' success in asserting a successful divisibility defense in *Burlington Northern*, NCR "focused its efforts in the enforcement action" on establishing a similar defense "in an effort to substantially limit its ultimate liability."¹⁶⁶ Specifically, NCR undertook a very detailed and expensive study to carefully map portions of the Fox River.¹⁶⁷ Through sediment analysis and historical document review, "one expert arrived at an estimate of the percentage of the total PCBs each PRP discharged into [the Fox River] over . . . fifty-five years."¹⁶⁸ Another expert entered that data into a computer model designed to mimic the "movements of sediment and PCB transport in the river."¹⁶⁹ A third expert then correlated the conclusions of the first two experts with the actual remediation costs, dividing the river into "73 apportionment polygons, and arrived at a calculation of each party's share of the remediation cost in each polygon."¹⁷⁰

NCR and Glatfelter, another paper manufacturer PRP, presented the expert divisibility evidence over the course of a two-week trial.¹⁷¹ Following full briefing on the apportionment issue, the district court concluded that "NCR and Glatfelter had failed to prove that the harm caused by the discharge of PCBs into the river was divisible," and held both parties jointly and severally liable.¹⁷² On appeal, the Seventh Circuit Court of Appeals vacated the district court's holding that the harm was not divisible and remanded the case, concluding that the district court had failed to explain why the mass-percentage estimates of one of NCR's experts were unreliable.¹⁷³

After remand and acting on multiple motions for reconsideration, the district court concluded that NCR failed to meet its burden in demonstrating "both that the harm [was] theoretically capable of divisibility and that there [was] a reasonable basis for apportionment."¹⁷⁴ Specifically, the court noted that the exten-

166. *Id.* at *5.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* (citing *United States v. NCR Corp.*, 960 F. Supp. 2d 793 (E.D. Wis. 2013)).

173. *Id.* (citing *United States v. P.H. Glatfelter*, 768 F.3d 662 (7th Cir. 2014)).

174. *United States v. NCR Corp.*, No. 10-C-910, 2015 WL 6142993, at *5

sive briefing accompanying the motions for reconsideration illuminated the problem that the data relied upon by one of NCR's experts was inconsistent with "facts already found by the court."¹⁷⁵ The court also pointed out that because EPA's selected remedy required dredging of all soils with a PCB concentration greater than one part-per-million (ppm) and the cost of soil remediation was linearly proportional to the concentration of hazardous PCBs, any apportionment framework using a uniform remediation cost for *any* contamination greater than one ppm could not serve as a reasonable basis for apportioning costs.¹⁷⁶ In other words, an acceptable apportionment framework should have accounted for the higher costs associated with remediating soil with higher levels of contamination. After the district court concluded that NCR had not met its burden in proving divisibility, NCR filed what amounted to a motion for reconsideration, which was denied,¹⁷⁷ and requested certification for an interlocutory appeal on the divisibility issue.¹⁷⁸ The district court denied the certification request because any appellate review would involve a mixed question of law and fact, rather than a "pure question of law."¹⁷⁹ NCR did not pursue its divisibility defense any further and eventually entered into a settlement agreement with the government.¹⁸⁰

The Fox River litigation is an excellent example of how most Superfund divisibility cases have turned out post-*Burlington Northern*. Despite undertaking an expensive study of the contamination at the Fox River Superfund site, NCR was unable to establish a reasonable basis for apportioning the harm at the site, due in part to the historical complexities of how the PCB contamination occurred. In the aftermath of *Burlington Northern*, some courts "have rejected apportionment theories that do not address the entirety of the harm or the entirety of factors contributing to the harm at a site."¹⁸¹ This makes sense because

(E.D. Wis. Oct. 19, 2015).

175. *Id.* at *1 (stating, inter alia, that NCR's expert attributed over 9000 kg of discharged PCBs to one PRP, despite a more credible expert finding that no more than 1166 kg of PCBs could be attributed to that PRP).

176. *Id.* at *4–5.

177. *United States v. NCR Corp.*, No. 10-C-910, 2015 WL 6912545, at *1 (E.D. Wis. Nov. 9, 2015).

178. *Id.*

179. *United States v. NCR Corp.*, No. 10-C-910, 2016 WL 304805, at *2 (E.D. Wis. Jan. 25, 2016).

180. *United States v. NCR Corp.*, No. 10-C-910, 2017 WL 3668771, at *15 (E.D. Wis. Aug. 23, 2017).

181. *Joshi*, *supra* note 104, at 5 (citing, for example, *Pakootas v. Teck*

the more complicated the history of contamination at a site is, the more difficult it is to establish a reasonable basis for apportioning the entirety of the harm.

In arguing for divisibility, many PRPs point to factors such as “the length of time a party is involved with the site, [the] area of operation, or [the] geographic extent of chemical storage.”¹⁸² However, proving divisibility using only temporal and geographic factors is difficult at all but the simplest sites. These factors can only provide a reasonable basis for apportionment when other variables, such as toxicity and synergistic effects, are relatively consistent.¹⁸³ The complex contamination pathways found at most Superfund sites and the related high burden of proof for a successful showing of apportionment continue to be significant hurdles for PRPs asserting divisibility defenses in the vast majority of CERCLA actions.¹⁸⁴ In addition to the factual complexity of most Superfund sites, the judiciary’s reliance on the Restatement (Second) of Torts as the divisibility framework also contributes to the high burden of proof for a successful divisibility showing because the framework is closer to the classic rule of presumptive joint and several liability.¹⁸⁵

Cominco Metals, Ltd., 868 F. Supp. 2d 1106, 1117 (E.D. Wash. 2012)).

182. Wetmore, *supra* note 132, at 52. In fact, these factors provided the Railroads in *Burlington Northern* a reasonable basis for apportioning harm. *Id.*

183. *Id.*

184. Including the Fox River litigation, thirty-three courts have considered divisibility defenses post-*Burlington Northern*, but for one reason or another, PRPs have generally been unsuccessful in demonstrating a reasonable basis for apportioning harm. *See, e.g.*, *United States v. Fed. Res. Corp.*, 691 F. App’x 441, 443 (9th Cir. 2017) (finding that the PRP “did not provide the court with a reasonable basis for apportioning the harm at the . . . [s]ite” because it did not establish that there was a relationship between the volume of waste, the release of hazardous substances, and the harm at the site); *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 182–85 (4th Cir. 2013) (finding that the harm at the site was not divisible because the PRP’s proposed basis for apportionment did not, *inter alia*, “provide for a reasonable estimate of the volume of soil contaminated by secondary disposals” or appropriately compensate for “changes in the type and intensity of uses and construction on the site over time”); *Bd. of Cty. Comm’rs v. Brown Grp. Retail, Inc.*, 768 F. Supp. 2d 1092, 1117–18 (D. Colo. 2011) (finding that the PRP’s proposed basis for apportionment, relying on geographic and temporal factors, did not adequately address the “complex assessment of the relative toxicity, migratory potential, and synergistic capacity of the hazardous waste”—a showing which is often required when the harm to be apportioned consists of commingled wastes).

185. *Cf.* Wetmore, *supra* note 132, at 43 (describing the divisibility framework presented in the Restatement (Third) of Torts as a “more liberal apportionment analysis” compared to the analytical framework of the Restatement (Second)).

B. CERCLA'S CURRENT ANALYTICAL FRAMEWORK FOR
DIVISIBILITY LAGS BEHIND THE REST OF TORT LAW

As discussed above, *Burlington Northern* endorsed the *Chem-Dyne* court's approach to divisibility analyses. While the Court in *Burlington Northern* analyzed divisibility under the Restatement (Second), *Chem-Dyne* itself looked to the *then-current* state of tort common law to determine the applicable liability standard.¹⁸⁶ The *Chem-Dyne* court concluded that in 1983, the Restatement (Second)—adopted in 1976—best reflected the state of federal common law regarding the proper analytical framework for divisibility defenses to joint and several liability.¹⁸⁷ Yet, despite CERCLA courts' historical reliance on the Restatement (Second), “[t]he clear trend [in tort law] over the past several decades has been a move away from pure joint and several liability.”¹⁸⁸ Whereas the Restatement (Second) certainly does not mandate joint and several liability and allows for apportionment of harm,¹⁸⁹ in practice, joint and several liability is widespread throughout Superfund litigation in part because of the judiciary's application of a test that is difficult for PRPs to meet at all but the simplest sites.¹⁹⁰ When the Restatement (Third) was published in 2000, fifteen states still employed pure joint and several liability schemes, with the remainder having “adopted some hybrid form of joint and several and several liability.”¹⁹¹

Today, the trend in tort law has shifted even further away from joint and several liability in favor of some form of comparative responsibility.¹⁹² Indeed, as of 2017, “forty states have modified the rule of joint and several liability,”¹⁹³ twenty-eight of

186. See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983).

187. See *id.*

188. Amicus Curiae Brief of the Am. Tort Reform Ass'n in Support of Defendant-Appellant at 4, *United States v. NCR Corp.*, 688 F.3d 833 (7th Cir. 2012) (No. 12-2069) [hereinafter ATRA Amicus Brief] (quoting RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17 cmt. a, reporter's note (AM. LAW INST. 2000)).

189. See RESTATEMENT (SECOND) OF TORTS §§ 433A, 881 (AM. LAW INST. 1976).

190. See *supra* Parts II.A.1–II.A.2, for a discussion of how divisibility defenses tend to only be successful at Superfund Sites with simple factual scenarios.

191. RESTATEMENT (THIRD) § 17 cmt. a, reporter's note.

192. See AM. TORT REFORM ASS'N., TORT REFORM RECORD 4–12 (2017), <http://www.atra.org/wp-content/uploads/2017/07/Record-07-06-17.pdf>.

193. *Id.* at 4.

which have eliminated joint and several liability to some extent for environmental harms.¹⁹⁴ The majority of modifications to state joint and several liability schemes have come about by legislation, as opposed to court decisions.¹⁹⁵ Some scholars have argued that legislative efforts to blunt the harshness of joint and several liability schemes should not be viewed as changing the common law rule of liability.¹⁹⁶ However, a state's common law is necessarily informed by that state's legislation in the sense that courts interpret statutes and are constrained by the legislature's efforts.¹⁹⁷ Thus, legislative changes to states' joint and several liability schemes should still be considered when analyzing the general shift among the states towards comparative responsibility schemes.

Just as the Restatement (Second) articulated the rules surrounding the applicable liability scheme in CERCLA actions (drawing from both the common law and statutes that existed at that time), the Restatement (Third) should also be viewed as an accurate reflection of the common law that existed at the time of its publication. While no courts have explicitly endorsed the Restatement (Third), at least one court has interpreted *Burlington Northern* as "disallowing consideration of the Restatement

194. *See id.* at 4–12. The following states have shifted away from joint and several liability schemes to some degree, including where there is some sort of environmental harm at issue: Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. *See id.* The following states have also shifted away from joint and several liability schemes to some degree, but retain the potential for joint and several liability where there is some sort of environmental harm: Arizona, Florida, Hawaii, Idaho, Illinois, Nevada, New Jersey, New Mexico, New York, Pennsylvania, Texas, and Washington. *See id.*

195. *See id.* In contrast to the pure legislative efforts of other states, Kentucky's 1988 statute, HB 551, "codified the common law rule that when a jury apportions fault, a defendant is only liable for that share of the fault." *Id.* at 6.

196. Justin R. Pidot & Dale Ratliff, *The Common Law of Liable Party CERCLA Claims*, 70 STAN. L. REV. 191, 238, 238 n.256 (2018).

197. *See also* Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 549 (2007); Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 905 (2004); *cf.* Richard L. Revesz, *Restatements and Federal Statutes*, AM. L. INST. (Mar. 10, 2016), <https://www.ali.org/news/articles/restatements-and-federal-statutes> ("Traditionally, our Restatements dealt with areas of state common law. Of course, they recognized the existence of state statutes but those statutes were generally treated as constraints that displaced discrete common law rules in particular jurisdictions.").

(Third) . . . approach to apportionment.”¹⁹⁸ However, it is clear that the *Burlington Northern* court’s reliance on the *Chem-Dyne* approach to apportionment, that is, an inquiry into the divisibility of a single harm based on “evolving notions of common law,” rather than the Restatement (Second) explicitly, indicates that there should be some future role for the Restatement (Third) of Torts in Superfund apportionment analyses.¹⁹⁹

C. THE RESTATEMENT (THIRD) OF TORTS DIFFERS FROM THE RESTATEMENT (SECOND) IN THAT IT REFLECTS THE STATES’ GENERAL SHIFT AWAY FROM JOINT AND SEVERAL LIABILITY SCHEMES

The Restatement (Third) of Torts elaborates on the Restatement (Second)’s apportionment framework by “explaining that apportionment is proper where [the] ‘legally culpable conduct of a party . . . was a legal cause of less than the entire damages for which the plaintiff seeks recovery’ and those less-than-entire damages are calculable.”²⁰⁰ This broader interpretation for what constitutes a reasonable basis for apportionment is “significantly friendlier to PRPs” seeking to limit joint and several liability through a showing of divisibility.²⁰¹ Specifically, the Restatement (Third)’s apportionment provisions are friendlier to PRPs asserting divisibility defenses because it employs a two-step process that first divides damages by causation into indivisible component parts, and second, apportions liability for each component according to principles of comparative responsibility.²⁰² In contrast, the Restatement (Second)’s apportionment provisions simply divide damages by causation principles because those rules were developed before states started to adopt comparative responsibility schemes.²⁰³

Since most Superfund sites involve a relatively complex harm stemming from the activities of multiple tortfeasors, it

198. See Foy, *supra* note 24, at 648–49 (citing *Loving v. Sec’y of Dep’t of Health & Human Servs.*, No. 02–469V, 2009 WL 3094883, at *26 n.26 (Fed. Cl. July 30, 2009)).

199. See *id.* at 669.

200. *Id.* at 645 n.148 (citing RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26 (AM. LAW INST. 2000)).

201. *Id.*

202. See RESTATEMENT (THIRD) § 26(a). Comparative responsibility refers to apportionment that includes the fault or legal responsibility of the party as at least one factor in the apportionment. DAN B. DOBBS ET AL., THE LAW OF TORTS § 487 n.1 (2d. ed., 2017) (citing RESTATEMENT (THIRD) § 1).

203. See RESTATEMENT (THIRD) § 26 cmt. a.

makes sense that bringing elements of comparative responsibility into the fold, rather than simply relying on principles of causation, will ease the burden on PRPs arguing for divisibility. Traditionally, CERCLA courts have only considered causation in analyzing whether harm at a given site is divisible,²⁰⁴ but some scholars have argued that courts should consider noncausation principles, such as common law contribution, in assessing liability for cost recovery claims under Section 107.²⁰⁵ Considering that the Restatement (Third) reflects the vast majority of states' shift away from joint and several liability in favor of some form of comparative responsibility,²⁰⁶ it would be permissible for courts to consider noncausation principles in apportioning harm under CERCLA Section 107 because the Restatement (Third)'s apportionment framework reflects the *current* state of tort common law.

In an amicus brief filed in the Fox River litigation, the American Tort Reform Association (ATRA) argued that the Seventh Circuit should have adopted the Restatement (Third) in analyzing whether the harm at the site was divisible.²⁰⁷ The court declined to do so, stating that *Burlington Northern* required the Restatement (Second) to be used in analyzing divisibility, and that such a departure from precedent based on a "policy argument" would be "best directed to Congress."²⁰⁸ However, because Congress intended for liability under CERCLA Section 107 to be governed by *evolving* principles of common law, the courts have a permissible route to apply a contemporary analytical framework that furthers the policy that "no party should be liable for harm it did not cause, and an injury caused by two or more persons should be apportioned" according to their causal shares.²⁰⁹

204. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009).

205. See *Pidot & Ratliff*, *supra* note 196, at 260–61 (arguing that PRP cost recovery claims, contrasted with government-initiated cost recovery claims, "should be governed by common law contribution principles"); see also *Kilbert*, *supra* note 127, at 1071–77 (arguing for an analysis of equitable factors in determining liability in PRP cost recovery claims).

206. RESTATEMENT (THIRD), intro. ("[A]ll but four states and the District of Columbia have adopted comparative responsibility. That change raised a host of new issues, which are the subject of this Restatement.").

207. See ATRA Amicus Brief, *supra* note 188, at *3–11.

208. *United States v. NCR Corp.*, 688 F.3d 833, 838 n.1 (7th Cir. 2012).

209. See RESTATEMENT (THIRD) § 26 cmt. a; *7th Circuit Declines to Apply Third Restatement of Torts in Apportionment Case*, SCHNAPF LLC (Aug. 19, 2012), <http://www.environmental-law.net/2012/08/7th-circuit-declines-to-apply-third-restatement-of-torts-in-apportionment-case>.

III. COURTS SHOULD ADOPT THE RESTATEMENT (THIRD) OF TORTS IN ANALYZING DIVISIBILITY TO EFFECTUATE LEGISLATIVE INTENT

By analyzing the apportionment issue under the Restatement (Second) of Torts, the *Burlington Northern* court “reiterated the status quo,”²¹⁰ while recognizing “that ‘traditional and evolving principles of common law’ control the scope of liability under CERCLA.”²¹¹ Thus, rather than automatically applying the analytical framework outlined in the Restatement (Second), courts should look to the current state of tort common law in choosing an analytical framework for divisibility.²¹² As discussed above, the vast majority of states have moved away from joint and several liability in favor of comparative responsibility schemes that allow for a more equitable apportionment of liability tied to the party’s culpability, and this shift is reflected in the Restatement (Third).²¹³ In analyzing divisibility defenses under CERCLA, courts should apply the Restatement (Third) because of the widespread trend of states moving away from the rule of joint and several liability and because applying the Restatement (Third) is supported by several policy arguments.

The *Chem-Dyne* court was the first to consider the appropriate standard for liability under CERCLA cost recovery claims.²¹⁴ In making that inquiry, the court turned to the legislative history of CERCLA and observed from both the House and Senate proceedings that liability under Section 107 was meant to be governed by “evolving principles of common law,” rather than applying a joint and several liability standard across the board.²¹⁵ All post-*Chem-Dyne* decisions have applied the Restatement (Second) in analyzing divisibility of harm²¹⁶ but that is because

210. Wetmore, *supra* note 132, at 43.

211. Foy, *supra* note 24, at 651 (quoting *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613 (2009)).

212. *Id.* at 668 (“[C]ourts should not read [*Burlington Northern*] to require blind adherence to the apportionment principles of the Restatement (Second). Instead, courts presented with CERCLA-related divisibility questions must vigilantly track developments in liability-apportionment jurisprudence, and update their standards to reflect these developments.”).

213. See *supra* Parts II.B and II.C; see also Kilbert, *supra* note 127, at 1073.

214. See *supra* note 84 and accompanying text.

215. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807–08 (S.D. Ohio 1983).

216. *E.g.*, *Burlington N.*, 556 U.S. at 614 (“Following *Chem-Dyne*, the Courts of Appeals have acknowledged that ‘the universal starting point for divisibility of harm analyses in CERCLA cases’ is § 433A of the Restatement (Second) of Torts.”).

the Restatement (Second) had, for the most part, best-reflected the state of tort common law. In 1983, at the time of the *Chem-Dyne* decision, most states followed a rule of contributory negligence, whereby a plaintiff's own negligence would bar any recovery.²¹⁷ This rule is reflected in the Restatement (Second)'s apportionment provisions and as applied to divisibility of harm, makes it extremely difficult for PRPs to limit their liability on the basis of divisibility, even where those PRPs don't contribute to a substantial portion of the contamination.²¹⁸

However, beginning in the late 1980s, many states moved to comparative responsibility schemes that are reflected in the Restatement (Third)'s provisions regarding apportionment of liability.²¹⁹ In contrast to contributory negligence schemes, comparative responsibility schemes dictate that a plaintiff's negligence is simply a factor that can reduce that plaintiff's recovery, rather than serving as a complete bar.²²⁰ Applied to divisibility of harm, the Restatement (Third)'s apportionment provisions give defendants a more flexible framework within which they can argue that the harm at a given Superfund site is divisible. This is achieved by considering noncausation factors, like fault or other equitable principles, in addition to causation, in determining whether apportionment is appropriate for a particular defendant.²²¹ Given that Congress indicated that CERCLA liability was meant to be determined under *evolving* principles of common law, it is permissible for courts to adopt the Restatement (Third) in analyzing apportionment of harm because it reflects the current state of tort common law more accurately than the Restatement (Second) does.

The adoption of the Restatement (Third) is further supported by several policy arguments. First, because CERCLA doesn't influence current behavior,²²² applying a more liberal apportionment framework would not necessarily incentivize PRPs

217. See Kilbert, *supra* note 127, at 1073.

218. See *supra* Part II.A, notes 93–95 and accompanying text.

219. See Kilbert, *supra* note 127, at 1073; see also RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26 (AM. LAW INST. 2000); AM. TORT REFORM ASS'N *supra* note 192, at 4–12.

220. See Kilbert, *supra* note 127, at 1073.

221. See *supra* notes 200–03 and accompanying text.

222. CERCLA is focused on liability for contamination that has already occurred, whereas liability relating to current management practices involving hazardous substances falls under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k (2012). See also *Resource Conservation and Recovery Act (RCRA) Laws and Regulations*, EPA, <https://www.epa.gov/rcra> (last visited Oct. 31, 2018).

to behave badly.²²³ The Resource Conservation Recovery Act (RCRA) has its own provisions for “corrective action” that mandate the cleanup procedures for mismanagement of hazardous waste.²²⁴ Thus any deterrence factor for would-be-polluters would be coming from RCRA, not CERCLA, and updating the analytical standard for divisibility is not likely to result in more pollution.

Second, “[b]y encouraging apportionment, the Restatement (Third) mirrors the broader trend away from joint and several liability,”²²⁵ which can be attributed in part “to the biased targeting of deep-pocketed defendants that tends to accompany joint and several liability.”²²⁶ This biased targeting is analogous to EPA’s cost-recovery practices whereby EPA focuses on a few financially viable PRPs to bear the entire financial burden of the government’s remediation and/or removal costs.²²⁷ EPA focuses on financially viable PRPs to shoulder the cost of cleanup even where those PRPs are not responsible for a substantial portion of the contamination at issue, or are tangentially related to the site in question.

In some cases it might be fair for a PRP to bear the entire financial burden of remediating a Superfund site, for example, when that PRP is directly responsible for a substantial portion of the hazardous waste contamination. However, where PRPs only cause discrete, calculable proportions of the contamination or are being sued by EPA because of their status as a current site owner, they should not be held financially responsible for more than their fair share. A more liberal apportionment framework gives such PRPs a better opportunity to prove that the harm is divisible.

223. Jerry Taylor, *Hazardous Waste Landfills and Superfund*, CATO INST. (June 22, 1995), <https://www.cato.org/publications/congressional-testimony/hazardous-waste-landfills-superfund>.

224. See *RCRA Corrective Action Cleanup Enforcement*, EPA, <https://www.epa.gov/enforcement/rcra-corrective-action-cleanup-enforcement> (last visited Oct. 31, 2018).

225. Foy, *supra* note 24, at 648 n.172 (citing Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203, 213–15 (2003)).

226. *Id.* (citing Joanna M. Shepherd, *Tort Reforms’ Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 920 (2008)).

227. *Id.* (citing Jason E. Panzer, *Apportioning CERCLA Liability: Cost Recovery or Contribution, Where Does a PRP Stand?*, 7 FORDHAM ENVTL. L.J. 437, 451 (1996)).

Burlington Northern is an excellent example of how EPA sought to recover all of their cleanup costs from a financially viable PRP that was not responsible for a substantial portion of the contamination. Despite the Railroads prevailing in their divisibility defense using the more stringent principles of the Restatement (Second), the district court found that there was a reasonable basis for apportionment of harm and calculated the Railroads' contribution to the contamination at the Arvin Superfund Site using geographic, temporal, and volumetric/toxicity variables.²²⁸ In upholding the district court's apportionment calculations, the Supreme Court let the government, and by extension, the taxpayers, shoulder the remaining ninety-one percent orphan share that should have been paid by the actual polluter at the site—B & B.²²⁹

Thus, where a defendant can prove divisibility of harm, it is appropriate for the government to foot the bill for the remaining costs that can be attributed to defunct parties, even where the defendant asserting divisibility does have some connection to the contamination in question.²³⁰ In adopting the Restatement (Third) for analyzing divisibility defenses, courts would be giving less-culpable PRPs a better chance at mitigating potential joint and several liability because the Restatement (Third) is a more defendant-friendly approach to analyzing apportionment of harm. As discussed above, this analytical shift is overdue, given the prevalence of state comparative negligence schemes that are reflected in the more liberal apportionment framework of the Restatement (Third).

There is a legitimate counterargument that easing the burden on PRPs who assert divisibility defenses would result in the government (and by extension, the taxpayers) picking up the remaining portion of the cleanup bill. This is exactly what happened in *Burlington Northern*, as the Court forced the government to absorb approximately ninety-one percent of the cleanup costs at the Arvin Superfund Site. While the "polluter-pays" principle makes sense when the PRP in question was the party directly responsible for a substantial portion of the contamination, it is less fair when a company has complete turnover of its

228. See *supra* notes 105–28 and accompanying text.

229. See *supra* note 128 and accompanying text.

230. See generally *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009); Steven A. Kunzman, *Supreme Court Rules Arranger Liability and Apportionment Under CERCLA in Burlington Northern*, DIFRANCESCO, BATEMAN, KUNZMAN, DAVIS, LEHRER & FLAUM P.C. (Aug. 14, 2009), <http://newjerseylaw.net/arch/hello-world/>.

employees, shareholders, and customers, and those individuals are footing the cleanup bill.²³¹ To make “polluter-pays” true to its name, the government would have to identify and invoice a company’s employees, shareholders, and customers that existed at the time when the pollution occurred.²³² This endeavor would be extremely difficult in practice, however, and opponents of this Note’s solution may argue that a company in its current state, even if it is less culpable than its corporate predecessor, is the next best option.

However, where the government seeks joint and several liability against a PRP who is not directly responsible for a substantial portion of the contamination because there are no solvent PRPs who are more culpable, it is reasonable to allow that PRP to limit their liability by proving divisibility.²³³ In the case of a successful divisibility defense, it would be more equitable to spread the cost of the remaining orphan shares among as many people as possible (i.e., the taxpayers) rather than forcing a less culpable PRP to foot the bill for contamination they did not cause, simply because they are tangentially related to the site in question. Further, just as Medicare, unemployment insurance, Social Security, and other programs aimed at bettering the community at large are funded by American taxpayers, effective cleanup of hazardous contamination is of paramount interest for all individuals. Where less culpable PRPs are successful in limiting their liability through divisibility defenses and there are no financially viable PRPs who are more culpable, it is fair to allow the government to pay for the remaining orphan shares because the community at large receives the benefit from remediated Superfund sites. In light of the shift towards liability schemes that aim to limit a defendant’s liability according to her relative responsibility, it is less reasonable than ever before to hold PRPs jointly and severally liable when they are not directly responsible for a substantial portion of the contamination at issue and when they could potentially limit their liability by proving divisibility under the Restatement (Third).

CONCLUSION

Despite the fanfare in the aftermath of *Burlington Northern*, Superfund divisibility jurisprudence since the seminal Supreme

231. Taylor, *supra* note 223.

232. *Id.*

233. Exactly as the Railroads were able to do in *Burlington Northern*, 556 U.S. 599.

Court decision has confirmed that there was not a gigantic shift in the law, and that apportionment of harm in CERCLA cases should be governed by evolving principles of common law. The lack of successful divisibility defenses by PRPs is likely due to a variety of factors, including the complexity of the contamination at most Superfund sites and the Restatement (Second)'s relatively high burden of proving a "reasonable basis for apportionment of harm." States have also been steadily moving towards adopting rules which apportion liability in line with a defendant's culpability. Thus, to bring the analytical framework for CERCLA divisibility into the twenty-first century, courts should adopt the Restatement (Third)'s approach towards apportionment, which is broader and friendlier towards PRPs asserting divisibility defenses. The adoption of a new framework is further supported by the fact that it would give less culpable PRPs a better opportunity to limit joint and several liability, a harsh rule that is becoming rarer as states continue to move towards comparative responsibility schemes.

APPENDIX

Case No.	Citation	Divisibility Outcome
1	City of Gary v. Shafer, Case No. 2:07-CV-56-PRC, 2011 WL 3439239, at *3 (N.D. Ind. Aug. 5, 2011).	Divisible
2	Reichhold, Inc. v. U.S. Metals Ref. Co., 655 F. Supp. 2d 400, 448–49 (D.N.J. 2009).	Divisible
3	United States v. P.H. Glatfelter Co., 768 F.3d 662, 678, 681 (7th Cir. 2014).	Not divisible
4	PCS Nitrogen, Inc. v. Ashley II of Charleston, LLC, 714 F.3d 161, 183 (4th Cir. 2013).	Not divisible
5	Gavora, Inc. v. City of Fairbanks, No. 4:15-cv-00015-SLG, 2017 WL 3161626, at *7 (D. Alaska July 25, 2017).	Not divisible
6	USA Env't, L.P. v. Am. Int'l. Specialty Lines Ins. Co., Case No. 4:16-cv-2216, 2017 WL 2908975, at *8 (S.D. Tex. July 7, 2017).	Not divisible
7	Valbruna Slater Steel Corp. v. Joslyn Mfg. Co., 260 F. Supp. 3d 988, 998 (N.D. Ind. 2017).	Not divisible
8	United States v. Land O'Lakes, Inc., Case No. CIV-16-170-R, 2017 WL 706346, at *9 n.11 (W.D. Okla. Feb. 22, 2017).	Not divisible
9	Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-0256-LRS, 2016 WL 4258929, at *5 (E.D. Wash. Aug. 12, 2016), <i>aff'd</i> , No. 16-35742, 2018 WL 4372973 (9th Cir. Sept. 14, 2018).	Not divisible
10	New York v. Next Millennium Realty, LLC, 160 F. Supp. 3d 485, 513 (E.D.N.Y. 2016).	Not divisible
11	Ford Motor Co. v. Mich. Consol. Gas Co., No. 08–13503, 2015 WL 540253, at *14 (E.D. Mich. Feb. 10, 2015).	Not divisible
12	Emhart Indus., Inc. v. New England Container Co., Inc., 130 F. Supp. 3d 534, 609 (D.R.I. 2015)	Not divisible
13	United States v. Fed. Res. Corp., 30 F. Supp. 3d. 979, 993 (D. Idaho 2014), <i>aff'd</i> , 691 F. App'x. 441 (9th Cir. 2017).	Not divisible
14	Padgett Bros. LLC v. A.L. Ross & Sons, Inc., No. 1:10–cv–00858–RLY–DML, 2014 WL 3547353, at *10 (S.D. Ind. July 17, 2014).	Not divisible

15	United States v. Conagra Grocery Prods. Co., 4 F. Supp. 3d 243, 264 (D. Me. 2014).	Not divisible
16	APL Co. Pte. Ltd. v. Kemira Water Sol's., Inc., 999 F. Supp. 2d 590, 597 (S.D.N.Y. 2014).	Not divisible
17	U.S. V.I. Dep't of Planning and Nat. Res. v. St. Croix Renaissance Grp., LLLP, No. 07-114, 2013 WL 5640720, at *4 (D.V.I. Oct. 16, 2013).	Not divisible
18	Pentair Thermal Mgmt., LLC v. Rowe Indus., Inc., No. 06-cv-07164 NC, No. 10-cv-01606 NC, 2013 WL 1320422, at *23 (N.D. Cal. Mar. 31, 2013).	Not divisible
19	Voggenthaler v. Md. Square LLC, No. 2:08-cv-01618-RCJ-GWF, 2012 WL 5944420, at *5 (D. Nev. Nov. 26, 2012).	Not divisible
20	Teruya v. Shaw, No. 10-00282 JMS/KSC, 2012 WL 3308872, at *5 (D. Haw. Aug. 10, 2012).	Not divisible
21	Dep't of Toxic Substances Control v. Brown & Bryant, Inc., No. CV F 96-5879 LJO DLB, 2012 WL 913765, at *4 (E.D. Cal. Mar. 16, 2012).	Not divisible
22	Litgo N.J., Inc. v. Martin, No. 06-2891 (AET), 2012 WL 32200, at *11-12 (D.N.J. Jan. 5, 2012).	Not divisible
23	United Alloys, Inc. v. Baker, No. CV 93-4722 CBM (Ex), 2011 WL 2749641, at *21 (C.D. Cal. July 14, 2011).	Not divisible
24	Bd. of Cty. Comm'rs v. Brown Grp. Retail, Inc., 768 F. Supp. 2d 1092, 1117 (D. Colo. 2011).	Not divisible
25	United States v. Atlas Lederer Co., No. 3:91cv309, 2011 WL 13205932, at *17 (S.D. Ohio Feb. 15, 2011).	Not divisible
26	500 Assocs., Inc. v. Vt. Am. Corp., 768 F. Supp. 2d 914, 920 (W.D. Ky. 2011).	Not divisible
27	3000 E. Imperial, LLC v. Robertshaw Controls Co., No. CV 08-3985 PA (Ex), 2010 WL 5464296, at *11 (C.D. Cal. Dec. 29, 2010).	Not divisible
28	Sanchez v. Esso Standard Oil de P.R., Inc., No. 08-2151 (JAF), 2010 WL 3809990, at *12 (D.P.R. Sept. 29, 2010).	Not divisible

29	United States v. Iron Mountain Mines, Inc., No. 91-0768-JAM-JFM, 2010 WL 1854118, at *3 (E.D. Cal. May 6, 2010).	Not divisible
30	ITT Indus., Inc. v. Borgwarner, Inc., 700 F. Supp. 2d 848, 879 (W.D. Mich. 2010).	Not divisible
31	United States v. Saporito, 684 F. Supp. 2d 1043, 1062 (N.D. Ill. 2010).	Not divisible
32	Friedland v. TIC-The Indus. Co., No. 04-cv-01263-REB-KLM, 2008 WL 185693, at *2 (D. Colo. Jan. 18, 2008), <i>aff'd</i> , 566 F.3d 1203 (10th Cir. 2009).	Not divisible
33	In re Midland Ins. Co., 58 N.Y.S.3d 32, 34 (N.Y. App. Div. 2017).	Not divisible