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SPILL SPLITTING

by

Steven L. Feldman and Steven L. Crane

You have long represented a client in his general business affairs. For years, the client has leased a parcel of property located in the western United States to a small chemical distribution company. One day, you get a telephone call from your client informing you that he has been sued in federal court by the U.S. Environmental Protection Agency.

The EPA has sued him under the Comprehensive Environmental Response and Compensation and Liability Act, 42 U.S.C. Sections 9601 et. seq., arising out of the contamination of soil and groundwater near the leased property. The lawsuit caption indicates that the EPA also has named a much larger but now defunct neighboring chemical manufacturing company that manufactured some of the same chemicals your client's tenant distributes.

Your client says a multimillion-dollar clean-up is taking place at the neighboring manufacturing company site. He wants to know what his exposure may be in the CERCLA suit.

CERCLA is a strict-liability federal environmental clean-up statute whose provisions can result in joint and several liability to an owner of real property where a hazardous substance has been deposited, stored or otherwise come to be located. The owner can be liable even if the activity on the property contributed only a portion of the total contamination and the landowner was not negligent and did nothing to cause the contamination.

CERCLA liability is "super strict." Proof that a defendant discharged a hazardous substance and that there is a plausible pathway for the substance to have migrated to the contaminated site is sufficient to establish causation. *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F. Supp. 2d 1053 (C.D. Cal. 2003).

A defendant who has released minute quantities of a potentially hazardous material can be held jointly and severally liable for the entire cost of remediating a contaminated site. *Fireman's Fund Insurance v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002). Release of even trace quantities of a hazardous substance, at levels below naturally occurring background quantities, is sufficient to establish prima facie liability. *U.S. v. Western Processing Co. Inc.*, 734 F. Supp. 930 (W.D. Wash. 1990).

Your client clearly has cause for concern, but he may have a way to limit his liability to the EPA.

Previously, the 9th Circuit had suggested that a defendant could avoid joint and several liability "by establishing it had only caused a divisible portion of the harm," but the circuit had not described the elements of a "divisibility" defense or what would constitute sufficient proof of

divisibility. See, *Carson Harbor Village Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001) (en banc).

In a recent decision, *U.S. v. Burlington Northern & Santa Fe Railway Co.*, 479 F.3d 1113 (9th Cir. 2007), the circuit finally explained the legal standard and burden of proof for the divisibility defense. The ruling explains how a CERCLA defendant may avoid joint and several liability for the entire cost of remediation of a contaminated site by showing either that it had contributed only a divisible portion of the contamination or that the substance it released resulted in only a segregable portion of the total cost of remediation.

For the practitioner, the *Burlington Northern* decision sets the parameters for designing effective expert testimony in cost-recovery actions brought under CERCLA Section 9607(a).

In *Burlington Northern*, the 9th Circuit follows the 5th and 8th circuits in adapting Section 433A of the Restatement (Second) of Torts to CERCLA. Section 433A explains there should be apportionment of damages among joint tortfeasors when "(a) there are distinct harms, or (b) there is a reasonable basis for determining *the contribution of each cause* to a single harm." As a legal matter, the harm must be theoretically capable of apportionment, rather than by its nature too unified for apportionment; and, as a factual matter, the defendant must prove the harm is subject to apportionment by presenting sufficient evidence to allow the trial court to determine a proper division of liability.

The decision recognizes two types of harm that may be divisible. It primarily addresses a divisible harm as a proportion of the total volume or mass of the contaminants, but it also acknowledges that the harm in a CERCLA case may be divisible when different costs are incurred to remediate distinct hazardous substances.

To meet its evidentiary burden, a defendant must prove there is a reasonable, objective basis for determining the proportion of hazardous substances traceable to the defendant in relation to the total contamination at the site. This is where the defendants in *Burlington Northern* came up short.

The railway defendants had leased an 0.9 acre parcel to an agricultural chemical distributor. That parcel adjoined the distributor's own 3.8 acre parcel, where it had been operating for many years. The distributor used the leased acreage to expand its operations. The other defendant, Shell Oil, shipped pesticide containing one of the contaminant substances to the chemical distributor, and frequent spills occurred in transferring that pesticide from Shell delivery trucks to on-site storage tanks.

The 9th Circuit reversed a trial-court judgment that had capped the railway company's liability at only 9 percent and Shell's liability at 6 percent of the total costs incurred by the EPA and California Department of Toxic Substances Control for remediating the combined site.

The District Court had apportioned liability based on the percentage of land each party owned and on the years of lease versus the total years of operation.

In reversing, the 9th Circuit determined that the entire 4.7-acre site was a single facility under CERCLA. Noting synergistic operations on different portions of the site, including the portion leased by the railroad, the circuit held the District Court's apportionment method was not an objectively reasonable way to determine the railway's contribution.

The circuit said that the more pertinent comparison would have been to estimate the amount of chemical leakage attributable to the railroad's parcel, in part based on storage and likely spillage; the pathway that the contaminants traveled to contaminated soil and groundwater; and the cost of cleaning up that portion of the contamination.

The circuit understood that the lack of historical records on such matters as storage and spillage was reasonable. But it refused to sanction what it called the trial court's "meat-axe" approach, in which it divided the liability based on percentage of land ownership or on the percentage of time that railroad property was leased to the chemical distributor.

The appellate court stated that Shell Oil had come close to meeting its burden of establishing its proportionate contribution to the total contamination, based on records from which the total volume of delivery spillage could be estimated for a six-year period. But Shell had failed to establish that this six-year history was consistent with the entire 23-year period when it sold pesticide to the distributor.

Under CERCLA, the defendant has the burdens of proving that the harm theoretically was subject to apportionment and then of producing evidence to establish the factual basis for that apportionment.

In many cases, this requires counsel to locate and assemble the historical records of the operations conducted on the site and nearby properties, including incident reports maintained by regulatory agencies. He or she also may need to retain process engineering experts to quantify the likely amount of spillage or leakage.

The practitioner also must consult with geologists and hydrogeologists about likely contaminant pathways, with chemists about the chemical properties of the substances at issue, and with remediation engineers about allocable clean-up costs. The objective is to develop a rational calculation of the contaminant mass found in the soil and groundwater, the contributive share of the contaminants from the client's property and the cost to clean them up.

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Additionally, the client's best option often is to seek early settlement with the EPA.

Moving quickly to fill the "evidentiary vacuum" through investigation and consultation with required experts places the client in the best position to negotiate with the EPA or otherwise to defend the action and pursue contribution from other potentially responsible parties, if necessary.

Steven L. Feldman is a partner and **Steven L. Crane** is an associate with Goldfarb, Sturman & Averbach in Encino.