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A RIVER (AND ITS CONTAMINATED SEDIMENTS) RUNS THROUGH IT: DIVISIBILITY OF LIABILITY UNDER CERCLA IN SEDIMENT CASES

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Can PRPs avail themselves of the divisibility defense to avoid CERCLA's joint and several liability in the complex setting of a contaminated river sediments Superfund site, following the Fox River Litigation. In May 2015, the Eastern District of Wisconsin district court agreed with NCR that its liability for a portion of the site was divisible, and not joint and several. Then, in October 2015, the same court reversed its holding in response to motions for reconsideration and held that the expert opinions underlying NCR's divisibility arguments were unreliable and could not support a finding of divisibility.

To prove divisibility, PRPs bear the burden of proof, which will require rigorous (and costly) fact and expert discovery and can be difficult to establish.

As the Supreme Court recognized in BNSF, courts previously found that the universal starting point for divisibility of harm analyses in CERCLA cases is § 433A of the Restatement (Second) of Torts. Section 433A is a two step process: (1) "whether the harm at issue is theoretically 'capable of apportionment,'" which is a "question of law" to be made by the court; and (2) "if the harm is capable of apportionment, the fact-finder must determine how actually to apportion the damages, which is a question of fact." The burden is on the party seeking apportionment to prove that a reasonable basis for apportionment exists.

To prove divisibility, the "harm" that must be apportioned is the actual contamination caused by each PRP. In 2012, the Seventh Circuit held that the "harm" to be apportioned is the "'contamination traceable to each defendant.'" Under this apportionment theory, landfill cases with known waste manifests are easily divisible. Other types of CERCLA sites with co-mingled plumes from multiple sources are not always easily divisible solely based on volume of contaminants.

The Seventh Circuit in the Fox River Litigation found that "harm" could be capable of apportionment if a PRP could demonstrate that the remediation costs (the "harm") could be correlated with the PCB concentrations being remediated. However, in the preliminary hearing, the court found that the PRP had not proven that the harm was linearly correlated to the amount of PCBs discharged. At trial, the PRP showed that the remediation costs are directly correlated to with the concentration of PCBs at the surface versus at greater depths because the type of remediation varies by depth – dredging versus capping. Therefore, the Seventh Circuit held the harm is capable of apportionment and if the PRP could show the extent to which it contributed to PCB concentrations at the site, then the costs are divisible. Importantly, the connection between the contamination and the remediation costs is now a means of proving divisibility and apportionment.

The Fox River district court's reversal demonstrates that a divisibility defense can fail if a PRP does not adequately address all the harms at the site. Specifically, the court found that the PRP overstated the PCB discharges of another entity and it did not account for all of the sources of PCBs into the site. Following this case, PRPs must adequately apportion all of the harms at the site by all parties in order to prove divisibility and apportionment.

In sum, to avail itself of a divisibility defense, a PRP must prove: (1) whether the harm is capable of apportionment; and (2) whether a reasonable basis for apportionment exists, including the relative contributions of all PRPs

If a PRP cannot prove divisibility in a complex river site, then joint and several liability would apply. Although the costs incurred to litigate and prove divisibility may be significant, some of the tools used may be transferable to an allocation proceeding with other PRPs. In that case, the PRPs would likely argue for an equitable allocation using the site fate and transport model to prove connectivity of remediation costs to the contaminants contributed by each PRP. Clear as mud?