

**The Divisibility Defense:
Its Status and Prospects,
As Applied In the Fox
River Litigation
(*US v. NCR Corp.*)**

Kirsten Nathanson
Crowell & Moring LLP
Washington, DC
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Overview

- Legal Background
- Summary of *US v. NCR* History
- 2014 Seventh Circuit Decision
- 2015 Rulings on Remand
- Key Takeaways

Legal Background

- Divisibility is a potential defense to joint and several liability in a 107(a) cost recovery action
 - Not available in contribution cases, which are governed by equitable allocation
- Derived from Section 433A of the Restatement (Second) of Torts
 - Subject to liability only for the portion of the harm caused
 - Damages are to be apportioned where there are distinct harms OR there is a reasonable basis for determining the contribution of each cause to a single harm
- *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009)
 - Brought new life to the defense; upheld district court “reasonable” apportionment
 - Does not require scientific certainty, but rather a plausible or rational basis for apportionment will suffice
- Burden is on the Defendant to prove that (1) the harm is theoretically capable of apportionment; and (2) a reasonable basis for apportionment exists

Summary of *US v NCR* History

- Lower Fox River/Green Bay Site
 - PCB-contaminated sediment site – 39 miles of river – five operable units
 - NCR discharged PCBs into OU2
- EPA Section 106 UAO to NCR to cleanup OU2-OU5
 - NCR complied until 2011; refused to do further work in 2012
- US brought suit seeking injunctive relief requiring NCR to comply with the UAO
 - District court granted preliminary injunction and Seventh Circuit affirmed (688 F.3d 833 (2012))
 - District court held bench trial, rejected NCR's divisibility defense, and ruled for US (2013), and NCR appealed to the Seventh Circuit again

2014 Seventh Circuit Decision – 768 F.3d 662

- Held that the district court wrongly rejected NCR’s divisibility defense
- The district court oversimplified by treating the harm from PCB contamination as binary
 - The Fox River PCB contamination is “continuous”
- The harm is theoretically capable of apportionment **if NCR could show the extent to which it contributed to PCB contamination in OU4**
- If NCR cleared that hurdle, a reasonable basis for apportionment could be found in the remediation costs necessitated by each party
- The district court did not analyze or critique the work of the parties’ experts under that paradigm; the experts estimated the percentages of PCB mass attributable to each party in OU4; and an NCR expert took the estimates and calculated the remediation costs caused by each party
 - Reverse and remand for further proceedings

2015 Rulings on Remand – May 2015 Ruling for NCR

- US asked court to look at 2012 trial record and reaffirm that the OU4 harm is not divisible and that NCR is jointly and severally liable
- The Seventh Circuit forced the court look at the harm through a new set of lenses
- It is enough for NCR to demonstrate what percentage of the toxicity in OU4 was caused by its discharges
 - A simple volumetric approach on how much of each party's releases stayed in OU4
- The court determined that the experts' analyses were reliable
- Noted that *Burlington Northern* lowered the bar for what evidence is acceptable to establish apportionment
- Reasonable basis for a 28% NCR share for OU4

2015 Rulings on Remand – October 2015 Reversal

- Following May ruling, court received reconsideration briefing from US and other PRPs attacking reliability of expert testimony and court's assumptions in accepting NCR's divisibility defense
- The experts' estimates contradicted facts already found by the court, particularly on US Paper's contributions to OU4
- The error on US Paper's estimates affected all other parties' estimates, including NCR's
- Reinstated finding of joint and several liability
- NCR has asked the court for an interlocutory appeal; briefing is underway
 - US says the appeal would not be a pure question of law

Key Takeaways

- Divisibility defense is viable, but requires rigorous and extensive fact and expert work
 - Particularly at complex waterway sites
- The US is not going to easily concede that harm is theoretically capable of apportionment
 - The US is going to work to make the burden as steep as possible to prove the defense
- Important to watch for other district court treatment of the defense, given unique context of Fox River litigation

Kirsten Nathanson
Environmental Law & Litigation
Crowell & Moring LLP
knathanson@crowell.com
(202) 624-2887