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

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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
  - 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
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
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