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The Changing Landscape Of Liability For Natural Resource Damages

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Many jurisdictions have announced that they plan to more actively pursue natural resource damages ("NRDs") from potentially responsible parties ("PRPs") deemed liable under CERCLA or Superfund. Recent developments in case law have changed the landscape when it comes to assessing the scope of this CERCLA/NRD liability and how to pay for it. NRDs are defined as "the dollar value of the appropriate degree of restoration necessary to assess, restore, rehabilitate, replace or otherwise compensate for the injury to 'land, fish, wild life, biota, air, water' as a result of a discharge." NRDs also may be exacerbated by the spreading out of a discharge because of events such Superstorm Sandy said to be associated with climate change.

Apportionment Of CERCLA Liability, Causation And Insurance Implications

Under the 2009 *Burlington Northern* case, certain PRPs may be able to "apportion" their environmental liability where the facts provide a reasonable basis for division according to the respective contributions to the harm alleged. However, subsequent cases have clarified or limited apportionment where it has been asserted as a defense to further cleanup liability. *See, e.g.,* the 2012 case, *USA v. NCR Corp*. Alternatively, jointly and severally liable PRPs without sufficient facts to support apportionment may be able to take advantage of traditional equitable principles to instead "allocate" their NRD liability. Several practical factors such as the PRP's degree of involvement or cooperation come into play in allocating, but the results are often similar to what one eligible to apportion might expect. The key difference is that those faced with allocation remain jointly and severally liable and must generally complete the cleanup before seeking contribution. Apportionment, on the other hand, can offer a defense to conducting further work.

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Businesses that allegedly caused NRDs could be exposed to significant liabilities – some of them decades old, and inherited from predecessor companies. At the same time, liability insurance policies – particularly historic policies, which contain fewer potentially applicable exclusions – may provide coverage to off-set the costs of NRD claims even where environmental-coverage actions previously have been brought and resolved. NRDs differ from CERCLA "response costs" incurred to address more immediate environmental crises. The semantic distinction between costs and damages has been used by the insurance industry in the past to argue against coverage for "response costs" as opposed to "resource damages." This distinction, however, may also allow policyholders to argue successfully that prior coverage settlements address only environmental cleanup or response "costs" and do not operate to preclude previously untapped or additional coverage for NRDs going forward.

In *Burlington Northern*, the court cited traditional tort principles in finding that "when two or more persons acting independently caus[e] 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 himself caused." However, "where two or more persons cause a single and indivisible harm, each is subject to [joint and several] liability for the entire harm." *See* Restatement (Second) of Torts § 433A.

In part relying on this precedent three years later, NCR unilaterally ceased cleanup activities after unsuccessfully seeking contribution from others. From 1954 to 1971, NCR and several other PRPs in the carbonless paper business owned and operated mills that generated and released polychlorinated biphenyls ("PCBs") into a local river. NCR argued that it had paid more than its apportioned share and should not be required to perform further work. The *NCR* court employed a two-part test in evaluating whether apportionment could trump joint and several liability. First, the harm must be "theoretically capable of apportionment." Second, where apportionment may be possible, the court must determine precisely how to apportion damages (a question of fact).

In applying NCR's apportionment theory – volumetric contribution – the court rejected it as a defense because PCBs in sediments must be addressed via soil dredging. This dredging remedy is not based upon volumetric contributions, but rather involves the same cost and volumes of soil

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regardless of whether the water was lightly or heavily contaminated. NCR was not able to satisfy its burden to prove otherwise, in part, because "the need for cleanup triggered by the presence of a harmful level of PCBs in the river is not linearly correlated to the amount of PCBs that each paper mill discharged." In other words, the facts of the contamination, how it was caused and how it was to be addressed were not consistent with how NCR sought to apportion its liability.

Similarly, another federal district court recently dismissed an environmental defendant's apportionment defense because the entirety of the harm was held to have not yet been addressed. In *Pakootas v. Teck Cominco Metals, Inc*., the metals company's affirmative defense seeking apportionment was found to be premature at best where plaintiffs, both Native American tribes and the state, claimed substantial response costs and NRDs.

Ironically, this so-called concurrent-causation principle where the facts on causation cannot support apportionment has been used to find insurance coverage where a covered and an uncovered cause of loss converge. The classic example is two forest fires, one caused accidentally and the other by arson, that merge and destroy property. In cases such as these, the "tie" goes to the policyholder, i.e., the inability to apportion tips in favor of coverage. The recent proliferation of so-called anti-concurrent causation clauses in property insurance explicitly reversing this contract-interpretation rule has unexpectedly left many policyholders without coverage, especially after events like Sandy. Just as with CERCLA apportionment, however, where the facts can demonstrate a factual basis for separating out causes, a policyholder PRP should be given a chance to make its case. The *NCR* and *Pakootas* decisions place significant limitations on an "apportionment" defense to joint-and-several CERCLA liability. This may signal a shift away from apportionment back toward broader CERCLA liability.

Allocation Versus Apportionment

As discussed above, equitable principles purportedly do not have a role in apportionment, but equitable considerations are at the heart of allocation. As a U.S. District Court put it recently in *Yankee Gas Services v. UGI Utilities, Inc*.: "To apportion is to request separate checks, with each party paying only for his own meal. To allocate is to take an unitemized bill and ask everyone to pay what is fair." While allocation and apportionment are conceptually distinct as seen from the various criteria discussed herein, they often reach the same result.

The *Yankee Gas* court reviewed the so-called Gore allocation factors: "(1) The ability of the party to demonstrate that his contribution to the release can be distinguished; (2) The amount [and] …; (3) The degree of toxicity of the hazardous substance involved; (4) The degree of involvement of the person in the manufacture, treatment, transport, or disposal of the hazardous substance; and (5) The degree of cooperation … in preventing harm to public health or the environment," including mitigation. The court also cited a second possible list of so-called Torres Factors, including the following: (1) the extent to which the costs at issue are related to waste for which each party is responsible; (2) each party's level of culpability; (3) the degree to which the party benefitted from the disposal; and (4) ability to pay.

Obtaining Insurance Coverage For NRDs

In addition to these allocation issues, three factors typically will determine whether insurance coverage for NRDs is available. First, the timing of the actual "occurrence" or events giving rise to environmental property damage likely must have taken place before 1985, when the so-called "absolute pollution exclusion" became a standard part of virtually all comprehensive general liability ("CGL") insurance policies.

Second, the timing of a policyholder's notification of a covered "occurrence" almost inevitably will be an issue. NRDs are not assessed in every case and, to date, have been the exception rather than the rule. Insurance companies faced with coverage claims for post-cleanup NRDs likely will argue that the policyholder should have foreseen an action for NRDs and that NRDs are directly linked to other earlier events and/or environmental response costs already incurred – and possibly covered. The counterargument is that insurance companies likely have suffered no prejudice. NRDs merely reflect an after-the-fact assessment of existing harm to natural resources generally. Reflexive denial of NRD-related claims is typical, but can work to the policyholder's advantage because it makes it difficult to legitimately argue prejudice.

Third, the specifics of how NRDs are apportioned or allocated scientifically and legally will give rise to coverage issues and arguably implicate some sort of policy "fine print." Accordingly, policyholders should expect a fight when seeking coverage for NRDs. However, there is much to gain and little to lose in pursuing insurance coverage for NRDs, and policyholders should not be deterred. Even past coverage settlements or judgments may be overcome because they generally do not expressly encompass NRDs.

Government agencies charged with protecting the environment increasingly are looking for alternative sources of environmental funding. Accordingly, companies hit with a "suit" seeking damages for NRDs (or more likely a trustee demand letter) should immediately notify their brokers and liability insurance companies and begin investigating legitimate bases for apportionment or allocation, including the nature and migration of the contaminants at issue. Existing case law on apportionment, allocation and insurance coverage for NRDs is mixed but encouraging. A great deal depends upon the jurisdiction. If NRD trustees come knocking, the more one knows about how the contamination at issue arose, generally the better the options for managing the liability.