



Limiting Remediation Liability and Shifting Costs to Others:

Legal and Strategic Considerations

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Reed Neuman

Byron Gee





Limiting Remediation Liability and Shifting Costs to Others

- Ultimate Objectives:
 - Avoiding Imposition of Liability
 - Defenses and Options
 - Avoiding Liability Beyond “Fair Share”
 - Warding off Disproportionate Liability
 - Managing Clean-up Costs
 - Shifting Costs to Others
 - Legal proceedings
 - Allocation proceedings



Limiting Remediation Liability and Shifting Costs to Others

- Common Fact Situations
 - “Owned” Sites
 - “Others” could include:
 - Predecessors/Successors
 - Current Owners/operators
 - Landlords/tenants
 - On-site Contractors
 - Neighboring Owners/operators
 - Others with interest in real estate:
 - » Easement holders
 - » Banks/Creditors/Insurers



Limiting Remediation Liability and Shifting Costs to Others

- Common Fact Situations
 - Third-party sites/Off-site liabilities
 - Disposal/storage sites
 - Treatment/Reprocessing sites
 - Recycling/Recovery sites
 - Custom/Toll manufacturing sites
 - Other manufacturing – “captives”
 - Downstream/downgradient impacts



Limiting Remediation Liability and Shifting Costs to Others

- Common Fact Situations
 - Third-party Sites/Off-site Liabilities
 - “Others” include:
 - Owners/operators of third-party sites
 - Plus same list of related parties
 - Plus other responsible parties
 - » other “arrangers” or transporters



Liability Issues – Recent Legal Developments

- CERCLA liability is strict and joint and several absent a basis to apportion (divide) harm among multiple actors
 - Caselaw sets bar very high to limit liability precisely to extent of harm/cause
 - Particularly when government is seeking remediation, courts reluctant to create funding or performance shortfalls
 - Most state “Superfund” laws take similar view
 - Early PRP targets should expect to overpay



Liability Issues – Recent Legal Developments

- Divisibility and Apportionment
 - *Burlington Northern and Progeny*
 - *BN*: Apportionment is proper if record shows that a reasonable basis exists for determining contribution of each cause to a single harm
 - But defendants seeking to avoid J&S bear burden of proving that basis
 - Court looked at different actions and time periods even though “singular” harm existed
 - Found facts in records supported apportionment of liability, rather than full J&S
 - 556 U.S. 599 (2009)



Liability Issues – Recent Legal Developments

- Divisibility and Apportionment (cont.)
 - *BN* essentially confirms prior caselaw on elements to establish basis to defeat J&S
 - “*BN* did not add a new mandate that District Courts must apportion harm.” (*U.S. v. Iron Mountain Mines*, 2010 WL 1854118, 3 (E.D. Cal.))
 - Key is the trial record –
 - Court will not make arbitrary apportionment on its own
 - Defendant must show that harm is capable of being apportioned, and that a reasonable basis exists



■ Liability Issues – Recent Legal Developments

■ Arranger Liability

– *BN* also addresses:

- PRP's knowledge that its action will result in a release is insufficient; PRP must take 'intentional steps' or 'plan for the disposal' of hazardous substances. (556 U.S. at 610)
- See *Celanese Corp. v. Eby Construction*, 620 F. 3d 529 (5th Circ. 2010) (contractor did not know it had struck a pipeline, causing methanol release)
- Thus, *BN* raises the bar a bit on the degree of intent needed to establish threshold liability



Liability Issues – Recent Legal Developments

- Cost Causation/Fingerprinting
 - Only nexus, not causation, need be proved
 - that PRP’s hazardous waste was deposited at the site
 - that there was a release
 - and the release caused the incurrence of response costs
 - Not necessary to prove that PRP’s waste was the source of release or caused incurrence of costs
 - “Fingerprinting” waste not a requirement
 - See, e.g., *Pakootas v. Teck Cominco Metals*, 2012 U. S. Dist. LEXIS 72139 (E.D. Wash. April 4, 2012)



Strategic Objectives

- Avoiding liability up front
 - In the entirety, if facts warrant
 - Beyond reasonable “fair share”, when liability is unavoidable
- Avoiding or minimizing underwriting others’ shares
 - Securing agreements or positioning for others to help pay



Strategic Objectives

- Getting Agencies or Private Parties to Chase Others
- Leveraging Other Responsible Parties to Cooperate
- Developing Plans to Shed Unavoidable “Extra” Liability through Cost Recovery Mechanisms



Limiting Liability – Tools and Strategies

- Federal and State liability and enforcement regimes
 - Compare and contrast USEPA approach with key State agencies
 - Understanding and working with agency resource constraints and reticence



Limiting Liability – Tools and Strategies

- Persuading agencies to pursue others
 - Helping develop nexus information, including site use and operational history
 - Encouraging PRP status notifications
 - Identifying, quantifying and addressing any “orphan” or unreachable players
 - Seeking credit or *quid pro quo* for cooperation
 - Strategic work undertakings
 - “Cooperate and Participate” orders



Limiting Liability – Tools and Strategies

- Leveraging other responsible parties' cooperation
 - Developing/presenting nexus packages
 - Issuing demands for specific work and/or financial contribution
 - Tolling agreements
 - Deferring claims for strategic benefit
 - Or simply forestalling complicating conflict



Limiting Liability – Tools and Strategies

- Balancing cost avoidance/recovery goals with cost-efficient, strategic project management
 - When bankrolling others may make sense:
 - Controlling project; focusing on lowest-cost remedy
 - Gathering data/evidence for cost recovery
 - Focusing regulators on other COC's



Recovering Costs from Others

- Legal Trends in Cost Recovery
- CERCLA Cost Recovery v. Contribution
 - Authority for Claim – 107 or 113?
 - Voluntary v. Compelled Costs
 - *Cooper Industries (543 U.S. 157 (2004))*
 - PRP forced to reimburse response costs to another party by legal judgment or settlement may only seek contribution from other PRPs
 - Cause of action lies under CERCLA 113 (f)



Recovering Costs from Others

- Voluntary v. Compelled Costs
 - *Atlantic Research* (551 U.S. 128 (2007))
 - PRP that incurs response costs voluntarily and directly can seek cost recovery against other PRPs
 - Cause of action lies under CERCLA 107(a).
- What about PRPs that incur costs to perform work under consent agreements?
 - Supreme Court has yet to address; prevailing view in federal circuit courts: contribution, not cost recovery (and not both)
 - See, e.g., *Solutia, Inc., v. McWane, Inc.*, 672 F.3d 1230 (11th Circ. 2012), and *Morrison Enterprises v. Dravo Corp.*, 638 F.3d 594 (8th Circ. 2011)



Recovering Costs from Others

- Determination of applicable cause of action can mean significant differences
 - 107 cost recovery claim offers several strategic advantages:
 - J&S available – but subject to equitable allocation among all liable parties
 - More favorable burdens of proof
 - Sharing of “orphan shares” among all
 - Longer statute of limitations period



Recovering Costs from Others

- Preparing the Case
 - Locate/marshal facts:
 - Internal documents – studies, reports, business records, transaction files
 - Witnesses – current and former employees, consultants
 - Communications with third parties, regulators
 - Predecessor/successor operations
 - Assess the road to recovery:
 - Cost-shifting agreements:
 - Contract/indemnity agreements
 - Insurance policies
 - Cost-sharing agreements with other PRPs



Recovering Costs from Others

- Preparing the Case (cont.)
 - Assess the road to recovery:
 - Basis for claim
 - Statutory – federal or state
 - » CERCLA 107 or 113?
 - Common law
 - Contract/indemnity
 - Choice of court/venue
 - Conditions Precedent
 - Notice provisions
 - Claim strategy
 - Demand for sum certain or work?
 - Offer to negotiate?
 - Tolling agreement?
 - Offer ADR before suit?
 - Tender draft complaint?



Recovering Costs from Others

- Preparing the Case (Cont.)
 - Importance of Historical and Scientific Evidence, and Experts
 - Fingerprinting and Cost Causation
 - Identify drivers/COCs
 - Basis for apportionment
 - Geography, time, type
 - Assigning harm(s) to others
 - “But-for” analysis of response costs
 - What costs necessary, and due to presence of what?



Recovering Costs from Others

- Preparing the Case (cont.)
 - Allocation Strategies
 - Cost causation analysis
 - Do COCs predominate response costs?
 - » COCs v. Mass
 - How much for remediation v. overhead?
 - » Studies, oversight, land acquisition, etc.
 - Volumetric and other surrogate approaches
 - Years of operation
 - Years of ownership, control
 - Total site activity
 - Total waste produced



Conclusions

- Greatest Value Comes From Proactive Approach to Avoiding and Minimizing Disproportionate Liability
- Cost Recovery or Contribution Claims Rarely Return Full Value
 - Litigation Risks, Costs
 - Settlements Typically Involve Compromise
 - Balance Against Site/Cost Risk Management