

Divisibility Resurrected? US v. NCR Corp.

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Jonathan Wells
Partner – Alston & Bird

U.S. v. NCR Corporation (May 15, 2015)

- Post-trial decision following remand from Seventh Circuit
- Held that NCR had established divisibility defense – apportioning 28% of liability of one operable unit to NCR

Burlington Northern v. U.S.

- In 2009 decision, U.S. Supreme Court endorsed apportionment of response costs.
- Specifically, endorsed the Restatement of Torts' approach to joint and several liability
- Apportionment/Divisibility allowed when a single harm “is theoretically capable of apportionment” and there is a “reasonable basis” for apportionment

U.S. v. NCR Corporation Background

- Fox River Superfund site
- Multiple paper mills discharged PCBs in wastewater from 1950s through 1970s
- Dredging 7 million cubic yards plus some capping
- Selected remedy costs more than \$700 million



U.S. v. NCR Corporation

- EPA issued a UAO in 2007 directing PRPs to implement remedy
- NCR initially led remediation efforts, but ceased complying in 2011 after district court ruled against NCR on its claims for contribution against other PRPs
- U.S. sued to enforce UAO, and district court ruled in favor of government following 11 day bench trial
- On appeal, Seventh Circuit reversed, finding a reasonable basis could be found for apportionment and ordered district court to reconsider its rulings on remand

U.S. v. NCR Corporation

- Theoretical Divisibility

- Because harm at issue is PCBs actual toxicity (and that harm increases in rough proportion to the concentration of PCBs in water), NCR only needed to demonstrate what percentage of toxicity was caused by NCR's discharges.
- Expert estimates were NCR's contribution was between 27% and 43%

- Reasonable Basis for Apportionment

- NCR's contribution to the harm was a reasonable way to apportion costs
- Adopted NCR's proposed 28% share

Divisibility Trend?

Pro-Divisibility

- Burlington (S Ct 2009)
- Reichhold v US Metals Refining Co (DNJ 2009)
- US v NCR (7th Cir 2014 & D Wis 2015)

Anti-Divisibility

- La Plata County, Colorado v Brown Group Retail (D Col 2011)
- Pakootas v Teck Cominco Metals (ED Wash 2012)
- PCS Nitrogen v Ashley II (4th Cir. 2013)
- US v NCR (7th Cir 2012)

Successful Divisibility Strategies

- Geography, time, and volume (Burlington Northern)
- Percentage contribution (US v NCR, 2015)
- Making “harm” the harm to health/environment and NOT remedy/costs triggered by discharge (US v NCR, 2014)
- Single contaminant sites show most promise

Failed Divisibility Strategies

- Contribution to harm alone sufficient to require entirety of remedy (US v NCR, 2012)
 - But, this worked in New Jersey (Reichhold)
- Focus on entirety of harm, not just defendant's contamination (Pakootas)
- Highlight incomplete information
 - Ownership time periods not linked with contribution to the harm (La Plata)
 - Missing information on all time periods and activities (PCS Nitrogen)
 - Analysis of synergistic effects of contaminants (Pakootas & PCS Nitrogen)

Thank You & Questions

Jonathan Wells

Partner – Environmental, Land Use, & Natural Resources

Alston & Bird LLP

1201 W. Peachtree Street

Atlanta, GA 30309

(404) 881-7472

jonathan.wells@alston.com

