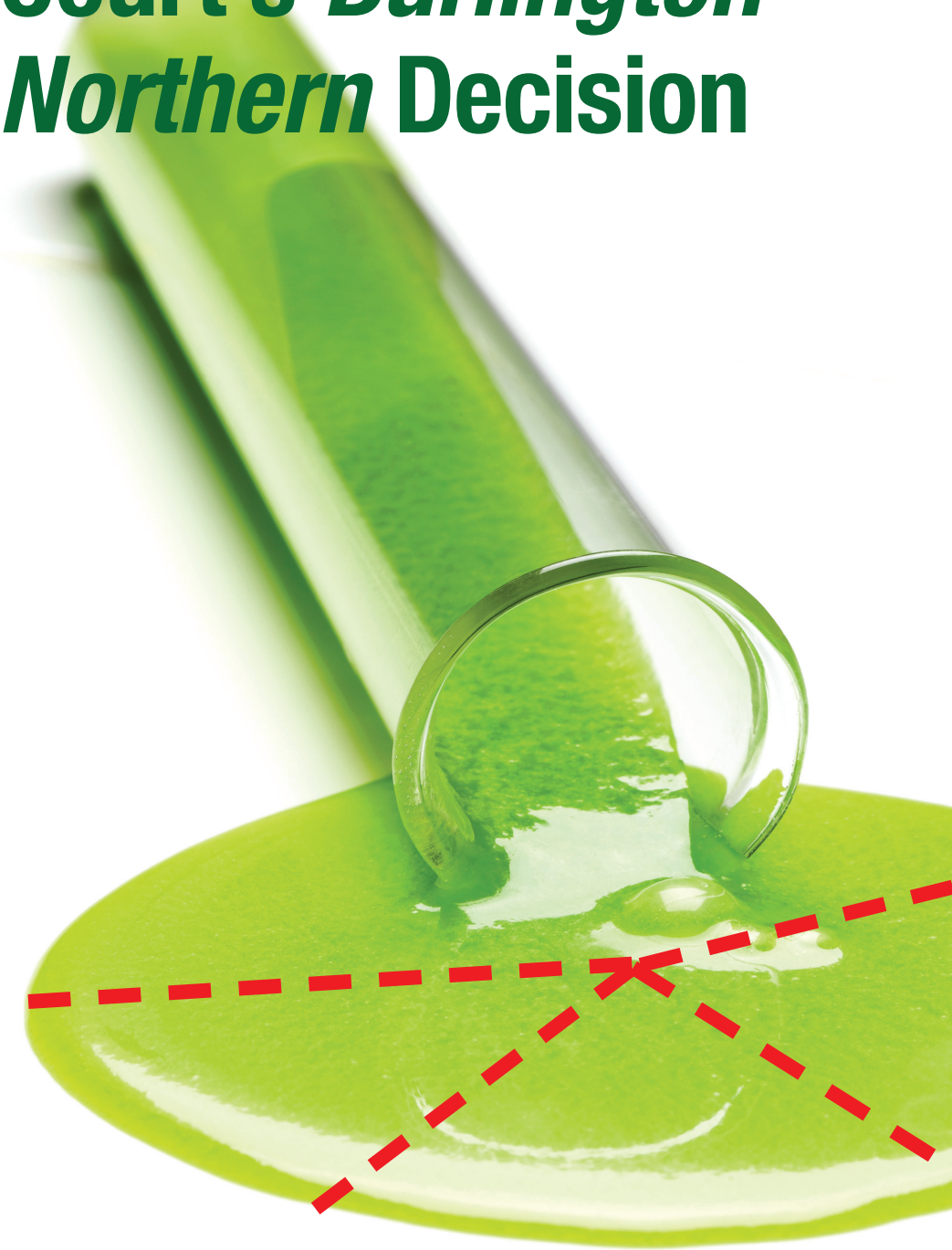
CERCLA Liability Defense

After the Supreme Court's *Burlington Northern* Decision

By Mark Misiorowski and Joel D. Eagle

Practitioners should consider the advantages and potential pitfalls associated with various interpretations of this recent case.



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Since its passage in a lame duck session of Congress in December 1980, the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) has lived an often tumultuous life. At the time, Congress recognized that thousands of highly contaminated sites such as the Valley of the Drums in Bullitt County, Kentucky, and Love Canal in Niagara Falls, New York, posed extraordinary risks to human health and the environment. Lawmakers thus designed CERCLA, often referred to as the Superfund law, to promote "the timely cleanup of hazardous waste sites" throughout the United States and to require the parties responsible for contaminating sites to pay for these cleanups. *See Consolidated Edison Co. of N.Y. v. UGI Util., Inc.*, 423 F.3d 90, 94 (2d Cir. 2005).

Despite Congress's best intentions and high aspirations, CERCLA's effectiveness has been limited by numerous factors. Shortly after becoming law, CERCLA became the subject of a major federal, political scandal. Later, the Superfund program's main funding mechanism, a tax on industrial and chemical businesses, expired, and it has not been reinstated. Finally, as a result of poor drafting, the number of judicial opinions attempting to interpret CERCLA could fill a case book.

The U.S. Supreme Court has occasionally weighed in on CERCLA, but with its recent decision in *Burlington Northern & Santa Fe v. United States*, the Court may have inadvertently turned the law upside down. *See* 129 S. Ct. 1870, 556 U.S. ___ (2009). While the fallout from *Burlington Northern* has not yet settled, a nearly unanimous Court—8–1, with Justice Ginsburg in dissent—may have opened the door wide for potentially responsible parties to avoid joint and several liability, the traditional default in CERCLA cases. This article examines the troubled history of CERCLA, the decade-long *Burlington Northern* case, and the possible effect the decision may have on environmental cleanups throughout the country. The article concludes with some practical considerations for the defense bar as it adjusts to a post-*Burlington Northern* CERCLA world.

CERCLA: Law with a Checkered Past

The United States Environmental Protection Agency (EPA) was created in 1970, the same year that the first Earth Day was celebrated. The environmental movement began to take shape in the 1970s with the passage of the Clean Water Act in 1972 and the Resource Conservation and Recovery Act in 1976. But it wasn't until 1980 that Congress passed a law specifically to address abandoned sites with historical contamination caused by decades of industrial operations without any serious oversight. CERCLA was passed in response to growing public understanding of the contamination levels at unlined landfills, open dump pits, coal gasification and oil processing plants, and other industrial facilities.

Early Obstacles

Almost immediately, CERCLA became enmeshed in a public scandal that involved the Reagan White House, the EPA, and the Department of Justice. After nearly three years and countless hearings and interviews, Congress concluded that soon after CERCLA was passed, various EPA decision makers, including then-EPA Administrator Anne Burford Gorsuch and then-Assistant Administrator for Solid Waste and Emergency Response Rita Lavelle, engaged in serious wrongdoing related to the Superfund. According to the U.S. House of Representatives' 1984 Report, *Investigation of the Environmental Protection Agency: Report on the President's Claim of Executive Privilege Over EPA Documents, Abuses in the Superfund Program, and Other Matters*, by the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, H.R. Comm. Print 98-AA (Aug. 1984):

> [D]uring 1981, 1982, and 1983, top-level officials of the Environmental Protection Agency violated their public trust by disregarding the public health and the environment, manipulating the Superfund Program for political purposes, engaging in unethical conduct, and participating in other abuses.

H.R. Comm. Print 98-AA at 9.

CERCLA has consistently caused great confusion with practitioners in both the public and private sector.

As indicated in the quote above, in this detailed 300-plus-page report, Congress found that the Superfund program had been misused and abused in a variety of ways. Congress identified (1) an intentional yet "hidden agenda" to "go slow" in carrying out Superfund program cleanups; (2) various attempts to ensure that the Superfund law would not be renewed after its first five years; (3) the imposition of "excessive and unjustified cost-requirements on States seeking Superfund cleanup action;" (4) restrictive interpretation of emergency authority; (5) attempts to misrepresent the inventory of hazardous waste sites; (6) serious and intentional "foot-dragging" in remedying urgent hazardous waste problems; (7) specific examples of political manipulation of the Superfund program; and (8) numerous other examples of unethical and criminal conduct. Ultimately, Administrator Burford and Assistant Administrator Lavelle resigned, along with nearly 20 other EPA employees. Rita Lavelle also served time in prison for her role in the events. The U.S. House also issued a second report titled *Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents From Congress in 1982–83* by the Committee on the Judiciary, H.R. 99-435 (Dec. 1985).

Lack of Funding

After the early years of Superfund misman-

agement, the program successfully cleaned up some of the most highly polluted sites in the country. However, as most environmental law practitioners are well aware, remediating contaminated industrial sites can be very costly undertakings. Cleanups are often initiated by the government, which later seeks to recover its expenses through Section 107 of CERCLA. CERCLA is often known as the Superfund law because of the multibillion dollar trust fund established to finance the cleanup of some of the country's most contaminated sites early in CERCLA's life. Although Congress intended CERCLA to be a "polluter-pay" law—the Superfund was originally bankrolled using taxes from industrial and chemical companies—over time, the fund became depleted as monies were expended to clean up various sites that the EPA had prioritized.

The language of the Supreme Court's holding… is sufficiently vague to allow different interpretations.

In 1995, after roughly a decade of cleanup progress, the corporate tax that fueled CERCLA's fund expired and has not been reinstated. With its source of income eliminated, the Superfund program quickly spent its remaining funds. President Obama has proposed reinstating the tax beginning in 2011, which would bring in an estimated $17.2 billion in revenue from 2011 through 2019. As before, industries subject to the tax oppose its reinstatement. Also, the 111th Congress has devoted funds to help clean up certain industrial and commercial brownfield sites throughout the country using the recently passed American Recovery and Reinvestment Act of 2009. In any event, funding for Superfund program cleanups remains a thorny issue.

Lame Duck Law

Since its emergency passage in 1980, CERCLA has consistently caused great confusion with practitioners in both the public and private sector. Known for myriad drafting errors, as well as vague and ambiguous provisions, CERCLA has become a heavily litigated statute. Unfortunately, litigation has led to more problems than solutions, as district courts have struggled to balance plain language interpretations with Congress's original intent for the statute. As one court wrote, judges hope that "if they stare at CERCLA long enough, it will burn a coherent afterimage on the brain." *CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc.*, 769 F. Supp. 432, 435 (D.N.H. 1991). A detailed analysis of various problems with the Superfund law can be found in John Copeland Nagle, *CERCLA's Mistakes*, 38 Wm. & Mary L. Rev. 1405 (1997).

Congress attempted to correct some of CERCLA's shortcomings with the 1986 Superfund Amendments and Reauthorization Act (SARA) and to incentivize business to redevelop contaminated sites by passing the 2002 Small Business Liability Relief and Brownfields Revitalization Act. Despite these efforts, CERCLA remains a source of contention and uncertainty for environmental law practitioners.

In the recent *Burlington Northern & Santa Fe Railway v. United States* decision, the Supreme Court handed down a long-awaited opinion addressing two important CERCLA issues: (1) what is the scope of liability for "arranging for" disposal of hazardous wastes; and (2) how to define a "reasonable basis" for apportioning responsibility for cleanups. *See generally*, 129 S. Ct. 1870, 556 U.S. ___ (2009). While the Supreme Court's decision on arranger liability was based on a straightforward, "plain language," "ordinary meaning" analysis of the words arrange and arranger, its holding on determining apportionment of responsibility was less clear.

As the next sections explain, although the "apportionment" holding of *Burlington Northern* has yet to be interpreted by lower courts, the opinion's expansive language may result in drastic, new government enforcement and liability schemes. At the same time, *Burlington Northern* may create significant opportunities for the defense bar in addressing future CERCLA cases.

Burlington Northern: Over a Decade in the Making

While Congress intended for CERCLA to hold potentially responsible parties jointly and severally liable for cleanup costs, case law has developed to allow parties to avoid this "strict liability standard." *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). Parties may avoid joint and several liability by showing that "there is a reasonable basis for determining the contribution of each cause to a single harm." *Burlington Northern*, 129 S. Ct. at 1881, citing Restatement (Second) of Torts §433A(1)(b), p. 434 (1963–1964). Because of the often complex circumstances at CERCLA sites—such as a large number of potentially responsible parties or an array of chemicals deposited over a long time period—attempts to apportion liability were often very difficult, if not impossible. *Burlington Northern* is an example of how courts and parties can struggle with apportioning liability, even at a relatively simple CERCLA site such as the one at issue.

From 1960 until 1989, when it became insolvent and went out of business, Brown & Bryant operated a site in Arvin, California, that stored and distributed various hazardous agri-chemicals, such as weed killers and pesticides. Certain chemicals were produced by and delivered to the site by Shell Oil Co. To facilitate a 1975 business expansion, Brown & Bryant leased a roughly one-acre parcel of land from Burlington Northern and Santa Fe Railroad Co. and Union Pacific Railroad.

Over 28 years of operation, the facility, both the Brown & Bryant-owned land and the parcels owned by the railroads, experienced frequent delivery spills, equipment failures, and tank and trailer rinsing. *Burlington Northern*, 129 S. Ct. at 1875. The site was added to the Superfund program's National Priorities List in 1989 after hazardous chemicals had seeped into the soil and groundwater for years. *Id.* at 1876. Separate investigations and cleanups by the railroads, the California Department of Toxic Substances Control, and EPA ensued. In 1999, a consolidated-bench trial was held as the governments sought to recover approximately $8 million that it had spent to clean up the site. There were originally four parties potentially responsible for the site: Brown & Bryant, Shell Oil, and the two railroads. However, since Brown & Bryant was insolvent at the time of trial, the only remaining defendants were Shell and the two railroads.

During the trial, neither Shell nor the railroads advanced arguments for apportionment, refusing to acknowledge any percentage of liability for contamination. The trial court termed these tactics "scorched earth," "all-or-nothing approach[es] to liability." *U.S. v. Atchison, Topeka & Santa Fe Ry.*, 2003 U.S. LEXIS 23130, at *236. Although the trial and appellate courts, as well as the Supreme Court, all seemed to acknowledge that the railroads failed to meet their burden of proof for divisibility, the district court "independently found [in the record] a reasonable basis for apportionment in spite of the parties[']presentations." *U.S. v. Burlington Northern & Santa Fe Ry.*, 520 F.3d 918, 943 (9th Cir. 2007).

Because the parties did not present an apportionment analysis, the district court invented an equation that, according to the Ninth Circuit, "relied on the simplest of considerations: percentages of land area, time of ownership, and types of hazardous products." *Burlington Northern*, 520 F.3d at 943. Using these factors, the district court determined that the railroads' liability was approximately six percent. Then the district court assigned an arbitrary 50 percent error rate to the equation, resulting in a total liability for the railroads of nine percent. Despite the Ninth Circuit's criticisms of this approach, the Supreme Court held that "the facts contained in the record reasonably supported the apportionment of liability." *Burlington Northern*, 129 S. Ct. at 1882.

Defense attorneys for potentially responsible parties should be aware of the effects of an arbitrary error rate such as the 50 percent error rate that the district court used. Error rates are usually calculated using statistical analyses of standard deviations. Thus, simply choosing a random error rate does not comport with principles of sound science and statistics.

More importantly, while a 50 percent error rate has little impact when an apportionment equation results in six percent liability, the effect balloons as the proportion of liability increases. For example, if a party is found 60 percent liable instead of six percent, an error rate of 50 percent may spike liability to 90 percent. When environmental cleanup costs reach millions of dollars, this type of error rate would have a dramatic impact on a company's bottom-line liability. Instead, statistically significant error rates based on generally accepted apportionment methods may prove more accurate and fair.

As discussed below, depending on how broadly or narrowly district courts interpret the Supreme Court's holding, *Burlington Northern* may have a dramatic impact on the future of CERCLA as one of the federal government's primary mechanisms for cleaning up contaminated sites. To a large extent, parties considered potentially responsible for contamination will determine the future impact that *Burlington Northern* will have in CERCLA litigation, because the Court did not rule that parties seeking to avoid joint and several liability no longer bear the burden of showing that harm is apportionable. Although the district court, the Ninth Circuit, and Justice Ginsburg in dissent noted that the parties in *Burlington Northern* failed to meet this burden by refusing to propose a theory to apportion liability, this did not prevent the Supreme Court from ruling that the district court's apportionment equation was reasonable.

Broad or Narrow Interpretation?

Because *Burlington Northern* has not been interpreted by lower courts, its actual impact on CERCLA cleanups is not yet known. The language of the Supreme Court's holding, however, is sufficiently vague to allow different interpretations. If *Burlington Northern* is read broadly, future litigants, and even trial courts, may not need to use scientific facts or evidence to demonstrate a reasonable estimate of the amount of contamination for which a party is responsible. In its 8–1 decision, the Supreme Court affirmed the district court's simple equation, which used basic time and space factors to decide the railroads' proportion of CERCLA liability. The district court's equation did not analyze any technical aspects of the actual pollution and remediation, such as fate and transport models of chemical contamination, groundwater flow, or degradation processes of the specific chemicals at issue. Under this type of broad interpretation, parties stand a much greater chance to apportion liability and avoid the harsh effects of joint and several liability.

However, the decision poses some risks. Although the Supreme Court upheld a simple apportionment analysis in this particular case, it is unlikely that all courts will agree that a simple apportionment is sufficiently "reasonable." A narrow interpretation of *Burlington Northern* suggests that, because each apportionment analysis will depend on the specific facts in the record, a rudimentary equation may only stand with very simple fact patterns. Thus, while the Supreme Court upheld an unscientific apportionment analysis in *Burlington Northern*, which involved only three potentially responsible parties, two of which it found liable, and three chemicals, another court might not deem this type of equation "reasonable" for complex CERCLA sites, such as old landfills and industrial sites where hundreds of potentially responsible parties disposed of thousands of chemicals over decades.

As is often true when interpreting a statute, the Supreme Court did not clearly define what constitutes a "reasonable basis" for apportioning liability for cleanup costs. Although this uncertainty may cause angst among parties viewed as potentially responsible for CERCLA-related cleanups, *Burlington Northern* also creates opportunities for inventive, site-specific apportionment presentations. While we do not know how low the burden will be to show that apportionment has been computed using a "reasonable basis," what is known is that the Supreme Court ruled that a court-created, unscientific apportionment analysis was reasonable under the circumstances in this particular case—*Burlington Northern*.

Uncertainties Equal Opportunities

In practice, due to uncertainty about what standard will meet the "reasonable basis test" and the potentially enormous costs associated with cleaning up severely contaminated industrial sites, parties involved in large environmental cleanups should think twice about putting all of their eggs in the basket of a broad interpretation of the *Burlington Northern* holding.

Over the past two decades, numerous apportionment methods have been developed and peer-reviewed, using site-specific information and records that stand a greater chance of being deemed "reasonable" by a court. Environmental law practitioners with experience in

CERCLA apportionment cases are familiar with apportionment methods such as the weighted sites attributes model (sometimes abbreviated WSAM), the individual plume approach (sometimes referred to as IPA), area-of-contribution method, the volume-of-contribution method, the mass-of-contribution method, chemical fingerprinting, and isotope analysis. Typically, experts in environmental forensics, engineering, hydrology, geology, hydrogeology, chemistry, or biology will assist in the apportionment process using these techniques. *See*, *e.g.*, Barbara J. Graves, David Jordan, Dominique Cartron, Daniel B. Stephens, and Michael A. Francis, *Allocating Responsibility for Groundwater Remediation Costs*, 23(4) The Trial Lawyer 159–171 (2000).

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In *Burlington Northern*, since no party prepared an apportionment analysis, no *Daubert*-qualified experts in environmental forensics or any other relevant scientific discipline were admitted to testify on apportioning remediation costs. Although the absence of testimony on apportionment could have led the district court to find the responsible parties jointly and severally liable, on its own the court decided to "perform the equitable apportionment analysis demanded by the circumstances of the case." *Atchison, Topeka & Santa Fe Ry.*, 2003 U.S. LEXIS 23130, at *236. However, as Justice Ginsburg noted with the lone dissenting vote and opinion in the Supreme Court case, in the absence of arguments for apportionment, trial courts do not typically undertake their own apportionment efforts. *Burlington Northern*, 129 S. Ct. at 1885–86 (Ginsburg, J., dissenting) (stating "[g]iven the party presentation principle basic to our procedural system, it is questionable whether the court should have pursued the matter *sua sponte*.") (internal citations omitted). Practitioners should remember that in most cases parties will likely retain the burden to demonstrate why joint and several liability should not apply.

Attorneys and investigators should continue to play a key role in developing strategies for apportionment. There are many tools readily available to gather evidence to support apportionment. For over nearly 150 years, Sanborn Fire Insurance Maps have provided a massive database of towns and specific information on buildings and structures, such as size, shape, construction of materials, heights, functions of structures, and property boundaries. The maps also provide specific information relevant to a CERCLA apportionment analysis, such as locations of pipelines, wells, sumps or dumps, and heavy machinery. In the case of larger factories and commercial buildings, the maps often provide details of how specific rooms were used. The Sanborn database has been digitized and is available online.

There are a plethora of other resources to access during the apportionment analysis process. Over the past 35 years, the U.S. Geological Survey (USGS) has become a primary provider of aerial maps throughout the country. Today's digital aerial and satellite images are critical to site investigations and studies. The federal government maintains many other databases providing valuable resources to assist in an apportionment analysis. The U.S. Department of Agriculture Aerial Photography Field Office is an essential source for aerial images of rural areas dating back to 1955. The U.S. Department of Transportation Bureau of Transportation Statistics provides information on transportation facilities, networks, and services. The Federal Emergency Management Agency (FEMA) is the official government source for flood hazard mapping information, which may be used for general research purposes as well in connection with specific flood events that cause environmental contamination. Other agencies, such as the National Oceanic and Atmospheric Administration (NOAA), the EPA, the National Park Service, and the Department of the Interior's Bureau of Land Management have electronic and hard copies of invaluable source material.

State and local resources should also be reviewed during the apportionment process. Similar to federal agencies, state departments of transportation, environmental protection, and agriculture may maintain useful records. Although older records can be more challenging to find than records for the past 10–20 years, a Freedom of Information Act request or subpoena for records is often an important starting point. Most secretaries of state and state archivists will provide plat maps, corporate business records, and other historical documents. County buildings, town halls, courthouses, and planning commissions will also hold records, often dating back to the early days of an area. Local fire and police departments may also have reports and other records related to specific emergency release events.

Finally, in a complex pollution scenario, but especially when operations records have not been easily found, conducting interviews with former employees may prove invaluable. Longtime facility and plant operators and workers often have the greatest knowledge of a business's daily operations, chemical handling procedures, and specific spill events. Former employees and managers, including disgruntled former employees, have also been known to maintain their own personal records in basements, garages, and attics that prove to be treasure troves of important information.

Conclusion: Playing It Safe

The recent *Burlington Northern & Santa Fe v. U.S.* decision will likely have a significant impact on how the government and potentially responsible parties address contaminated sites. For the present, practitioners should consider the advantages and potential pitfalls associated with various interpretations. To be safe, and to increase the likelihood of winning an appeal, practitioners should use traditional, generally accepted apportionment methods in complex or costly cases. Using historical records gathered from federal, state and local governments, as well as from the private sector and the parties, a practitioner

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can present a technically sound apportionment analysis.

While extensive data mining and investigation may be time-consuming, it is cost-effective and worthwhile given the high stakes involved in environmental cleanups. If you choose a simple apportionment presentation without the support of hard, scientific, site-specific evidence, courts are more likely to rule that the parties have not provided a "reasonable basis" for apportionment and not met their burden. As a result, a court will hold these parties jointly and severally liable. In the long run, with the high costs of environmental cleanups, potentially responsible parties in a post-*Burlington Northern* world may be better off going the extra mile at the apportionment stage. FD