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# Long Live Volumetric Apportionment: Will Courts follow Burlington Northern: The Mystery Continues! United States v. NCR Corporation

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# Long Live Volumetric Apportionment: Will courts follow *Burlington Northern*? The mystery continues!

United States v. NCR Corporation[1]

## I. INTRODUCTION

The Seventh Circuit's decision in *NCR* was highly anticipated because it was that court's first Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") apportionment case since the United States Supreme Court's decision in *Burlington Northern*[2].[3] Considering the high costs of environmental cleanup, and the reality that much of the environmental contamination has been caused by bankrupt or defunct companies, the issue of whether, and in what circumstances, defendants can be held liable for contamination caused in part by third parties has been a major source of disputes arising under the CERCLA since its inception.[4] Once Congress enacted CERCLA, lower federal courts received cases that required them to interpret and implement the liability provisions of the act.[5] Subsequently, the Supreme Court quickly acknowledged that CERCLA was based on a system of tort liability, in that joint and several liability should be applied whenever a case involves multiple defendants who are responsible for a single indivisible harm.[6] On the contrary, the Court has noted apportionment is proper when "there is a reasonable basis for determining the contribution of each cause to a single harm."[7] Due to the fact that there is no consensus as to what constitutes "a reasonable basis," courts that have analyzed this

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[1] 688 F.3d 833 (7th Cir. 2012).

[2] Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009) [hereinafter Burlington Northern].

[3] *See generally* Nancy Peterson, et al., *Seventh Circuit Says Joint and Several Liability is Alive*, QUARLES & BRADY LLP, http://www.quarles.com/seventh_circuit_liability_2012/ (last visited Oct. 20, 2012).

[4] Kevin A. Gaynor, et al., *Unresolved CERCLA Issues After Atlantic Research And Burlington Northern*, 40 ENVTL. L. REP. 11198 (2010).

[5] *See* Steve C. Gold, *Dis-Jointed? Several Approaches To Divisibility After Burlington Northern*, 11 VT. J. ENVTL. L 307, 308 (2009).

[6] Rachel K.. Evans, Case Comment, *Burlington Northern & Santa Fe Railway Co. v. United States*, 34 HARV. ENVTL. L. REV. 311, 317 (2010).

[7] *Burlington Northern*, 556 U.S. at 614 (citing Restatement (Second) of Torts § 433(A)(1)(b) (1963-1964)).

question have rarely apportioned harm.[8] In fact, to prove apportionment, a defendant must show a correlation "between the causes that give rise to liability, which are capable of division, and the harm, which is not."[9]

Parties raising the volumetric apportionment defense, often, attempt to prove the quantity of waste that each party has contributed to the site is measureable and proportionate to the amount of harm caused.[10] However, parties have encountered problems using this method because they are typically unable to precisely quantify the volume of waste they have contributed, and are usually unable to show a proportional correlation between their waste volume and the amount of harm caused.[11] Due to these types of problems, the volumetric apportionment defense is frequently unsuccessful.[12]

## II. FACTS AND HOLDING

In the late 1990's, the United States Environmental Protection Agency ("EPA") and the Wisconsin Department of Natural Resources ("WDNR") began devising a remedial plan to clean up the Fox River in Wisconsin.[13] The EPA designated the National Cash Register Corporation ("NCR") as a potentially responsible party, and thus responsible for undertaking remedial work.[14] Prior to the implementation of the EPA's remedial plan, various companies dumped polychlorinated biphenyls ("PCB's") into the Fox River's waters.[15] Wisconsin is the country's

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[8] Robert M. Guo, Note, *Reasonable Bases For Apportioning Harm Under CERCLA*, 37 ECOLOGY L.Q. 317, 319 (2010).

[9] William C. Tucker, *All Is Number: Mathematics, Divisibility And Apportionment Under Burlington Northern*, 22 FORDHAM ENVTL. L. REV. 311, 327 (2011).

[10] Matter of Bell Petroleum Servs., Inc., 3 F.3d 889, 904 (5th Cir. 1993).

[11] Tucker, *supra* note 9, at 316-17.

[12] *Id.* at 317.

[13] United States v. NCR Corp., 688 F.3d 833, 835 (7th Cir. 2012).

[14] *Id.*

[15] *Id.* at 836. "PCBs are toxic chemicals that remain highly stable in the environment for a long time and are known to cause a host of health problems, including birth defects and cancer, in both animals and humans" who have consumed fish or had other contact with

leading producer of paper products and as early as the 1980's paper mills began operating on Wisconsin's many rivers.[16] The densest concentration of those mills, and in the world, is found on the Lower Fox River, which begins at Lake Winnebago and runs approximately forty miles northeast until it discharges into Green Bay.[17] "Many of the PCB's present in the Lower Fox River are attributable to the production of "carbonless" copy paper that was developed by NCR in 1954."[18]

"Between 1954 and 1971, NCR, along with other paper manufacturers, produced and recycled PCB tainted paper, and ultimately discharged an estimated 230,000 kilograms of PCB's into the Lower Fox River."[19] In 2002, the EPA issued a final cleanup plan that divided the river into five sections called operable units beginning with the upstream portions of the river and ending with the lower portions that flow into Green Bay.[20] The EPA determined that concentrations of PCB above 1.0

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PCBs. *Id* at 836.; *see also* Appleton Papers Inc. v. George A. Whiting Paper Co., No. 08-c-16, 2009 WL 5064049, at * 1 (E.D. Wis. Dec. 16, 2009)). Other entities such as cities, utilities and sewerage districts, treated and/or released wastewater containing NCR's PCBs into the river. *Id.*

[16] *NCR*, 688 F.3d at 835.

[17] *Id.*

[18] *Id.* at 836. A key component of NCR paper was an emulsion, a mixture of liquids that do not mix, containing Aroclor 1242, a solvent manufactured by the Monsanto Corporation. *Appleton*, 2009 WL 5064049 at *1. Aroclor is a type of PCB that does not easily degrade. *Id.*

[19] *NCR*, 688 F.3d at 836. Although NCR developed and sold its carbonless paper product and created the PCB containing emulsion, the paper was actually manufactured by the Appleton Coated Paper Company, which coated sheets of paper with NCR's emulsion. *Appleton*, 2009 WL 5064049 at *1. This is the manufacturing process that resulted in the significant discharges of PCBs into the Fox River. *Id.* In addition, PCBs also escaped into the river when Appleton Coated sold its paper waste to paper mills for recycling, which was also a water intensive process. *Id.* After years of working closely together, NCR purchased the Appleton Coated Paper Company in 1970, and Appleton Coated merged with another company and formed Appleton Papers, Inc. the next year. *Id.*

[20] *NCR*, 688 F.3d at 836. ( "Remediation is largely complete in the first three operable units. At issue in this appeal is the last section of the River, the fourth operable unit, which runs from the De Pere Dam to the mouth of Green Bay... The parties further

ppm (*i.e.* parts per million) were hazardous to human health, and anywhere that the average concentration of PCB's in the Lower Fox River exceeded that amount required remediation.[21] "Depending on the particular concentration of PCB's and river dynamics, the plan called for a combination of dredging[22]... and capping[23] ... at various sites in each of the Lower Fox River's operable units."[24]

In November 2007, the EPA issued a Unilateral Administrative Order, pursuant to CERCLA, directing NCR and Appleton Papers Incorporated ("API") to complete the removal of 660,000 cubic yards of sediment from the Lower Fox River in operable units two through five.[25] "After EPA issued this order, NCR participated in—and even led—remediation efforts in operable units two and three, at a cost of approximately $50 million."[26] NCR also "performed some of the work required in the fourth unit," and NCR "had completed about half the dredging required in the upper half of unit four and twenty percent of that required in its lower half" by the end of 2011.[27] Throughout this time, "NCR maintained that it should not be responsible for [one hundred percent] of the remediation work and tried to recoup some of the cleanup costs from the other potentially responsible parties."[28]

In January 2008, NCR filed a suit for contribution in equity from the other paper plants, which the United States District Court for the Eastern District of Wisconsin denied in 2009.[29] After the district court's

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divide this fourth section into an upper and lower half[.]")

[21] *Id.*

[22] Dredging is the "gathering and disposing of sediments." *Id.*

[23] Capping is the "covering of contaminated sediments." *Id.*

[24] *Id.* The dredging operation continued for twenty-four hours a day, five days a week (excepting winter). *Appleton*, 2009 WL 5064049 at *1.

[25] *Id.*; *see also* United States v. NCR Corp., No. 10-C-910, 2012 WL 1490200, at *1 (E.D. Wis. Apr. 27, 2012), *aff'd*, 688 F.3d 833 (7th Cir. 2012).

[26] *NCR*, 688 F.3d at 836.

[27] *Id.*

[28] *Id.*

[29] *Id.*; *see also* Appleton Papers Inc. v. George A. Whiting Paper Co., No. 08-c-16, 2009

ruling, "NCR notified the EPA that it would no longer comply with their order because it had already done more than its share of the work."[30] Subsequently, NCR cut its work in half and refused to commit to perform any remediation work in 2012.[31] In response the United States filed a motion for a preliminary injunction in the United States District Court for the Eastern District of Wisconsin to require NCR and API to complete the scheduled work.[32] "NCR's principal grounds for contesting the propriety of the injunction was that its liability was less than the costs it had already incurred... the harm to Fox River [was] divisible, and thus the remediation costs should be apportioned among all of the potentially responsible parties."[33]

On July 5, 2011, the district court denied the United States' motion for preliminary injunction on the ground that the government was not likely to show that API was liable.[34] On March 19, 2012, the government filed another motion for a preliminary injunction tailored to NCR alone.[35] "The district court rejected [NCR's] defense, holding the harm to the site was not reasonably capable of apportionment, and in an order dated April 27, 2012, it issued the [United States'] injunction."[36] NCR responded by immediately filing a "notice of appeal, requesting expedited treatment and a stay of the injunction during the pendency of the

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WL 5064049, (E.D. Wis. Dec. 16, 2009)). The district court denied NCR's claim because it found that NCR, and not the companies operating the other plants, had been aware of the significant risks of PCBs at an early date but had decided "to accept the risk of potential environmental harm in exchange for the financial benefits of continued sales of carbonless paper." *NCR*, 688 F.3d at 836-37.

[30] *Id.* at 837.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* ("API was then dismissed as a party from the current motion for a preliminary injunction").; *see also* United States v. NCR Corp., No. 10-C-910, 2012 WL 1490200, at *1 (E.D. Wis. Apr. 27, 2012), *aff'd*, 688 F.3d 833 (7th Cir. 2012).

[35] *Id.*

[36] *NCR*, 688 F.3d at 837.

appeal."[37] The Seventh Circuit Court of Appeals permittd expedited treatment, but denied the motion for stay.[38] Thus, during appeal, NCR's remediation efforts continued in compliance with the district court's order.[39] Ultimately, the court of appeals affirmed the holding of the district court by concluding NCR did not meet its burden of showing that the harm to the Fox River was capable of apportionment.[40] The Seventh Circuit held apportionment in this case to be improper by concluding the discharge of PCB's by more than one entity is sufficient in itself to bring about conditions hazardous to human health under EPA guidelines, and "a delay in the Fox River cleanup would inflict irreparable harm in the form of permitting pollution to continue unabated."[41]

## III. LEGAL BACKGROUND

### A. *The History Behind the Comprehensive Environmental Response, Compensation, and Liability Act*

In 1980, Congress enacted the CERCLA "in response to the serious environmental and health risks posed by industrial pollution."[42] With the implementation of CERCLA, Congress' primary goals were to facilitate prompt cleanup of inactive hazardous waste sites and impose liability for the costs of cleanup on those who contributed to the presence of industrial waste.[43] CERCLA "was designed to promote the timely

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *See id.* at 838-44.
[41] *Id. at 843.*
[42] Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 602 (2009). "CERCLA was enacted both to provide rapid responses to the nationwide threats posed by the 30-50,000 improperly managed hazardous waste sites in the United States as well as to induce voluntary responses to those sites." United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983). CERCLA established "a 1.6 billion dollar trust fund ("superfund") drawn from industry and federal appropriations, to finance clean-up and containment efforts." *Id.*
[43] *See* Aaron Gershonowitz, *The End of Joint and Several Liability In Superfund*

cleanup of hazardous waste sites and to ensure the costs of such cleanup efforts were borne by those responsible for the contamination."[44] CERCLA imposes strict liability upon several classes of potentially responsible parties, including the owners and operators of facilities from which hazardous substances were released, those who arranged for disposal of hazardous substances, and those who transported the hazardous substances.[45]

Under CERCLA, any potentially responsible party is jointly and severally liable for all costs of removal or remedial action incurred by the government, unless the party seeking to avoid joint and several liability can meet its burden of proving a reasonable basis for apportionment exists.[46] In addition, CERCLA permits parties labeled potentially responsible to seek contribution from other potentially responsible parties to the extent that they have paid more than their equitable share of the total costs associated with a site.[47] "When CERCLA was originally passed, a reference to "joint and several liability" was deleted from the statute."[48] The legislative history behind CERCLA suggests that the joint and several liability language was deleted in order to avoid a mandatory standard applicable in all situations that might produce inequitable results.[49] Due to this silence, courts have used common law principles to determine the

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*Litigation: From Chem-Dyne To Burlington Northern*, 50 DUQ. L. REV. 83,85-86 (2012). The crucial CERCLA provision that created liability for cost recovery and damages for injury to natural resources was §107. *See* Gold, *supra* note 5, at 308.

[44] *Burlington Northern*, 556 U.S. at 602 (internal quotations omitted).

[45] *Id.* at 608-09.; *See also*, Gershonowitz, *supra* note 43, at 85.

[46] *See* Gershonowitz, *supra* note 43, at 86.; *See also Burlington Northern*, 556 U.S. at 614.

[47] 42 U.S.C. §§ 9613(f)(1), (f)(3)(B). ; Answering Brief of the United States, United States v. NCR Corp., 688 F.3d 833 (7th Cir. 2012) (No. 12-2069), 2012 WL 3105299, at *8.

[48] Kevin A. Gaynor, et al., Comment, *Unresolved CERCLA Issues After Atlantic Research And Burlington Northern*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11198 (2010).

[49] United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983).

scope of liability when assessing the propriety of applying joint and several liability.[50]

### B. *The Chem-Dyne Approach*

In 1983, Chief Judge Carl Rubin of the United States District Court for the Southern District of Ohio wrote what has been referred to as the "seminal opinion" on the subject of apportionment in CERCLA actions.[51] Judge Rubin's confrontation of the defendants' motion for an early determination that they were not jointly and severally liable for the clean-up costs incurred at the Chem-Dyne superfund site was a matter of first impression.[52] After reviewing CERCLA's history, Judge Rubin concluded that although the Act imposed a strict liability standard, it did not mandate joint and several liability in every case.[53] Rather, Congress intended the scope of liability to be "determined from traditional and evolving principles of common law."[54] The court described the common law rule of joint and several liability as stated in the Restatement (Second) of Torts: "[w]hen two or more persons acting independently caused 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 has himself caused . . . [b]ut where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm."[55] The divisibility inquiry turns on an intensive factual determination, and the *Chem-Dyne* court noted the mixture of waste raises questions about the divisibility of harm.[56] The court stated the volume of waste is not an adequate basis for divisibility because volume cannot

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[50] *Id.*
[51] *Burlington Northern*, 556 U.S. at 613 (citing United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983)).
[52] *Chem-Dyne*, 572 F. Supp. at 804.
[53] *Id.* at 808.
[54] *Id.*
[55] *Id.* at 810.
[56] *Id.* at 811.

accurately predict the risk associated with the waste, the toxicity, or the migratory potential.[57]

### C. *The Burlington Northern Approach*

Following *Chem-Dyne*, courts have acknowledged "the universal starting point for divisibility of harm analysis in CERCLA cases is the Restatement (Second) of Torts."[58] Under the Restatement, apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm.[59] However, when two or more causes produce a single, indivisible harm, each of the causes is charged with responsibility for the entire harm.[60] In *Burlington Northern*, the Supreme Court allowed the volumetric apportionment defense and reversed the decision of the Court of Appeals for the Ninth Circuit.[61] The Court concluded the district court reasonably apportioned a railroads' share of site remediation costs.[62] Under the two-part test used by the Seventh

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[57] *Id.*

[58] *Burlington Northern*, 556 U.S. at 614 (internal quotations omitted).

[59] *Id.*

[60] *Id.* at 614-15.

[61] *Id.* at 618.

[62] *Id.* The district court calculated the railroad's liability based on three figures. First the court noted that the railroad parcel constituted only nineteen percent of the surface area of the site in question. Second, the court observed that the railroads had leased their parcel to Brown & Bryant, an agricultural chemical distributor, for thirteen years, which was only forty five percent of the time Brown & Bryant operated the site in question. Finally, the district court found that the volume of hazardous substance releasing activities on the Brown & Bryant property was at least ten times greater than the releases that occurred on the railroad parcel, and it concluded that only spills of two chemicals substantially contributed to the contamination that had originated on the railroad parcel and that those two chemicals had contributed to two-thirds of the overall site contamination requiring remediation. The court multiplied .19 by .45 by .66 and rounded up to determine that the railroads were responsible for approximately six percent of the remediation costs. "Allowing for calculation errors up to fifty percent," the court concluded that the railroads could be held responsible for nine percent of the total CERCLA response cost for the site in question. *Id.* at 616-617.

Circuit in *NCR*, a court must first determine whether the harm at issue is "theoretically capable of apportionment."[63] Secondly, if the harm is capable of apportionment, the court must determine how to apportion damages.[64] *Burlington Northern* did not address the first step of the two-part test because the parties agreed that the contamination was "theoretically capable of apportionment."[65] *Burlington Northern* distinguished apportionment from contribution by stating, "[a]pportionment ... looks to whether defendants may avoid joint and severable liability by establishing a fixed amount of damage for which they are liable, while contribution actions allow jointly and severally liable potentially responsible parties to recover from each other on the basis of equitable considerations."[66] The Supreme Court stated, "[e]quitable considerations play no role in the apportionment analysis; rather apportionment is proper only when the evidence supports the divisibility of the damages jointly caused by the potentially responsible parties."[67]

## IV. INSTANT DECISION

In *NCR*, the Seventh Circuit held that the harm to the Fox River, caused by the PCB's dumped into it by various potentially responsible parties, was indivisible by using the Restatement (Second) of Torts and a two-part test that determined apportionment may not shield NCR from joint and several liability under CERCLA.[68] On appeal NCR's principle ground for contesting the propriety of the injunction was that its liability was less than the cost it had already incurred and thus it had already performed more than its share of work.[69] NCR argued the harm to Fox

[63] United States v. NCR Corp., 688 F.3d 833, 838 (7th Cir. 2012).
[64] *Id.*
[65] *Burlington Northern*, 556 U.S. at 615.
[66] *Id.* at 615 n. 9.
[67] *Id.*
[68] *NCR*, 688 F.3d at 838-39.
[69] *Id.* at 837.

River was divisible and thus the remediation costs should have been apportioned among all of the potentially responsible parties.[70]

The court began its analysis by stating, "[t]he 'universal starting point for divisibility of harm analysis in CERCLA cases' is § 433A of the Restatement (Second) of Torts."[71] To determine whether the harm is divisible courts must look to the common law and the Restatement standard adopted by the Supreme Court in *Burlington Northern*.[72] Under this standard when two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.[73] Under the two-part test used by the Seventh Circuit, a court must first determine whether the harm at issue is "theoretically capable of apportionment."[74] Secondly, if the harm is capable of apportionment, the court must determine how to apportion damages.[75]

Here, the analysis stopped at step one because the court determined NCR was unable to prove the harm to the Fox River was "theoretically capable of apportionment."[76] NCR argued, through expert testimony, that the harm was divisible based on the volume of PCB's that each potentially responsible party released into the River.[77] Assuming NCR's expert testified accurately, the court found NCR's contribution alone would have been sufficient to raise PCB levels in the Lower Fox River above the 1.0

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[70] *Id.*
[71] *Id.* at 838.
[72] *Id.*
[73] *Id.* (citing Restatement (Second) of Torts, § 875).
[74] *Id.* This is a mixed question of law and fact that requires the court to make a decision in all cases. *Id.*
[75] *Id.* This is a question of fact, and at all times the burden remains on the party seeking apportionment to "prove that a reasonable basis for apportionment exists." *Id.*
[76] *Id.* at 839.
[77] *Id.* Dr. Connolly, NCR's expert, testified that NCR's discharge of PCBs into the Lower Fox River in the second operable unit contributed about nine percent of the PCBs in the fourth operable unit's upper half, and six percent of the PCBs in the lower half. *Id.*

ppm EPA maximum safety threshold which requires remediation.[78] The court concluded such remediation would cost the same whether the Fox River was heavily or lightly contaminated.[79] When NCR's expert was asked by the government how NCR's model would assign liability between one party who deposited 3 ppm, and another party who deposited 30 ppm, NCR's expert testified that the model would assign ten percent liability to the first polluter and ninety percent liability to the second polluter.[80] The court responded that "both polluters are liable under the Restatement because either discharge of PCB's was sufficient to create a condition that is hazardous to human health under EPA guidelines."[81] The need for cleanup triggered by the presence of a harmful level of PCB's in the River does not correlate to the amount of PCB's that each paper mill discharged.[82] The Seventh Circuit found apportionment to be improper by stating the facts of *NCR* are similar to the joint and severable liability cases involving merging fires.[83] In regards to NCR being able to recoup any costs it should not have paid, the court concluded it is an open question and the district court's weighing of equities did not amount to an abuse of discretion.[84]

## V. COMMENT

### A. *Divisible Harm in the Restatement (Second) of Torts*

The determination of whether harm is theoretically capable of apportionment is a "question of law for the court to decide in all cases."[85] When faced with the question of apportionment in *NCR*, the court was guided by commentary to the Restatement (Second) of Torts § 433A(2)

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[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 844.
[85] *Id.* at 838; *See also* Restatement (Second) of Torts § 434.

that specifically focuses on indivisible harm, rather than equally considering the restatements remarks on divisible harm as well.[86] In fact, the *NCR* court used language directly from comment (i) in the restatement when it acknowledged, "[a]pportionment is improper 'where either cause would have been sufficient in itself to bring about the result, as in the case of merging fires which burn a building.'"[87] The court also made reference to illustrations fourteen and fifteen in comment (i) of the Restatement (Second) of Torts §433A(2) to counter a divisible harm argument made by NCR, and concluded there is not one universal way to approach apportionment in pollution cases.[88] Based on this determination, the court held the facts in *NCR* were an example of multiple sufficient causes of an environmental harm and therefore the harm to the Lower Fox River is not theoretically capable of apportionment.[89]

Nevertheless, the court made this determination without ever addressing the Restatement's example of divisible harm that states, "where two or more factories independently pollute a stream, the interference with the plaintiff's use of the water may be treated as divisible in terms of degree, and may be apportioned among the owners of the factories, on the basis of evidence of the respective quantities of pollution discharged into the stream."[90] This example shows that apportionment is not just theoretically possible, but appropriate where pollution from two or more

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[86] *NCR*, 688 F.3d at 839; *See also* Restatement (Second) of Torts § 433(A)(2).
[87] *NCR*, 688 F.3d at 839; *See also* Restatement (Second) of Torts § 433(A)(2) cmt (i).
[88] *NCR*, 688 F.3d at 841. Illustration 14 states, "A Company and B Company each negligently discharge oil into a stream. The oil floats on the surface and is ignited by a spark from an unknown source. The fire spreads to C's bar, and burns it down. C may recover a judgment for the full amount of his damages against A Company, or B Company, or both of them." Illustration 15 states, "[t]he same facts as in Illustration 14, except that C's cattle drink the water of the stream, are poisoned by the oil and die. The same result." *Id.*
[89] *Id.* at 839.
[90] Restatement (Second) of Torts § 433(A)(1) cmt. d.

sources is discharged into a waterway.[91] The difference between the divisible harm example and the illustrations used by the *NCR* court is that divisible harms are cumulative and scalable while the examples in the illustrations are inherently indivisible because either party's action is independently sufficient to cause the entirety of the harm.[92] There is a superficial similarity to the merging fire case the court mentions, but it is not the correct analogy to the facts in *NCR* because the harm in the merging fire case is not capable of volumetric apportionment. As the examples in comment (d) in the restatement illustrate, many pollution cases are apportionable because added pollutants cause more environmental harm; while in the case of a merging fire, a building can not be more burned down and the harm is the same regardless of the contribution of each defendant.[93]

When harm can be allocated it seems fair to make each contributor liable for his or her own share. But, according to *NCR* when a chemical may not be very harmful but becomes so when mixed with other chemicals, it will not suffice to look solely at the amount of contamination present in order to estimate the harm.[94] Rather than conceptualizing the harm as the damage to the environment or the total rise to human health, which might continue to rise as contributions from all polluters are combined and placed in the River, the *NCR* court deemed the relevant harm to be the cost of cleanup.[95] Having done so, it concluded that all polluters whose contributions exceed the threshold of contamination that require cleanup have each acted in a way sufficient to cause one hundred percent of the harm.[96] Under this view each additional polluter is merely redundant, much like the merging fires or successive harm cases.

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[91] Reply Brief for Defendant-Appellant NCR Corp., United States v. NCR Corp., 688 F.3d 833 (7th Cir. 2012) (No. 12-2069), 2012 WL 1965511, at *6.
[92] *Id.* at *7.
[93] *Id.*
[94] *NCR*, 688 F.3d at 840.
[95] *Id.* at 840.
[96] *Id.* at 841. The court focused exclusively on two main points, (1) PCBs must be

According to the court in *NCR*, if a case involves "facts that are simple, and it is reasonable to assume that the respective harm done by each of the [pollutants] is proportionate to the volume of contaminant each discharged into the environment, then a court might be able to measure harm based simply on the volume of contaminant."[97] However, the problem with this determination is that it does not give an explanation of a "simple" case, nor does it allow for volumetric apportionment when the facts of a case are not "simple." Therefore, this determination is flawed because it doesn't follow the view of the Restatement that the Supreme Court chose to follow in *Burlington Northern.*

### B. *Volumetric Apportionment under Burlington Northern*

When looking at case law concerning hazardous environmental substances it becomes obvious that apportioning contamination and apportioning the cost of remediation are two different concepts.[98] The *NCR* court stated contamination occurs whenever PCB's pass a threshold level, and apportioning the cost of remediation will vary depending on how the harm that flows from pollution is characterized.[99] In *Burlington Northern*, the Court apportioned the costs of remediation, thereby permitting apportionment on the basis of what contamination was attributable to the parties.[100] The Court contemplated that apportionment would occur where possible and made no explicit mention of thresholds.[101] As a result, the burden was on the *NCR* court to explain why the facts of the *NCR* case were different enough to justify one

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remediated only after reaching a particular concentration threshold, and (2) the cost to remediate PCBs is inert for any concentration over that threshold. *Id.* at 839.

[97] *Id.* at 841.

[98] *See* Gershonowitz, *supra* note 43, at 110. Prior to the decision in *Burlington Northern* the Seventh Circuit characterized apportionment, in CERCLA joint and several liability cases, as a "rare scenario. Metropolitan Water Reclamation Dist. Of Greater Chi. v. North Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 827 n. 3 (7th Cir. 2007).

[99] *NCR*, 688 F.3d at 841.

[100] Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 616-18 (2009).

[101] *Id.*

hundred percent liability under a threshold analysis. The Seventh Circuit tried to explain the outcome of *NCR* by stating *Burlington Northern* said nothing about fact patterns in which multiple entities independently contribute amounts of pollutants sufficient to require remediation.[102] The *NCR* court mentions, "[i]n *Burlington Northern* one party had contributed to no more than 10% of the total site contamination, some of which did not require remediation."[103]

The *NCR* court's analysis purports to distinguish *Burlington Northern* from *NCR* by stating some of the contamination in *Burlington Northern* did not require remediation, which did not reach the threshold, and therefore is different than the facts of *NCR*.[104] However, this is not a fair reading of *Burlington Northern* because in *Burlington Northern* some chemicals that caused contamination did reach the threshold to require remediation, but nonetheless the defendant was only required to pay a fraction of the remediation costs.[105] Due to this fact, the holding of *Burlington Northern* is in conflict with *NCR* because in *Burlington Northern* the defendant reached the threshold and was not held joint and severally liable for remediation costs, which differs significantly from the holding in *NCR*.

To counter the volumetric apportionment argument, the *NCR* court declared, "even if NCR contributed no more than 10% of the PCBs, that 10% would require remediation."[106] It appears as if the court is saying that if a single defendant pollutes enough to require remediation that defendant can be asked to bear the entire costs of clean up, as opposed to apportioning remediation costs like the Supreme Court did in *Burlington Northern*.[107] Under the volumetric apportionment analysis if a defendant caused ten percent of the pollution they would be responsible for ten

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[102] *NCR*, 688 F.3d at 842.
[103] *Id.*
[104] *Id.*
[105] *Burlington Northern*, 556 U.S. at 600,618.
[106] *NCR*, 688 F.3d at 842.
[107] *Burlington Northern*, 566 U.S. at 600, 618.

percent of the cleanup.[108] To support the holding that volumetric apportionment is not possible in *NCR* the Seventh Circuit emphasizes the fact that in *Burlington Northern* the parties agreed that apportionment was theoretically possible, and thus the Supreme Court never addressed that question.[109] In fact, the *NCR* court says apportionment in *Burlington Northern* was upheld based on a "rather rough, *sua sponte* calculation of apportionment," and requiring lower courts to always take such an approach would "in essence replace an evidence-based apportionment calculation with a rougher appeal to equity."[110] The court hypothesized that even if NCR had contributed their claimed nine or six percent of the PCB's in the Lower Fox River it does not necessarily follow that NCR is responsible for only nine or six percent of the cleanup costs.[111]

The court concluded that even if all that was present in the river was NCR's contributions, remediation would still be required because the threshold of 1.0 ppm of PCB's would have been reached.[112] The *NCR* court based its determination on clean up costs rather than focusing on the volumetric contributions or environmental harm.[113] Essentially the *NCR* holding indicates that since the act of any of the worst polluters would have required dredging it is ok to make each of them responsible for total remediation.[114] But, the court has no authority from *Burlington Northern* to support this proposition. In *Burlington Northern*, the site contamination created a single harm that required remediation, but the court concluded that the harm was divisible and capable of apportionment.[115] The total contribution for a defendant who reached the threshold requiring

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[108] See *id.* at 616-18 (discussing calculation methodology).
[109] *NCR*, 688 F.3d at 842.
[110] *Id.*
[111] *Id.* at 839.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 606 (2009)

remediation was calculated by looking at the area, duration, and volume of the harm.[116]

Even though courts cannot theoretically recognize distinct parts of polluted bodies of water such as lakes and rivers, damage to these entities should be apportioned based on the amount of contamination each party has contributed to the total level of contamination.[117] While *Burlington Northern* opened the door for an apportionment defense to joint and several liability that included a volumetric contribution component, the decision in *NCR* places a limit on the circumstances in which a contribution by volume method for assessing apportionment can be used.[118] The Seventh Circuit, and any circuits which endorse *NCR*, have closed the door opened in *Burlington Northern* by indicating volumetric apportionment can be applied only when a responsible party can establish the amount of its contaminants alone would not have caused the necessary response work.[119] This differs significantly from the holding in *Burlington Northern*.

The decision in *NCR* imposes a significant limitation on the "apportionment" defense to joint and several liability under CERCLA that the Supreme Court set forth in *Burlington Northern*. Currently, *NCR* is directly inconsistent with *Burlington Northern*. If the Supreme Court eventually endorses *NCR*, it will signal a shift back toward a broader imposition of such liability in appropriate cases.[120] For that reason, other circuits should not adopt the decision in *NCR*. Nevertheless, *NCR* will

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[116] *Id.*

[117] *See* Gershonowitz, *supra* note 43, at 92.

[118] *See generally* Jeremy Esterkin, *7th Circuit Hits the Brakes on Burlington Northern, Imposes Causal Element to CERCLA Volumetric Apportionment*, MARTINDALE.COM (Aug. 21, 2012), http://www.martindale.com/zoning-planning-land-use-law/article_Bingham-McCutchen-LLP_1572442.htm.

[119] *See NCR*, 688 F.3d at 839.

[120] Esterkin, *supra* note 118.

undoubtedly be cited as part of the ongoing development of joint and several liability under CERCLA.[121]

### C. *Equitable Considerations*

The Supreme Courted has stated equitable considerations should play no role in the apportionment analysis, and apportionment is proper when evidence supports the divisibility of damages jointly caused by potentially responsible parties.[122] Under CERCLA, if a party seeking to avoid joint and several liability can meet its burden of proving a reasonable basis for apportionment exists, the party will not be held jointly and severally liable for all costs of removal or remedial action incurred by the government.[123] The reason for this CERCLA provision is based on the fact that contribution claims are intended to equitably divide payments between tortfeasors with common liability.[124] In *NCR*, the court determined preventing injuries to the Lower Fox River was in the public interest and that the equities favored issuance of an injunction as soon as possible because the harm to the public outweighed any potential harm to NCR.[125] The court made this decision even though the possibility of NCR being able to recoup costs from other potentially responsible parties was very slim given the fact that others settled with the government, and the district court's ruling that NCR was not entitled to contributions.[126]

The court issued a preliminary injunction against NCR under the belief that anything they might say about how liability would be equitably distributed would be entirely speculative and that there might be enough

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[121] *Id.*

[122] Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 615 n. 9 (2009).

[123] *See* Gershonowitz, *supra* note 43, at 115-16.; *See also Burlington Northern*, 556 U.S. at 614.

[124] *See* Brief of Plaintiff-Appellee at 24, United States v. NCR Corp., No. 122069, 2012 WL 3140191, (7th Cir. Aug. 3, 2012) (No. 12-2069), (2012 WL 3105299).

[125] *NCR*, 688 F.3d at 843.

[126] *Id.*

time later to sort out the various parties' liability.[127] The *NCR* court explained that while § 113(f) of CERCLA provides for a contribution action order for potentially responsible parties to sort out among one another after remediation costs are incurred, it also states a person who has resolved its liability with the United States in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in settlement.[128] This led to the court's conclusion that NCR cannot seek contribution from parties that have settled.[129]

Conversely, under § 107(a) of CERCLA, a potentially responsible party that has not yet been subject of any government enforcement action or admitted liability may seek cost recovery.[130] The Seventh Circuit determined NCR incurred clean up costs pursuant to a consent order and chose not to determine whether these compelled costs of response work were recoverable under § 113(f), § 107(a), or both.[131] Because NCR currently cannot recoup the costs it incurs and will continue to incur in remediating portions of the Lower Fox River for which it is not liable at all, the balance of equities should have prevented the issuance of the courts preliminary injunction.[132] The court's choice not to rule on this issue benefitted the United States and affected NCR because even after the clean up is completed it is unlikely that the superfund will have funds sufficient to cover a reimbursement to NCR.[133] Ultimately, *NCR* contradicted the Supreme Court by using equitable considerations regarding public interest in the issuance of a preliminary injunction that affected the court's apportionment analysis. If courts continue to follow

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[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 844.
[132] *See* Brief of Plaintiff-Appellee at 24, United States v. NCR Corp., No. 122069, 2012 WL 3140191, (7th Cir. Aug. 3, 2012) (No. 12-2069), (2012 WL 3105299).
[133] *Id.*

*NCR*, the Supreme Court's prevention of equitable consideration in apportionment analysis will be undermined.

## VI. CONCLUSION

The Seventh Circuit's decision in *NCR* was highly anticipated because it was that court's first CERCLA apportionment case since the Supreme Court's decision in *Burlington Northern*.[134] In *Burlington Northern*, the fact of separate ownership was critical to the Court's conclusion that the record reasonably supported apportionment.[135] Similarly, the facts in *NCR* indicate that NCR, along with other paper manufacturers, produced and recycled PCB-tainted paper between 1954 and 1971.[136] Additionally, NCR participated in the remediation efforts at a cost of approximately fifty million dollars, and as of the end of 2011, NCR had completed about half of the dredging required in the upper half of unit four and twenty percent of that required in its lower half.[137] NCR's claim for volumetric apportionment can be supported by the fact that to establish a reasonable basis for allocation, a defendant does not need specific evidence regarding what he or she is responsible for.[138] A defendant's claim shall suffice if it "shows through volumetric evidence, geographic evidence, or some combination thereof, what contamination the defendant cannot be responsible for."[139] Once these facts are established, "rather than impose joint and several liability, the court should impose several liability and relieve the defendant of the obligation to pay for costs that cannot be attributed to said defendant."[140] Therefore the holding in *NCR* substantially departs from the precedent set forth in

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[134] Peterson, *supra* note 3.
[135] Gold, *supra* note 5, at 330.
[136] *NCR*, 688 F.3d at 836.
[137] *Id.*
[138] *See* Gershonowitz, *supra* note 43, at 121
[139] *Id.*
[140] *Id.*

*Burlington Northern* by limiting the instances in which volumetric contribution will be allowed.

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