

NCR Divisibility Win Breathes New Life Into CERCLA Defense

By **Juan Carlos Rodriguez**

Law360, New York (May 28, 2015, 7:41 PM ET) -- A Wisconsin federal judge's recent renewal of NCR Corp.'s divisibility defense in a CERCLA lawsuit has given new shine to a long-abandoned litigation tactic, but while the ruling is good news for defendants, future cases will depend heavily on the facts at the contaminated sites, attorneys say.

U.S. District Judge William Griesbach's ruling earlier this month followed the Seventh Circuit's September order that he take another look at NCR's divisibility defense, which he had previously rejected.

Judge Griesbach found, upon reconsideration, that based on the appeals court's analysis, NCR could show that the damages in one of five sections of the Lower Fox River and Green Bay Superfund site could be split up among the various potentially responsible parties and that the company's share is 28 percent.

The decision was a surprise to many court watchers because the defense against joint and several liability was considered a lost cause in most Comprehensive Environmental Response, Compensation and Liability Act suits after so many judges rejected it.

The defense faced these long odds despite the U.S. Supreme Court's 2009 ruling in *Burlington Northern & Santa Fe Railway Co. v. United States*, which allowed for divisibility when the responsibility of separate parties can be proved with a reasonable amount of certainty, attorneys note.

"This is great, because this will give potentially responsible parties at multiparty sites the opportunity to demonstrate divisibility, and courts won't be necessarily concerned about the fact that it's never been done before because it has been done now by this one district court judge," said Margaret Hill, a partner at Blank Rome LLP and head of the firm's environmental litigation practice.

Hill said attorneys have talked about divisibility since the idea was floated as a "back door" defense to joint and several liability in CERCLA cases decades ago. Judge Griesbach's decision is a vindication of the theory, she said, noting that he even used a volumetric approach to apportioning liability — something attorneys have long done in their own negotiations.

But she also cautioned attorneys not to get too excited.

"This is one case, and one set of facts," Hill said. "We're talking about a river where there was

continuous contamination, and there was at least some ability to allocate by volume what NCR contributed. That's not always going to be possible."

Joshua More, a partner at Schiff Hardin LLP, also said it's too early to declare a sea change in the way CERCLA liability is determined. He said Judge Griesbach's decision is clearly fact-specific and that the ability to apply a volumetric analysis to other sites is going to be very dependent upon the site conditions.

"I don't think it is a true watershed moment where it has changed divisibility across the board," More said. "But it does open up the opportunity to apply this metric or similar metrics at other sites. It's a positive development for those seeking to avail themselves of the divisibility defense."

And Michael Showalter, another Schiff Hardin partner, said he finds it hard to believe that the judge's ruling is going to change all of the past decisions that found no divisibility.

"Maybe it's a watershed moment, or maybe it's a unicorn that's a result of this site and these particular facts," Showalter said.

More said divisibility is an important defense if it's available because a potentially responsible party can eliminate exposure at a large Superfund site. Because the Fox River site is primarily a sediment contamination site, he said, it's likely that parties embroiled in similar situations and cases will be paying particular attention to this.

But one potential roadblock to a successful divisibility defense may be that the parties don't have a sufficient record, Hill said. Even in a similar situation where there is contamination in a river, it might be that parties are not able to calculate portions of liability. Areas where there has been historical contamination over many years may also impede divisibility.

"If you don't have that information by which to calculate divisibility, then you're going to end up with joint and several liability," Hill said.

Jeffrey Porter, chair of the environmental practice at Mintz Levin Cohn Ferris Glovsky & Popeo PC, saw a bit more promise for defendants in Judge Griesbach's decision.

"If the precedent set in this case starts to take root, decades of Superfund case law imposing joint and several, 'in for a penny, in for a pound' liability could be on the ropes, changing the way EPA and industry interact at multiparty megasites," Porter said.

But it's also not clear what effects Judge Griesbach's decision will have beyond this case, he said.

"The question is: Is this going to be the law in just the Seventh Circuit or is it going to become the law in other circuits?" he said. "My prediction is, whether it's in this case or another case, this issue is going back to the Supreme Court."

NCR is represented by Evan R. Chesler, Darin P. McAtee, Teena-Ann V. Sankoorikal and Yonatan Even of Cravath Swaine & Moore LLP, John M. Heyde of Sidley Austin LLP, and Linda R. Larson and Bradley M. Marten of Marten Law PLLC.

Georgia Pacific is represented by Mary Rose Alexander, Margrethe K. Kearney and Michael J. Nelson

of Latham & Watkins LLP.

The government is represented by Jeffrey A. Spector, Randall M. Stone and Kristin M. Furrie of the U.S. Department of Justice, and Assistant U.S. Attorney for the Eastern District of Wisconsin Susan M. Knepel.

The case is U.S. et al. v. NCR Corp. et al., case number 1:10-cv-00910, in the U.S. District Court for the Eastern District of Wisconsin.

--Editing by Jeremy Barker and Kelly Duncan.

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