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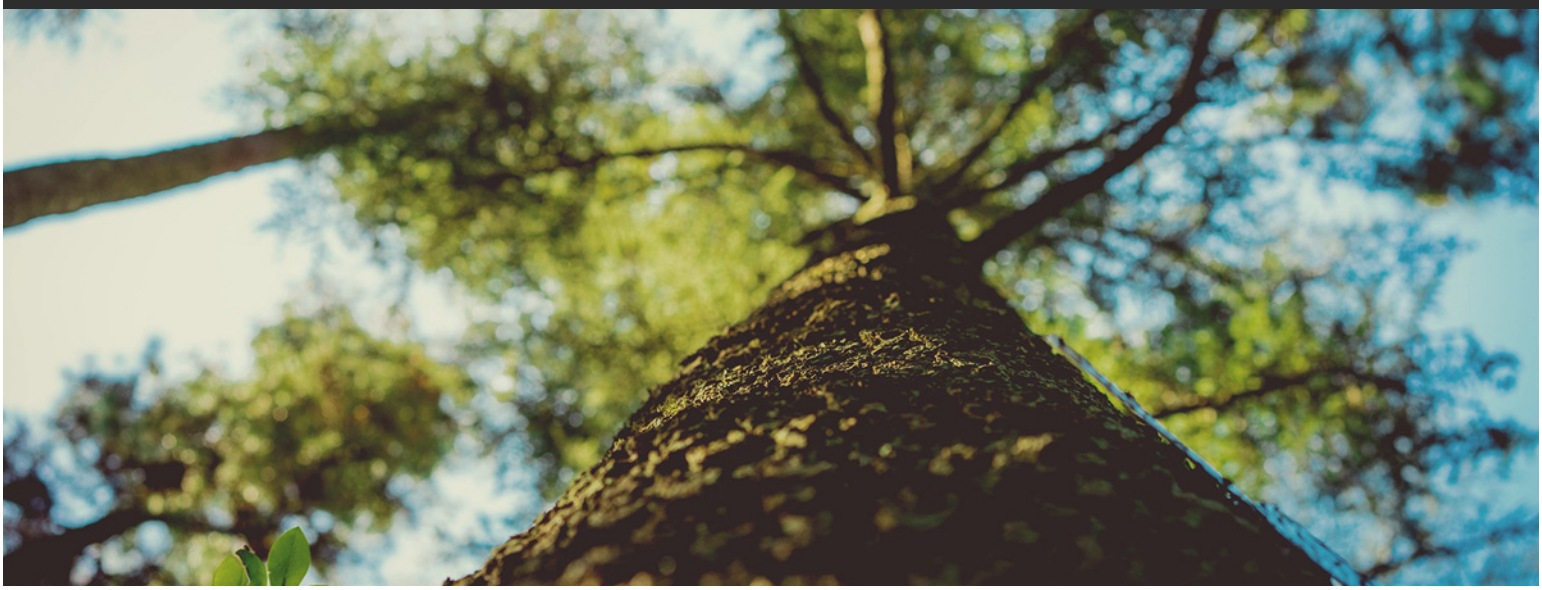
The Fairest of Them All: Advocating CERCLA Allocation



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Forty-one years after enactment of the federal Superfund statute, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Sections 9601-75, we continue to lack clear guidance from the courts or Congress on how to allocate among the responsible parties the cost of cleaning up a contaminated site. The absence of a black-letter allocation rule should mean that each practitioner in each case might wish to develop reasons why his preferred allocation among the responsible parties ought to govern. Careful thinking about how to do that advocacy should also lead to obvious ways in which the parties can avoid discovery into issues that do not swing the allocation very much, and thereby to case management orders that save all the litigants and the court a lot of time and money. How to do that careful thinking deserves a longer, more fully annotated exposition, but here is a framework.

CERCLA Section 113(f) authorizes contribution claims among parties jointly and severally liable for the same response actions or costs. Section 113(f)(1) goes on to provide that "in resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court

determines are appropriate." See 42 U.S.C. Section 9613(f)(1). In other words, district courts are supposed to allocate costs among responsible parties fairly.

An allocation is a list of numbers, one for each party, that add up to 100%. At some point, the court will have to determine which "equitable factors" it will use to develop that list of numbers. The court will have to determine how to quantify how each party does under each of those "factors" and how to combine many factors into that single list of numbers. The court's equitable intuition—its sense of fairness—may not be calibrated finely enough to allow the court to evaluate the allocation itself. With 25 parties, the average share is 4%. Is it more fair for Party X to get 3.8% or 4.2%? The court may simply have no way of deciding intuitively. That problem becomes even more acute when the matter has not 25 parties, but 1,000.

Advocates typically approach that problem by suggesting an allocation "methodology." A methodology is just a way of calculating shares from facts that the court finds in the usual way. One can think of it as a spreadsheet with embedded formulas or a complicated function or algorithm. Advocates will develop reasons why their proposed allocation methodologies better reflect "fairness" than the alternative proposals.

At this point, we ought to make a nod in the direction of the "Gore Factors." While Congress in the statute offered very little guidance, courts have seized upon an amendment to the original bill proposed by then-Rep. Al Gore suggesting six factors for allocation: ability to distinguish party contributions; amount of waste; toxicity of waste; degree of involvement; degree of care taken with respect to the waste; and degree of cooperation with the government. The amendment, of course, was defeated, so it is not conventional to use it as a gloss on the statute in fact adopted. Moreover, in 1980, when Gore suggested his factors, no one had yet litigated a case under CERCLA, and so no one could have had any real experience with how allocations like this would in fact work. Nevertheless, courts beginning with *United States v. A & F Materials*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984), and continuing through *Von Duprin v. Major Holdings,* No. 20-1711 (7th Cir. Sept. 3, 2021), two months ago, have referred to those six factors. Alas, "as is typical with multi-factor tests, … 'most of the Gore factors, unfortunately, fail to assist …'" See *Boeing v. Cascade*, 207 F.3d 1177, 1187 (9th Cir. 2001).

If the case involves only two or three liable parties, perhaps the court can avoid arithmetic. Most people can consult their "guts" to split costs evenly, or by wholes, halves, quarters and maybe even tenths. But when one has dozens of parties in a case, many of the shares will be quite small. Indeed, a small cottage industry has sprung up of claims brought by the responsible parties implementing a cleanup against hundreds or thousands of parties with small shares. Sheer equitable intuition without arithmetic probably cannot make distinctions among shares measured in basis points (ten-thousandths), or even smaller scales. The court will need an allocation methodology to do all that.

Suppose "volume" contributed to a site made a difference to a party's share. Suppose "toxicity" also made a difference. The court could hold a trial to determine exactly how much of which materials each party contributed. But it would then have to figure out what to do with those findings. First, it would have to decide what it even meant by "volume" and "toxicity." In sediment cases, "volume" typically means mass of a hazardous substance contained in a wastewater discharge or spill to the waterway, not the volume of wastewater discharged or the mass of all the solids in the wastewater. In a landfill case, "volume" often means weight of waste delivered to the site, not weight of the hazardous substances in the waste. "Toxicity" could mean "concentration of a hazardous substance" or "risk of a health effect to an exposed person posed by the material" or "contribution to the need for a cleanup of a unit of the waste" or "costs caused by the presence of a unit of the waste." Or each could mean something else. Then, the court must decide how to blend findings about "volume" and "toxicity" of disparate materials and convert them to percentages. And that is just two of the Gore Factors.

Thoughtful advocacy will explain why "volume" or "toxicity" matters and use that reason to suggest how they ought to be measured and then how they ought to be used to come up with that list of numbers adding to 100%.

I suggest that there are four buckets of reasons why facts have mattered to courts in reaching an allocation:

- *Conventional Fairness*—If a CERCLA case were a tort case, who would bear the loss because its behavior was intentionally wrongful or negligent? Who behaved badly and who behaved like a conventional business at the time?

- *Transactional Fairness*—Were there transactions (for example, buying or selling a facility, a corporation, waste material, etc.) that make an allocation to one party or another fair without regard to cost- or harm-causation? Were there bankruptcies or other similar events with a similar effect?

- *Cost- or Harm-Causation*—In the absence of conventional or transactional fairness issues, what contribution to the "problem" did each party's actions make? Sometimes that means contribution to the risk posed by a site. Sometimes it means contribution to the cost of addressing a site. Some argue that a party "causes" harm or costs when it is a sufficient cause of those costs or harm; those suggest that allocations be in proportion to a party's "stand alone" costs or harm. Others argue that a party "causes" harm or costs when it is a necessary cause of those harm or costs; those people suggest that allocations be in proportion to a party's incremental costs.

- *Post-Hoc Adjustments*—Courts often adjust allocations to reflect cooperation with the government cleanup effort, for example, or to assure a "margin of safety" when a party is allowed to resolve a contingent liability for a fixed cash amount.

The difficult task is to figure out how to litigate what the court thinks counts as fairness and why one methodology hews more closely to that equitable intuition than the alternative suggestions. That does not call for an expert in fairness. Instead, it calls for an expert in how the proposed computation reflects fairness as determined by the court.

Given a set of alternative proposed methodologies, often the very particular facts of "volume" or "toxicity" will not swing the allocation nearly as much as the broader questions of how to take conventional fairness or transactional fairness into account. Even within a cost- or harm-causation allocation, the way that "volume" or "toxicity" move the calculation often matter a lot more than the actual inputs.

If that turns out to be true, one can litigate the allocation methodology issues that matter most first, and try to settle the case once they are resolved. In that way, all the discovery into all the small issues that go into a set of findings about "volume" and "toxicity" can be deferred at great savings.

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