

Disclaimer ([00:00](#)):

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Announcer ([00:17](#)):

Welcome to Greenberg Traurig's E2 Law Podcast, where we discuss hot global topics related to Environmental and Energy Law.

David Mandelbaum ([00:29](#)):

Hello, my name is David Mandelbaum. I'm a shareholder in the environmental practice of Greenberg Traurig. I'd like to welcome you to another episode in our 2022 Evolving Environmental Law Series of podcasts. Today, we want to begin a conversation about how Superfund allocation problems are resolved and what we mean by "fairness" in them.

David Mandelbaum ([00:58](#)):

I'm joined today by William Hengemihle. Bill is with FTI Consulting and is a prominent Superfund allocation professional. I wonder, Bill, if you would give us a minute about your practice.

William Hengemihle ([01:18](#)):

Sure, David. Thank you. I work as an allocation mediator at Superfund sites around the country, where my job is to come in as a neutral third party and serve a diverse group of responsible parties at a Superfund site to help them develop an allocation through an out of court consensual process, where the objective is all the parties receive a percentage share and all the percentages better add up to 100% at the end of the day.

William Hengemihle ([01:50](#)):

To get these allocations completed, I usually form a multidisciplinary team of scientist, engineers to go through a process of factual investigation, hearing advocacy from the parties, offering a recommendation on a fair allocation, and then mediating that recommendation to a final binding settlement so that the site cleanup can be funded and move on and the lawyers don't have a case to try. That's what I do for a living, David.

David Mandelbaum ([02:21](#)):

Okay. I want to emphasize sort of the two alternative kinds of processes we're talking about today. For purposes of this conversation, I'm fairly well-focused on litigating allocation in courts under conventional rules of civil procedure. Bill is focused on the alternative ADR process. But both processes are intended to come up with that list of numbers that add up to 100%. The problem I think, and Bill, I'd be curious about your comment, is twofold.

David Mandelbaum ([03:10](#)):

One is even if I knew all of the facts of a case, what every single party had done, what waste or other material it had brought to a site or discharged to a river, under what circumstances, what the materials were and what effects they had on risk, I still wouldn't be confident that I knew what the allocation would be because you would have to come up with an allocation methodology, some kind of algorithm

or spreadsheet or formula, however you want to think about it, to take all those facts and convert them into that list of numbers that add up to 100%.

David Mandelbaum ([03:59](#)):

That's the first problem, this kind of radical uncertainty about what's fair. The second problem is that if any fact can matter, the number of facts is unmanageably large in many, many sites. The process can kind of swallow the value of the outcome. It can take forever or cost a fortune, and there must be a better way to get to an outcome either through litigation or through an ADR process. Is that your experience as well?

William Hengemihle ([04:39](#)):

Right, David, it is my experience. A lot of parties start off in the allocation process thinking they'll have that kind of perfect information of knowing what everybody put into a site, what kinds of chemicals, what type of mass. And ultimately, when they get into the process, they're disappointed about what we really know to inform the allocation, given the passage of time, death of witnesses. I mean, the relevant time period of these sites goes back to the civil war in some instances.

William Hengemihle ([05:09](#)):

We're talking about decades old facts that need to be explored, and oftentimes the actual record we have to work with is pretty sketchy. But even so, some focus on the methodology for allocation upfront I think can be beneficial for both the formal litigation process you're describing and have experience with, as well as more the settlement-based ADR process, that's really more of my field, where the objective is settlement as opposed to precision.

William Hengemihle ([05:38](#)):

Still some upfront candid assessment of the methodology can offer some streamlining advantages and some cost savings to all the participants, all the stakeholders.

David Mandelbaum ([05:50](#)):

Let's talk about that a second. For those who are not experienced Superfund practitioners, you would think that the statute would give you guidance as to how you would allocate what counts as a correct division of costs. But as we know, the statute gives you essentially no guidance. It says that a district court is supposed to allocate costs using such equitable factors as it determines are appropriate, which I interpret in colloquial terms as it's supposed to do fairness. It can consider anything.

David Mandelbaum ([06:37](#)):

That's not very restrictive. It offers no useful guidance on what does count as important, what counts as not important. And even if you knew that something was important, how you would do the math, right? There are an infinite number of ways of saying more stuff means more share. Which one is better? Should it be proportional to the logarithm? Should it be proportional to the square? Should it be something more complicated than that?

David Mandelbaum ([07:13](#)):

We have these Gore factors that courts often look to, which is kind of peculiar, right? Because the Gore factors come from a proposed amendment to the statute before it was adopted at the end of 1980 by AI

Gore when he was then a US Representative. But the amendment wasn't adopted. It's kind of peculiar to interpret a statute using an amendment that didn't pass.

David Mandelbaum ([07:44](#)):

And of course, Representative Gore or his staff at the time that they proposed this had not really had any allocation experience under contamination statute, because there hadn't been any real allocation experience under contamination statute. This was sort of a suggestion in the air. There are six of them.

David Mandelbaum ([08:06](#)):

To summarize real quickly: Are the contributions of parties severable, that is, is the liability not really joint and several; amount of hazardous waste; toxicity of hazardous waste; degree of involvement, that is how many of your fingerprints are on things; degree of care, were you negligent or not negligent or were you worse; and degree of cooperation after the fact with the cleanup. The problem with multifactor tests or suggested multifactor allocations is you still have to get to one list of numbers.

David Mandelbaum ([08:51](#)):

And if you have multiple factors, you need a way of translating from one to the other.

William Hengemihle ([08:57](#)):

Right, right. Those are the six Gore factors, David. But don't forget, there's this other set of the so-called Torres Factors, four factors used by Judge Torres when he decided an allocation for a Rhode Island site. They include things like the first Gore factor you mentioned, how are cleanup costs attributable to individual party's wastes? Also, what is the culpability or the benefit that parties realized in connection with their waste disposal? And even a party's ability to pay is an equitable factor under the Torres factors.

William Hengemihle ([09:35](#)):

But the point I would say is we can go through these lists of factors and participants in an allocation process in their brief, always review these 10 or more equitable factors. But the point is, there's no exhaustive prescribed list. It's equitable, as you mentioned, from the statute itself. It's Section 113. Equitable factors can be anything. There's no limit on what can be an equitable factor. It's an open book at every site. What really are the equitable factors to produce a fair allocation?

David Mandelbaum ([10:10](#)):

Here's the puzzle on what's a fair allocation, how do I advocate for a particular methodology as opposed to another methodology when the standard is fairness? At least in court, I can't really have an expert in fairness. That's the problems of the court. I can argue about fairness, but I can't prove fairness. How do you approach figuring out what's fair?

William Hengemihle ([10:44](#)):

Well, I'm going to say at the outset here that my view around fairness is often colored by my desire to settle a case, not find perfection in an allocation the way a trial lawyer might want to pursue. But my objective is to get these allocation disputes settled, resolved, so the parties can move on and this lake can be cleaned up. David, I would say I'm more focused on the fair settlement, which really revolves around making sure parties make fair compromises on the record to get an allocation dispute resolved.

William Hengemihle ([11:21](#)):

But to try to be responsive to your question, on the front end, I try to set up a process where similarly situated parties on the facts will receive similar allocations. That's one, I think, hallmark of fairness in an allocation. I think that when you get a matter set underway, you want to subscribe to that standard. Similar fact patterns to a site should give parties similar allocations.

William Hengemihle ([11:52](#)):

And to achieve that outcome, I think you need to take a realistic assessment of what kind of record do you have to work with in terms of the factual record, what level of detail do you know about the party's disposal histories at a site, the kinds of chemicals they discharged and how much, for example, how you can maybe relate those chemicals to the cleanup cost of this site or whatever the damages are that you're allocating.

William Hengemihle ([12:19](#)):

You need to I think upfront, the parties with the neutral, give a realistic assessment of, what do we have to work with to achieve fairness and let's right size our allocation process around that record. Do we really need to have expert witnesses on waste toxicity, given what we know about the wastes and the remedy?

William Hengemihle ([12:42](#)):

Or do we really need to search for witnesses and interview them based upon what we know about the history of this site, which may be gathered from things like historical aerial photographs or historical maps? I think we need to spend time upfront giving an honest assessment of what record do we have to work with to achieve fairness.

William Hengemihle ([13:05](#)):

Because in the end, it won't be a fair allocation because of the factual uncertainties that pervade and the existence of some other allocation problems you might raise later like the problem of the orphan share, liability that's assigned to parties who have no ability to pay because they're defunct or insolvent. Somebody needs to pay that orphan share in the end to achieve a final allocation in most cases.

David Mandelbaum ([13:31](#)):

Let's pause on that, and then I want to go back to about how I think about advocating for one allocation methodology versus another. But there are some constraints on an allocation. One is that it has to add up to 100%. If you have missing parties, you have to figure out a way to allocate the share that would otherwise be attributable to somebody who isn't present.

William Hengemihle ([13:58](#)):

Right.

David Mandelbaum ([14:01](#)):

Also, if you've got a way of assigning shared parties that have to do with what they caused or what they did, and two parties caused the same toxicity or the same risk or the same cost, you're going to end up with too much allocation, right? If you add it all up, it's going to be more than 100%. You've got to figure out a way to make sure that it adds up exactly to 100%.

William Hengemihle ([14:28](#)):

Can I talk about that first point you raised?

David Mandelbaum ([14:30](#)):

Sure. Please. Sure.

William Hengemihle ([14:33](#)):

David, when I get into these allocation proceedings, a lot of parties, just their instinct is to tell me how much waste they put into a site compared to how much waste is there at the site. That's not really relevant to get an allocation to 100% among the allocation participants, the viable parties at the proceeding. But everybody likes to tell me, "I put in this much mass and there's that much mass at the site. See how small my percentage is. It's well less than 1%."

William Hengemihle ([15:07](#)):

All the parties can make that argument in most instances because we don't have in the allocation process all the parties that contributed to all that mass. What's really relevant, I tell the parties, is tell me how your mass compares not to the mass at the site, but to the mass of the other parties who are here in this allocation proceeding who will be part of that 100%. That's what I really need to understand is, how much did you put in compared to the other parties to the proceeding?

William Hengemihle ([15:38](#)):

The parties say, "That's very unfair, Bill, because there's this tremendous volume of massive waste at the site we can't account for. Who's going to pay for that?" I say, "Don't blame me. Write to your Congressman." That's the way the statute works. Trial tested for decades. We have a problem of joint and several liability among the parties, meaning that the non-party share, that orphan share oftentimes, were the unattributable waste share.

William Hengemihle ([16:08](#)):

Except in some instances, normally we need to allocate that 100% to the parties, to the proceeding. You can almost get off on a feeling that the parties may feel the process is unfair because the way we're going to evaluate party's contributions is relative to one another, not party's contributions relative to the problem in the ground at the site. I think it's best to get that out at the front end where parties understand the methodology rather than the back end when we're trying to get a settlement achieved.

David Mandelbaum ([16:40](#)):

Right. But I think that some of what you're saying embeds some assumptions, right?

William Hengemihle ([16:48](#)):

Mm-hmm (affirmative). Right.

David Mandelbaum ([16:48](#)):

I think it's pretty clear that if you and I both contribute the same waste in the same form at the same time using the same business standard of business practice, right?

William Hengemihle ([17:04](#)):

Right.

David Mandelbaum ([17:06](#)):

We should get the same share. But if I contributed twice as much, or I contributed twice as much massive material but with a lower concentration of hazardous substances in it, it's not immediately apparent how you compare my contribution to your contribution. Should it be twice as much? Or should it be something different than twice as much?

William Hengemihle ([17:39](#)):

Right, right.

David Mandelbaum ([17:40](#)):

If I had taken great care to remove hazardous materials from my waste and some got out, should I pay more or less than you who was sloppy? But because you were producing less waste, the total amount of hazardous material that got out was the same as mine. These are the kinds of issues that truly affects what facts are important in putting together that allocation. I would say that the way you argue that one allocation methodology is better than another is by having an assumption about what fairness means.

David Mandelbaum ([18:36](#)):

Fairness means, for example, likes are treated alike. Two likes get twice as much allocation as one like, right? If you have those kinds of assumptions, then this allocation methodology generates an outcome. Or in a more sophisticated way, we want to allocate in proportion to the risk posed by the activity of the party independent of when that activity occurred, or maybe taking into account when that activity occurred, or something like that.

David Mandelbaum ([19:12](#)):

And then you have somebody testify as an expert that one approximation to that is better than another.

William Hengemihle ([19:21](#)):

If I could go back to where you started, the old volume-versus-toxicity argument, I think that's where allocation proceedings can benefit by upfront discussions around methodology to streamline and save parties money hopefully. David, what I'm talking about there is there can be discussions upfront, privately sometimes, between the neutral and the parties about, well, does volume really matter? Is the remedy driven more by volume considerations or by concentration, or toxicity considerations?

William Hengemihle ([19:53](#)):

Try to understand, is there some degree of consensus around volume versus toxicity? If there is some level of consensus that makes sense to try to pursue to get on a path towards a settlement, you might focus on, well, how to best measure volume, or how to best measure toxicity or concentration? What kind of rules do we want to put in place to assign numbers around volume, concentration, or toxicity? Do we need experts to help us with that?

William Hengemihle ([20:25](#)):

Or do we need to have specific focused discovery to see if we can really get at concentration levels and party's waste? Because if we can't, we may abandon that as a viable allocation methodology. Despite its idealistic fairness, it'd be great if we knew the concentration of everybody's methyl ethyl death in their waste streams to a site. We may get into it and find out it's an unwieldy information requirement for the allocation. We just don't have that kind of information.

William Hengemihle ([20:54](#)):

We'll spin our wheels and clients' money trying to get a concentration data for potentially years in discovery. We can maybe make a drop judgment to forego that as an allocation factor or criteria in the early going, because of its unavailability to inform the allocation in the end. Better to kind of make some of these methodology decisions upfront, if we can, than to just save them in the end.

David Mandelbaum ([21:23](#)):

Yeah. I want to pick up on what you just said because using the volume criterion or the volume factor, it tends to mean different things in different circumstances. When you're talking about waste into a landfill like we used to do back in the day, it really means weight, how many tons, I think because everything compresses to a uniform density in a landfill, except for tires. If you know what it weighs, you know how big it's going to be after everything settles.

David Mandelbaum ([21:59](#)):

In the sediment sites that you and I have had experience in of late, we really aren't measuring volume or weight of sediment. We're measuring mass of the chemical of concern that was released. It may be mass. It may be concentration. It may be some of the both, but we're doing it that way for a different reason, right? I think some conversation about what we really mean is helpful in scoping the data collection or discovery process.

David Mandelbaum ([22:44](#)):

I think that's the last topic I want to touch on with you is my experience is that if you can figure out a way to agree on or to litigate and get a ruling on what the allocation methodology is going to be based on really limited information about the site, you can probably figure out which facts are going to swing the allocation a lot and which facts are going to be in the round off error.

David Mandelbaum ([23:16](#)):

And that can help you scope your discovery or phase your discovery or scope your information collection in an ADR process, really to save time and money. I think that that is the big case management innovation that this whole area of practice kind of needs so that we're not litigating for decades. Is that your experience also?

William Hengemihle ([23:50](#)):

It is, David. What counts a lot in an ADR process is avoiding surprises. You really want to understand on the front end what elements of a party's defense might surprise people. Are there successor liability defenses that are going to come up? That a company's going to say, "Well, I may be responsible, but not for the company whose assets I purchased. You thought that was us, but that historical company that really put in most of the waste, that's not us. That's a defunct entity that we're not a successor to."

William Hengemihle ([24:30](#)):

It's important to identify legal defenses or technical issues that a party's going to raise in advocacy later. Maybe a party is planning to do an elaborate fingerprinting exercise with forensic scientists to try to identify sources to a contamination at the site using forensic techniques by looking at chemical signatures and opining on which industries most likely generated a waste that gives that type of chemical signature at the site.

William Hengemihle ([25:04](#)):

It's important to let all the parties have an understanding of what's going to be advocated or litigated in the front end so we can devise a procedure to accommodate everyone. It gets to due process, so everyone feels like they had a fair shake with the allocator, but it also gets to trying to right size the process upfront, to manage surprises. Let everybody know what's going to be advocated so folks are prepared.

William Hengemihle ([25:35](#)):

And we don't outsize the process. It tends to do more than what we really need to get to a resolution given what's at stake.

David Mandelbaum ([25:43](#)):

I think that's right. If you take the examples you just provided, the important thing for everyone to keep in mind is they only matter if they matter. Successor liability only matters if you're not thinking that there would be an equitable allocation or an equitable assignment of the predecessor's liability to the new company, if you will, not the successor, even if there was no successor liability. It doesn't matter.

David Mandelbaum ([26:12](#)):

You would also, for example, only care about the fingerprinting if the thing your fingerprinting is going to make a big difference in shares. If it's really not pertinent, then it doesn't matter. I think that, again, you're right. Talking about what is going to go into the fairness analysis upfront and devising the methodology upfront enables you to save a lot of money and right size, not outsize, the process at the end. I think that's important.

David Mandelbaum ([26:53](#)):

Thanks, Bill, for this conversation. I think we may want to continue in on some other topics, but this has been very interesting for today. Is there anything you want to add?

William Hengemihle ([27:03](#)):

No, it's been a pleasure talking to you in this forum, David, and thanks for the opportunity.

David Mandelbaum ([27:08](#)):

Thank you.

Announcer ([27:10](#)):

Thank you for listening, and tune in to the next episode of E2 Law, Greenberg Traurig's Energy and Environmental Podcast.